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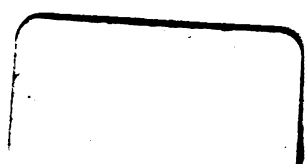
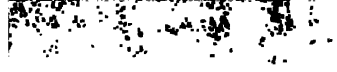
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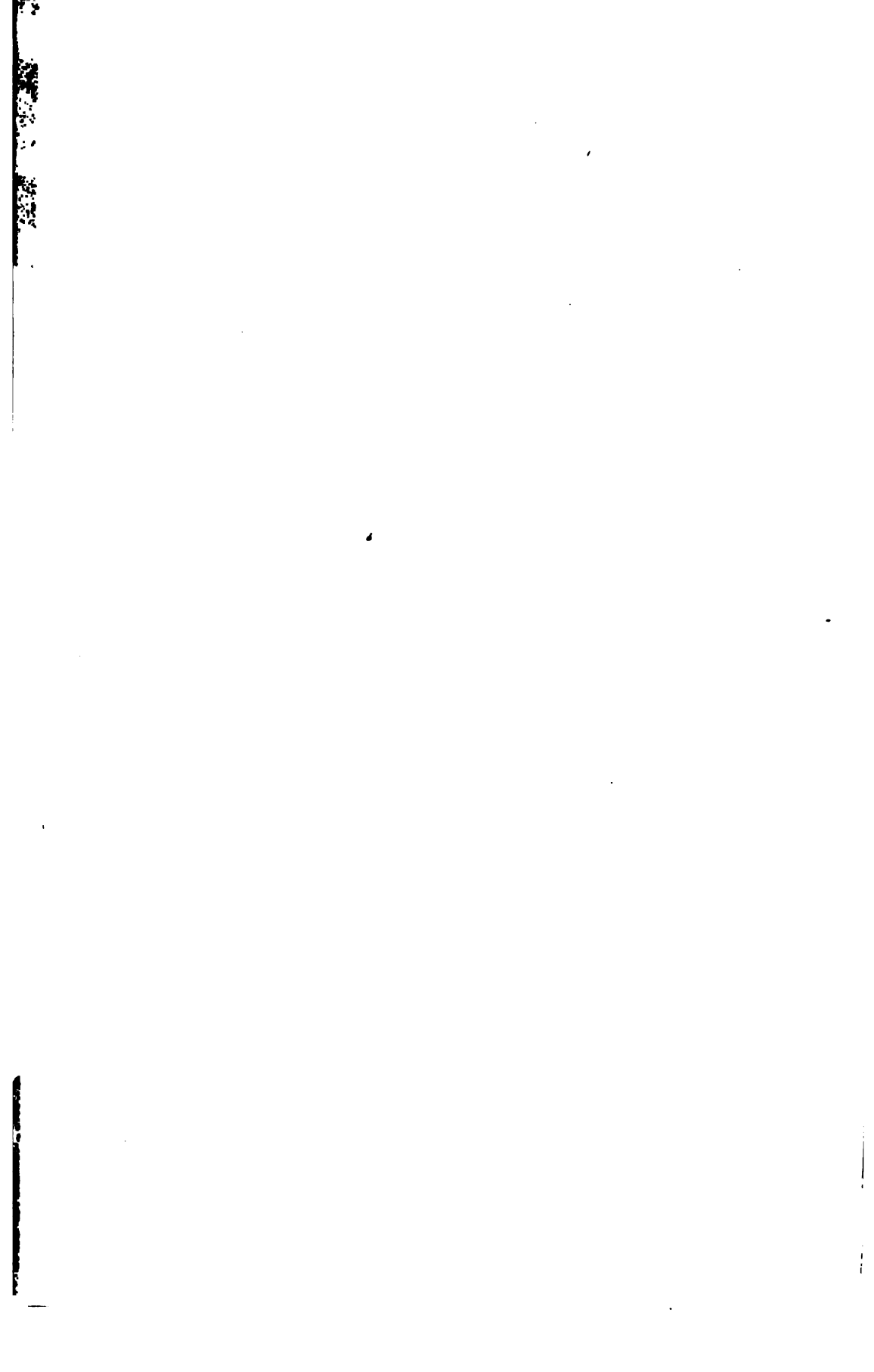
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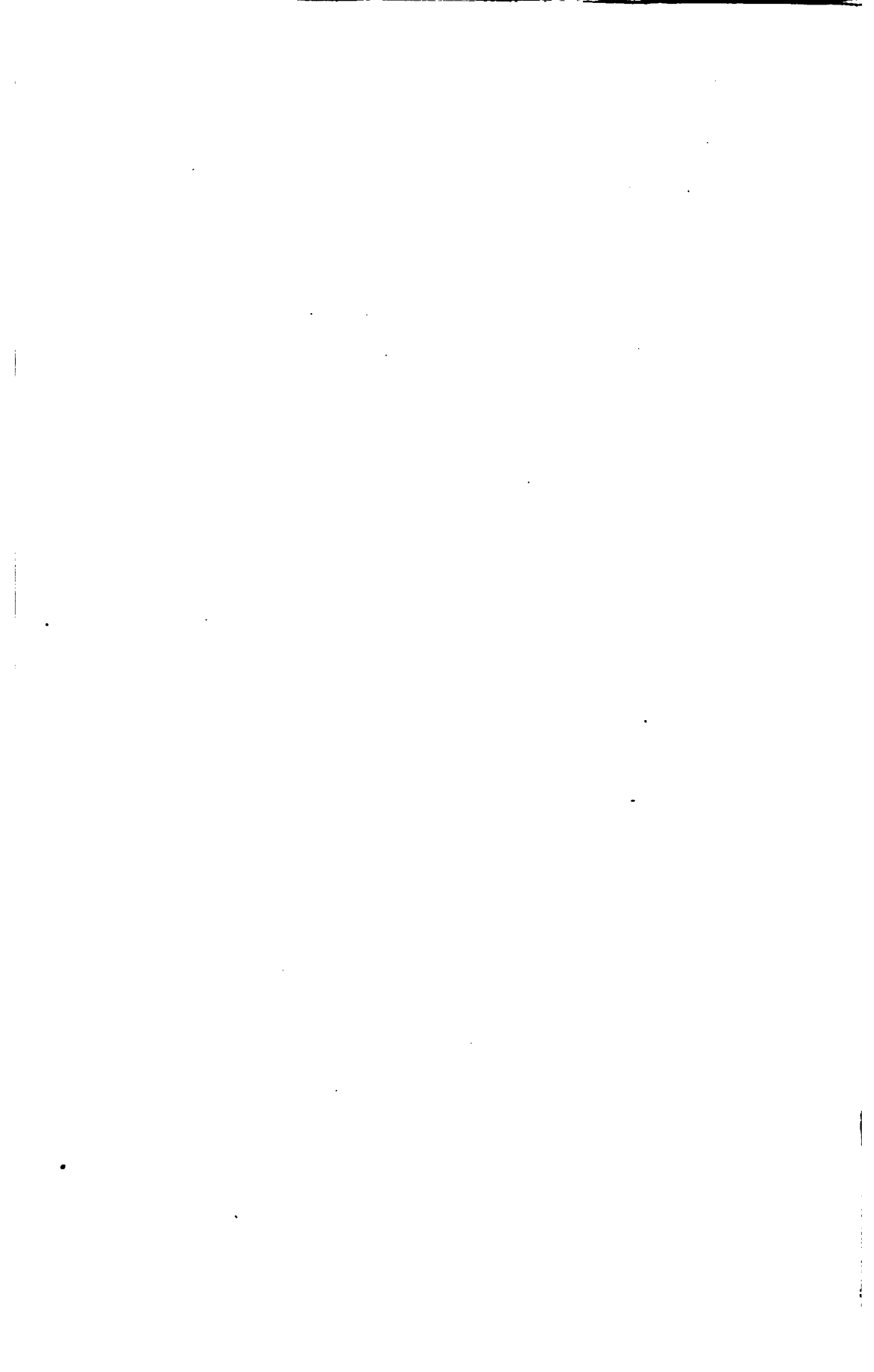
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**A DIGEST**  
**OF THE**  
**REPORTED DECISIONS**

**OF THE**  
**COURTS OF COMMON LAW, BANKRUPTCY, PROBATE,**  
**ADMIRALTY, AND DIVORCE,**

**TOGETHER WITH**  
**A SELECTION FROM THOSE OF THE COURT OF CHANCERY**  
**AND IRISH COURTS.**

**From 1756 to 1883 inclusive.**

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***FOUNDED ON FISHER'S DIGEST.***

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**BY**  
**JOHN MEWS,**  
**ASSISTED BY**  
**C. M. CHAPMAN,**  
**HARRY H. W. SPARHAM,**  
**AND**  
**A. H. TODD,**  
**BARRISTERS-AT-LAW.**

***IN SEVEN VOLUMES.***

**VOL. VII. TALES—YEAR, AND TABLE OF CASES.**

**LONDON :**  
**H. SWEET, 3, CHANCERY LANE ;**  
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# 514 LIST

## OF THE

### ABBREVIATIONS AND REFERENCES

ADOPTED IN

### THE DIGEST, WITH EXPLANATIONS.

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| B. & A. . . . .       | Barnewall & Alderson . . . . .                 | King's Bench    |
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| B. C. C. . . . .      | Lowndes & Maxwell's Bail Court Cases . . . . . | Bail Court      |
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| Bligh, N. S. . . . .  | Bligh's New Series . . . . .                   | House of Lords  |
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| Camp.          | Campbell                         | Nisi Prius                                |
| Car. C. L.     | Carrington's Criminal Law.       |   |
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| Car. & K.      | Carrington & Kirwan              | Nisi Prius                                |
| C. & P.        | Carrington & Payne               | Nisi Prius                                |
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| C. & F.        | Clark & Finnelly                 | House of Lords                            |
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| C. B.          | Common Bench Reports, Old Series | Common Pleas                              |
| C. B., N. S.   | Common Bench Reports, New Series | Common Pleas                              |
| C. L. R.       | Common Law Reports of 1855-56    | Queen's Bench, Common Pleas and Exchequer |
| C. P. D.       | Law Reports                      | Common Pleas Division                     |
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| Cooper, C. C.  | Cooper's Chancery Cases          | Chancery                                  |
| Cowp.          | Cowper                           | King's Bench                              |
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| Cr. & Ph.      | Craig & Philip                   | Chancery                                  |
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| C. & M.        | Crompton & Meeson                | Exchequer                                 |
| C., M. & R.    | Crompton, Meeson & Roscoe        | Exchequer                                 |
| Curt.          | Curteis                          | Ecclesiastical                            |

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| D. & M.           | Davison & Merivale                   | Queen's Bench   |
| Deacon            | Deacon                               | Bankruptcy  |
| Deac. & Chit.     | Deacon & Chitty                      | Bankruptcy  |
| Deane, Ecc. Rep.  | Deane's Ecclesiastical Reports       | Ecclesiastical  |
| Dears. C. C.      | Dearsly's Crown Cases                | Criminal Appeal                                       |
| Dears. & B. C. C. | Dearsly & Bell's Crown Cases         | Criminal Appeal                                       |
| De G.             | De Gex                               | Bankruptcy  |
| De G., F. & J.    | De Gex, Fisher & Jones               | Lord Chancellor and Appeals in Chancery               |
| De G., J. & S.    | De Gex, Jones & Smith                | Do.   |
| De G., M. & G.    | De Gex, Macnaghten & Gordon          | Do.   |
| De G. & Sm.       | De Gex & Smale                       | Knight Bruce, V.-C.                                   |
| Den. C. C.        | Denison                              | Criminal Appeal                                       |
| Dick.             | Dickens                              | Chancery  |
| Dougl.            | Douglas                              | King's Bench  |
| D. P. C.          | Dowling's Practice Cases, Old Series | Queen's Bench, Common Pleas, Exchequer and Bail Court |
| D. N. S.          | Dowling's New Series                 | Do.   |
| D. & L.           | Dowling & Lowndes                    | Do.   |
| D. & R.           | Dowling & Ryland                     | King's Bench  |
| D. & R. N. P. C.  | Dowling & Ryland's Nisi Prius Cases  | Nisi Prius  |
| Dom. Proc.        | Domus Procerum                       | House of Lords  |
| Drink.            | Drinkwater                           | Common Pleas  |
| Drew.             | Drewry                               | Kindersley, V.-C.                                     |
| Drew. & Sm.       | Drewry & Smale                       | Chancery  |

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| East           | East  | King's Bench       |
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| Eden           | Eden  | Chancery           |
| El. & Bl.      | Ellis & Blackburn                               | Queen's Bench      |
| El., Bl. & El. | Ellis, Blackburn & Ellis                        | Queen's Bench      |
| El. & El.      | Ellis & Ellis                                   | Queen's Bench      |
| Eq. R.         | Equity Reports of 1855-56                       | Chancery           |
| Esp.           | Espinasse                                       | Nisi Prius         |
| Ex.            | Exchequer Reports by Welsby, Hurlstone & Gordon | Exchequer          |
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| Ex. D.         | Law Reports                                     | Exchequer Division |

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| ABBREVIATIONS.    | NAMES OF REPORTERS AND REPORTS.    | NAMES OF COURTS OR JUDGES. |
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| Fonb. N. R. . . . | Fonblanque's New Reports . . . . . | Bankruptcy                 |
| F. & F. . . . .   | Foster & Finlason . . . . .        | Nisi Prius                 |

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| G. & D. . . . .    | Gale & Davison . . . . .    | Exchequer               |
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| Giff. & H. . . . . | Giffard & Hemming . . . . . | Vice-Chancellor Stewart |
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| H. & T. . . . .                    | Hall & Twells . . . . .                        | Lord Chancellor and Appeals<br>in Chancery       |
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| H. & N. . . . .                    | Hurlstone & Norman . . . . .                   | Exchequer  |
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| Ir. C. L. R. . . .  | Irish Common Law Reports (1850-1866) . . . . . | Common Law     |
| Ir. Ch. Rep. . . .  | Irish Chancery Reports (1850-1866) . . . . .   | Chancery       |
| Ir. R., C. L. . . . | Irish Common Law Series (1866-1878) . . . . .  | Common Law     |
| Ir. R., Eq. . . . . | Irish Equity (1866-1878) . . . . .             | Chancery       |
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| ABBREVIATIONS.                   | NAMES OF REPORTERS AND REPORTS.                  | NAMES OF COURTS OR JUDGES.               |
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| L. J., M. C. . . .               | Law Journal, New Series . . . . .                | Magistrates' Cases                       |
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| L. T., O. S. . . . .             | Law Times Reports, Old Series . . . . .          | All the Courts                           |
| L. T. . . . .                    | Law Times Reports, New Series . . . . .          | All the Courts                           |
| Leach, C. C. . . . .             | Leach's Crown Cases. . . . .                     |  |
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| Moore . . . . .                | J. B. Moore . . . . .                             | Common Pleas            |
| Moore, P. C. C. . . . .        | Moore's Privy Council Cases . . . . .             | Privy Council           |
| Moore, P. C. C., N. S. . . . . | Moore's Privy Council Cases, New Series . . . . . | Privy Council           |
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| N. & P. . . . .        | Neville & Perry . . . . .                  | Queen's Bench  |
| Nev. & Mac. . . . .    | Neville & Macnamara . . . . .              | Railway Cases  |
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| P. Wms. . . . .           | Peere Williams . . . . .                      | Chancery                   |
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| Price P. C. . . . .       | Price's Notes of Points in Practice . . . . . | Exchequer                  |
| P. D. . . . .             | Law Reports . . . . .                         | Probate Division           |
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| Railw. Cas. . . . .                  | Railway Cases by Nicholl, Hare, Oliver, Bea-<br>van & Lefroy . . . . . | All the Courts |
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| Rob. Adm. Rep. . . . .               | Dr. W. Robinson's Admiralty Reports . . . . .                          | Admiralty      |
| Rob. Ecc. Rep. . . . .               | Dr. Robertson's Ecclesiastical Reports . . . . .                       | Ecclesiastical |
| Romilly's Notes of<br>Cases. . . . . |  |                |
| Rose . . . . .                       | Rose . . . . .   | Bankruptcy     |
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| Russ. C. & M. . . . .                | Russell on Crimes and Misdemeanors, by Greaves. . . . .                |                |
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| R. & M. . . . .                      | Ryan & Moody . . . . .   | Nisi Prius     |

## S.

|                      |   |                       |
|----------------------|---|-----------------------|
| Scott . . . . .      | Scott . . . . .                                       | Common Pleas          |
| Scott, N. R. . . . . | Scott's New Reports . . . . .                         | Common Pleas          |
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| Sim. . . . .         | Simon . . . . .                                       | Shadwell, V.-C. E.    |
| Sim. N. S. . . . .   | Simon's New Series . . . . .                          | Chancery              |
| Sim. & Stu. . . . .  | Simon & Stuart . . . . .                              | Lord Cranworth, V.-C. |
| Smith . . . . .      | Smith . . . . .                                       | King's Bench          |
| Stark. . . . .       | Starkie . . . . .                                     | Nisi Prius            |
| Swans. . . . .       | Swanston . . . . .                                    | Chancery              |
| S. C. . . . .        | Same case. . . . .                                    |                       |
| S. P. . . . .        | Same point or principle. . . . .                      |                       |
| Sm. & G. . . . .     | Smale & Giffard . . . . .                             | Stuart, V.-C.         |
| S. & T. . . . .      | Swabey & Tristram . . . . .                           | Divorce and Probate   |

## T.

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| Tamlyn . . . . .      | Tamlyn . . . . .                         | Rolls           |
| Taunt. . . . .        | Taunton . . . . .                        | Common Pleas    |
| T. R. . . . .         | Term Reports (Durnford & East) . . . . . | King's Bench    |
| Tidd's Prac. . . . .  | Tidd's Practice. . . . .                 |                 |
| Turn. & Russ. . . . . | Turner & Russell . . . . .               | Chancery        |
| Tyr. . . . .          | Tyrwhitt . . . . .                       | Exchequer       |
| Tyr. & G. . . . .     | Tyrwhitt & Granger . . . . .             | Exchequer       |
| T. & M. . . . .       | Temple & Mew . . . . .                   | Criminal Appeal |

## U.

|                     |                           |
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## V.

|                   |                          |          |
|-------------------|--------------------------|----------|
| Ves. jun. . . . . | Vesey, junior . . . . .  | Chancery |
| Ves. & B. . . . . | Vesey & Beames . . . . . | Chancery |

## ABBREVIATIONS AND REFERENCES.

## W.

| ABBREVIATIONS.         | NAMES OF REPORTERS AND REPORTS.                 | NAMES OF COURTS OR JUDGES.                |
|------------------------|---|---|
| West . . . . .         | West . . . . .                                  | House of Lords                            |
| Wightw. . . . .        | Wightwick . . . . .                             | Exchequer                                 |
| W., W. & D. . . . .    | Wilmore, Wollaston & Davison . . . . .          | Queen's Bench                             |
| W., W. & H. . . . .    | Wilmore, Wollaston & Hodges . . . . .           | Queen's Bench                             |
| Wils. . . . .          | Wilson . . . . .                                | King's Bench and Common Pleas             |
| Wils. C. C. . . . .    | Wilson's Chancery Cases . . . . .               | Chancery                                  |
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| W. P. C. . . . .       | Wollaston's Practice Cases . . . . .            | Queen's Bench, Common Pleas and Exchequer |
| Woodf. L. & T. . . . . | Woodfall's Law of Landlord and Tenant, by Cole. |   |
| W. Bl. . . . .         | Sir William Blackstone . . . . .                | King's Bench and Common Pleas             |
| W. R. . . . .          | Weekly Reporter . . . . .                       | All the Courts                            |

## Y.

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|--------------------------|---|---------------------|
| Younge . . . . .         | Younge . . . . .                                | Exchequer, Equity   |
| Y. & C. . . . .          | Younge & Collyer . . . . .                      | Exchequer, Equity   |
| Y. & C. N. C. O. . . . . | Younge & Collyer's New Chancery Cases . . . . . | Knight Bruce, V.-C. |
| Y. & J. . . . .          | Younge & Jervis . . . . .                       | Exchequer           |

# A CHRONOLOGICAL LIST

## OF

# THE REPORTS

## COMPRISED IN THE DIGEST.

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### HOUSE OF LORDS.

|  |   |
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| <p>Brown's Reports—1702 to 1800.<br/> Dow—1812 to 1818.<br/> Bligh—1819 to 1821.<br/> Bligh, New Series—1827 to 1837.<br/> Dow &amp; Clark—1827 to 1832.<br/> West—1839 to 1841.<br/> Clark &amp; Finnelly—1831 to 1846.<br/> House of Lords Cases (Clark)—1847 to 1866.</p> | <p>Law Journal, New Series—1832 to 1883.<br/> Law Reports—1865 to 1883.<br/> Jurist—1837 to 1854.<br/> Jurist, New Series—1855 to 1866.<br/> Law Times, New Series—1859 to 1883.<br/> Weekly Reporter—1852 to 1883.<br/> Macqueen—1851 to 1866.</p> |
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|   |   |
|---|---|
| <p>Knapp's Reports—1829 to 1836.<br/> Moore—1836 to 1852.<br/> Moore's Indian Appeals—1836 to 1873.<br/> Moore's New Series—1852 to 1873.<br/> Jurist—1837 to 1854.<br/> Jurist, New Series—1855 to 1866.</p> | <p>Law Journal, New Series—1865 to 1883.<br/> Law Reports—1865 to 1883.<br/> Law Times, New Series—1859 to 1883.<br/> Swabey—1858 to 1859.<br/> Lushington—1860 to 1863.<br/> Browning &amp; Lushington—1863 to 1865.</p> |
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|   |  |
|---|--|
| <p>Wilson's Reports—1742 to 1774.<br/> Kenyon's Notes—1753 to 1760.<br/> Sir William Blackstone—1746 to 1780.<br/> Burrow—1757 to 1771.<br/> Burrow's Settlement Cases—1732 to 1776.<br/> Caldecott's Settlement Cases—1775 to 1786.<br/> Nolan—1791 to 1792.<br/> Lofft—1772 to 1774.<br/> Cowper—1774 to 1778.<br/> Douglas—1778 to 1784.<br/> Term Reports—1785 to 1800.<br/> Smith—1803 to 1806.<br/> East—1801 to 1812.<br/> Maule &amp; Selwyn—1813 to 1817.<br/> Barnewall &amp; Alderson—1817 to 1822.<br/> Barnewall &amp; Cresswell—1822 to 1830.<br/> Barnewall &amp; Adolphus—1830 to 1834.<br/> Adolphus &amp; Ellis—1834 to 1840.<br/> Queen's Bench Reports (Adolphus &amp; Ellis, New Series)—1841 to 1852.<br/> Ellis, Blackburn &amp; Ellis—1858.<br/> Ellis &amp; Ellis—1858 to 1861.<br/> Best &amp; Smith—1861 to 1869.<br/> Law Journal, New Series—1832 to 1883.</p> | <p>Law Reports—1866 to 1883.<br/> Dowling &amp; Ryland—1821 to 1827.<br/> Manning &amp; Ryland—1827 to 1830.<br/> Neville &amp; Manning—1831 to 1836.<br/> Neville &amp; Perry—1836 to 1838.<br/> Perry &amp; Davison—1838 to 1841.<br/> Gale &amp; Davison—1841 to 1843.<br/> Davison &amp; Merivale—1843 to 1844.<br/> Chitty—1819 to 1820.<br/> Dowling's Practice Cases, Old Series—1830 to 1840.<br/> Dowling's Practice Cases, New Series—1841 to 1842.<br/> Harrison &amp; Wollaston—1835 to 1837.<br/> Willmore, Wollaston &amp; Davison—1837.<br/> Willmore, Wollaston &amp; Hodges—1838 to 1839.<br/> Jurist—1837 to 1854.<br/> Jurist, New Series—1855 to 1866.<br/> Law Times, New Series—1859 to 1883.<br/> Weekly Reporter—1852 to 1883.<br/> Lowndes, Maxwell &amp; Pollock—1850 to 1851.<br/> Lowndes &amp; Maxwell—1852.<br/> Saunders &amp; Cole—1842 to 1848.</p> |
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### NISI PRIUS—*Continued.*

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Moody & Robinson—1831 to 1844.

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Carrington & Payne—1823 to 1841.  
Carrington & Marshman—1840 to 1842.  
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Foster & Finlason—1853 to 1867.

### CROWN CASES.

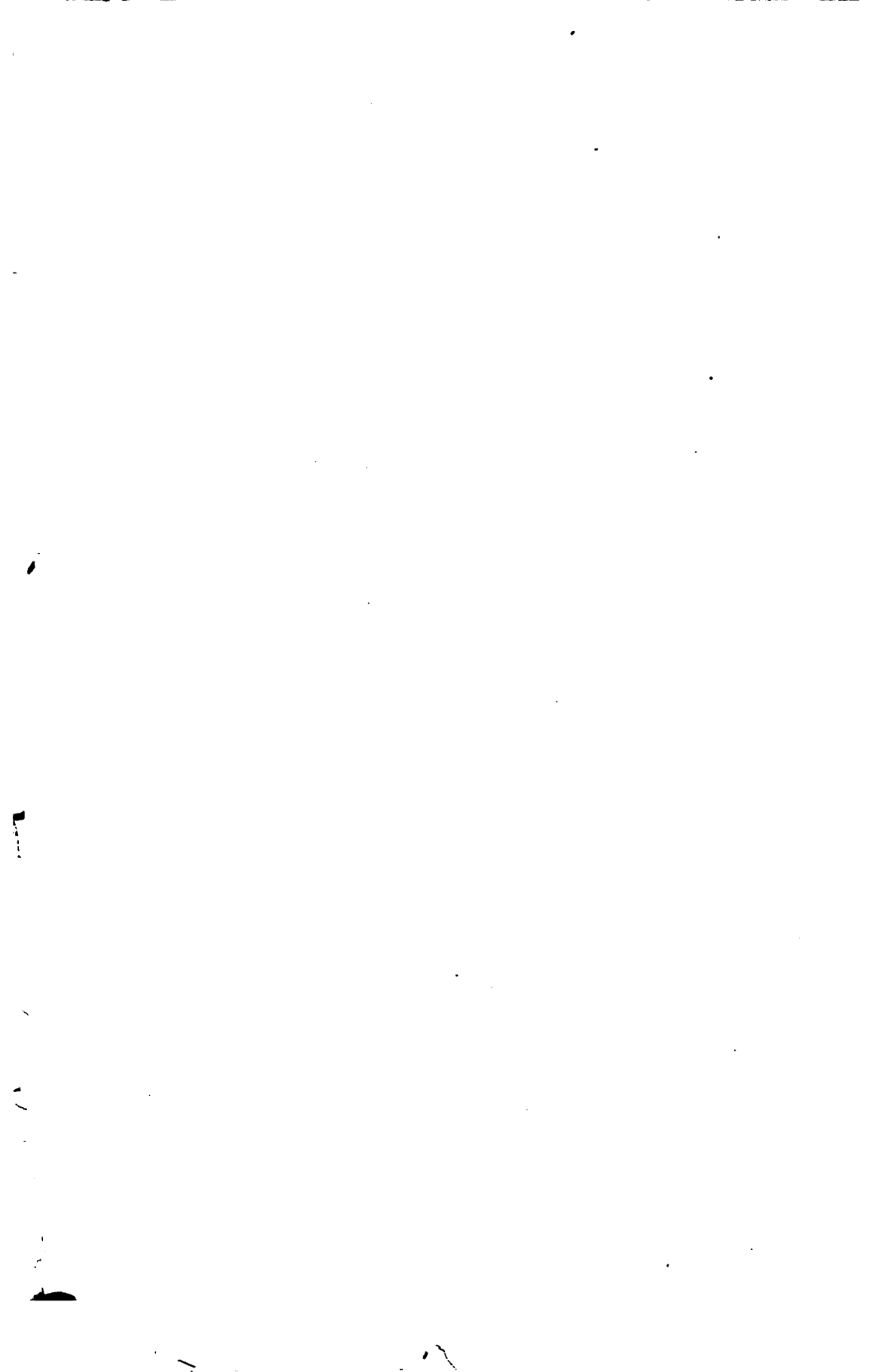
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Russell & Ryan—1799 to 1823.  
Lewin—1822 to 1838.  
Moody—1824 to 1844.  
Denison—1844 to 1852.  
Temple & Mew—1848 to 1851.

Dearsly—1852 to 1856.  
Dearsly & Bell—1856 to 1858.  
Bell—1858 to 1860.  
Leigh & Cave—1861 to 1865.  
Cox—1843 to 1883.

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Lutwyche—1843 to 1853.  
Keane & Grant—1854 to 1862.  
Hopwood & Philbrick—1862 to 1867.

Hopwood & Coltman—1868 to 1879.  
Coltman—1880 to 1883.



# A Digest

OF THE

## CASES REPORTED

FROM 1756 TO 1883.

### TALES.

*See* JURY.

### TAXATION.

I. BETWEEN PARTIES.—*See* COSTS.

II. BETWEEN SOLICITOR AND CLIENT.—  
*See* SOLICITOR.

III. ON ELECTION PETITIONS.—*See* ELECTION LAW.

### TAXES.

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### TELEGRAPH AND TELEPHONE.

#### I. TELEGRAPH.

1. *Powers and Privileges of Companies.*
2. *Compensation,* 3.
3. *Liability of Postmaster General,* 5.
4. *Messages and their Effect,* 6.
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#### II. TELEPHONE, 10.

#### I. TELEGRAPH.

##### 1. POWERS AND PRIVILEGES OF COMPANIES.

**Allowance of Commission for Collecting Messages—How far a Preference.**—A party collected messages for a telegraph company, and received a commission from the company on the messages collected:—Held, that the commission could not be considered as a violation of a provision in the charter of the company "for the sending and receiving of messages by all persons alike without favour or preference, and subject to such equitable charges and reasonable regulations as may from time to time be made by the company." *Reuter v. Electric Telegraph Company*, 6 El. & Bl. 341; 26 L. J., Q. B. 46; 2 Jur. N. S. 1245.

**Powers to place Wires and Posts.**—A telegraph company had power by their act to place

under any public road their wires and pipes, and to break up the pavement or soil of such roads, making compensation for all damage, provided that nothing in the provision should extend or apply to any railway, except that the company might carry their wires and pipes directly, but not otherwise, across any railway, so as not to damage or be likely to damage the railway or any of the works connected therewith. A railway, pursuant to the provisions of the act incorporating the company, crossed a public road on the level:—Held, that the telegraph company had no right to place their wires and pipes under that part of the public road where it was crossed by the railway on the level, as that part was not a public road, but a railway within the telegraph company's act. *South-Eastern Railway Company v. European and American Electric Telegraph Company*, 9 Ex. 363; 2 C. L. R. 467; 23 L. J., Ex. 113.

A telegraph company, without any parliamentary powers, laid down their wires in tubes under a public highway. An information and bill were filed complaining of those acts as a nuisance to the public and as an invasion of the rights of the owner of the adjacent land in the soil of the road. The court refused to grant an injunction until the legal right had been established. *Attorney-General v. United Kingdom Electric Telegraph Company*, 30 Beav. 287; 31 L. J., Ch. 329; 8 Jur., N. S. 583; 10 W. R. 167.

Where a company, for the purposes of profit to itself, placed telegraph posts upon a highway with the object and intention of keeping them there permanently, and did permanently keep them there, such posts being of such sizes and dimensions and solidity as to obstruct and prevent the passage of carriages and horses or foot passengers:—Held, that the company was liable to be found guilty upon an indictment for a nuisance. *Reg. v. United Kingdom Electric Telegraph Company*, 9 Cox, C. C. 174; 2 B. & S. 647, n.; 31 L. J., M. C. 166; 6 L. T. 378; 10 W. R. 538.

Held, also, that even if the posts were not placed upon the hard or metalled part of the highway, or upon a footpath artificially formed upon it, or although sufficient space was left for the public traffic, the company was still liable to a conviction. *Ib.*

## 2. COMPENSATION.

**What is an Interest Entitling to—Compulsory Purchase by Government.**—By 31 & 32 Vict. c. 110, s. 7, any railway company possessed of a telegraph open to the use of the public on the 1st of January, 1868, for transmitting messages for money, or possessing any beneficial interest in such telegraph, might require the postmaster-general to purchase the right of such railway company to transmit such messages, or other beneficial interest. By 32 & 33 Vict. c. 73, s. 10, any telegraph company with which the postmaster-general may not come to an agreement with respect to the amount of compensation to be paid to them for their undertaking, may have such amount settled by arbitration in manner provided by the Lands Clauses Act, 1845. By an agreement with the telegraph company, under which the telegraph company erected and placed their telegraphic apparatus on the Cowes and Newport Railway Company's line, the railway

company took the exclusive use of one wire during the continuance of the agreement, but was prohibited from using the wire for public use or for profit, or for any other purpose than the transmission of the railway company's own messages. The agreement was to be in force for twenty-one years, and at the end of that time the telegraph company was to remove its telegraphic apparatus:—Held, that the railway company had no interest in the telegraph such as to entitle them to require the postmaster-general to purchase it under the Telegraph Acts, 1868 and 1869. *Cowes and Newport Railway Company v. Board of Trade*, 43 L. J., Q. B. 242; 22 W. R. 807.

The Somerset and Dorset Railway Company, which connected two portions of the London and South-Western Railway, entered into an agreement in 1866, by which they undertook to complete all the works, including the telegraphs, and then to hand over, for the term of 1,000 years, their line to the South-Western, who undertook to pay them forty-five per cent. of the gross receipts from traffic conveyed by the railway. At the date of this agreement the Somerset and Dorset Railway had two telegraph wires along their line. In 1865 the South-Western had made an agreement with the Electric Telegraph Company, by which the latter was to have the exclusive right of transmitting messages along the lines which the South-Western then had or might afterwards acquire. After the passing of the Telegraph Acts, the postmaster-general acquired these telegraphs, and paid compensation in respect thereof to the South-Western. The Somerset and Dorset Railway Company then applied for compensation in respect of their telegraph, and afterwards requested the Chief Justice of the Common Pleas, pursuant to 31 & 32 Vict. c. 110, s. 9, to appoint an umpire, which he declined to do, on the ground that the Somerset and Dorset Company had no beneficial interest in a telegraph within 31 & 32 Vict. c. 110, s. 7:—Held, that that railway had, under the agreement with the South-Western, parted with the beneficial interest in their telegraph, that messages sent by the telegraph formed no part of traffic conveyed by the railway, and that consequently they were not entitled to compensation under the Telegraph Acts. *Reg. v. Coleridge*, 45 L. J., Q. B. 649; 34 L. T. 762.

**For Telegraph Monopoly—Award of a Lump Sum—Further Claim for Future Poles and Wires—Arbitration Clauses.**—By the Telegraph Act, 1868, s. 9, sub-s. 6, the postmaster-general shall pay railway companies by way of compensation (clause D.) such sums as shall be settled by arbitration in respect of the loss by such railway company of the privilege of granting other way-leaves and making future arrangements with telegraph or other companies, and in respect of granting a monopoly to the postmaster-general for the conveyance of telegraphs over their railways. By clause H. of the same sub-section, on acquisition of the telegraphs, the Postmaster-General shall have a perpetual right of way for his poles and wires over the whole of the railway company's system, and in consideration thereof he shall pay to the railway company such sum per mile per wire over the whole of the said system by way of yearly rent as shall be fixed by arbitration. The arbitrator in determining the amounts to be paid to the railway company under this act, shall have regard to the agreements

which subsist between the railway company and any telegraph company, and also to a compulsory sale being required from the railway company; and in estimating the amount to be paid under any one part of this section shall have regard to the advantages to be obtained and the disadvantages to be sustained by the railway company under any other part of this section. By sub-s. 8 of the same section, to the railway company is reserved power to erect and work private telegraphs for annual rent or payment for way-leave from traders. An arbitrator had awarded a certain lump sum to the defendants as and by way of compensation in pursuance of the provisions of sub-s. 6 of s. 9 of this act, but had made no allusion in his award to any yearly rent under clause H. of that sub-section:—Held, that the defendants were precluded from any further compensation for extra poles or wires which the postmaster-general might in future require to be erected on their railway system. *Reg. v. Metropolitan Railway Company*, 48 L. T. 367.

**To Officers.**—The Telegraph Act, 1868 (31 & 32 Vict. c. 110), s. 8, sub-s. 7, applies only to the three telegraph companies named at the beginning of s. 8; and, therefore, the telegraph superintendent of a railway company is not entitled to compensation for the loss of his office, when the telegraphic business of the company is acquired by the postmaster-general. *Reg. v. Postmaster-General*, 32 L. T. 559.

The superintendent of one of the three named telegraph companies was held entitled to compensation in respect of profits on allowance for expenses while travelling on the company's service. *Ib.*

By the Telegraph Act, 1868 (31 & 32 Vict. c. 110), s. 8, sub-s. 7, officers who have been for a fixed period in the employment of a telegraph company, whose undertaking has been purchased by the postmaster-general under the provisions of the act, and who have been in receipt of a yearly salary, or of remuneration not less than 50*l.* a year, are entitled, in the event of their receiving no offer of an appointment by the postmaster-general in the telegraphic department of equal value to that held under the company, to an annuity by way of compensation for the loss of their office, equal to a proportion of the annual emolument derived by them from their office. S. was an officer of a telegraphic company, whose undertaking had been purchased by the postmaster-general, and was entitled, so far as salary and term of office were concerned, to compensation under the Telegraph Act, 1868. It was part of his duty, when required, to travel on the company's business; when he so travelled his ordinary salary ran on, but his additional expenses were paid by the company, who agreed that he should receive certain fixed sums in lieu of making him bring in an account of his expenditure, and then repaying him:—Held, that the sums so paid to him for travelling expenses were to be taken into consideration in calculating the annual emolument derived by him from his office. *Reg. v. Postmaster-General*, 1 Q. B. D. 658; 45 L. J., Q. B. 609; 35 L. T. 241. Affirmed, 3 Q. B. D. 428; 47 L. J., Q. B. 435; 38 L. T. 89; 26 W. R. 322—C. A.

### 3. LIABILITY OF POSTMASTER-GENERAL.

**Exemption of, for Negligence in Working.**—By the Telegraph Act, 1868 (31 & 32 Vict. c. 110),

which incorporates the Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 2, the term "the company," in the Telegraph Act, 1863, shall, "in addition to the meaning assigned to it in that act, mean the postmaster-general." In an action against the postmaster-general, in his individual capacity, for, by his servants, negligently opening a flag-way for the purpose of erecting telegraph posts:—Held, that the action did not lie. *Jones v. Monsell*, 6 Ir. R., C. L. 155.

### 4. MESSAGES AND THEIR EFFECT.

**Liability for Misdelivery of Messages.**—A special act gave an electric telegraph company powers for laying down their line, and enacted that the use of their telegraph and apparatus for the purpose of receiving and conveying messages should, subject to the prior right of use for the service of the crown, and subject to such charges and reasonable regulations as might be made by the company, be open for the sending and receiving of messages by all persons alike. The company stipulated that they would not be responsible for mistakes or delays in the transmission of nor for the non-delivery of unrepeat messages from whatever cause arising, and that half the usual price for transmission would be charged in addition for repeated messages:—Held, that the obligation of the company to use due care and skill in the transmission of a message arose entirely out of contract, and that the vendor of goods who received an offer by telegraph from the vendee could not maintain an action against the company for a mistake in the message. *Playford v. United Kingdom Electric Telegraph Company*, 4 L. R., Q. B. 706; 38 L. J., Q. B. 249; 21 L. T. 21; 17 W. R. 968; 10 B. & S. 759.

No action will lie against a telegraph company at the suit of the receiver for the misdelivery of a telegram, unless there is either a contract between him and the company, or (possibly) fraud on their part in the transmission of it. *Dickson v. Reuter's Telegraph Company*, 2 C. P. D. 62; 46 L. J., C. P. 197; 35 L. T. 842; 25 W. R. 272. Affirmed, 3 C. P. D. 1; 47 L. J., C. P. 1; 37 L. T. 370; 26 W. R. 23—C. A.

The plaintiffs carried on business as merchants at Valparaiso, and were a branch house of a firm at Liverpool. A telegraph company, through the negligence of their agent, misdelivered a telegraphic message to the plaintiffs. The message purported to be from the plaintiffs' Liverpool house, and to be a large order for barley; but in fact it was not from the Liverpool house, nor intended for the plaintiffs. The plaintiffs executed the supposed order, and, having suffered a heavy loss in consequence, claimed damages against the telegraph company:—Held, that they were not entitled to maintain their action, as there was no contract between themselves and the company, nor any duty upon the company to transmit messages correctly. *Ib.*

An electric telegraph company's act provided that the public, without preference, shall have the use of the company's telegraph, subject to reasonable regulations, to be made by the company. When a person wishes to transmit a message by the telegraph, a message paper is handed to him for his signature, on which is indorsed a notice that messages of consequence ought to be repeated from the station to which they are ad-

dressed, and that a higher rate is charged for repeated messages, and that the company will not be responsible for mistakes in the transmission of unrepeat messages:—Held, that the company was not liable for the consequences of such mistakes; that the condition introduced into the notice was reasonable; and if not a reasonable regulation under the act, it was such a limitation of liability as the company, in the character of common carriers, was entitled to create by notice to their customers. *M'Andrew v. Electric Telegraph Company*, 17 C. B. 3; 25 L. J., C. P. 26; 1 Jur., N. S. 1073.

—**For Non-delivery.**—The defendant's business was to collect telegraphic messages for transmission to America and other places. The plaintiff entrusted the defendant with a message in cypher, which was unintelligible to the defendant, for transmission to America. The defendant negligently omitted to send the message. The consequence was that the plaintiff lost a sum of money which he would have earned for commission upon an order to which the message related:—Held, that the plaintiff could not recover such sum of money from the defendant, but only nominal damages. *Sanders v. Stuart*, 1 C. P. D. 326; 45 L. J., C. P. 682; 35 L. T. 370; 24 W. R. 949.

**Use of Cyphers.**—A telegram company in London made an arrangement with the defendants, being two individuals in Australia, for the transmission of messages, in which certain words were used as short expressions of the names and addresses of the principal customers; and the defendants were described as agents of the telegram company. In a little time the parties quarrelled, and one of the defendants came to England to carry on an independent telegram business with his partner in Australia, and sent circulars to the customers of the telegram company, mentioning that he had their cyphers. On motion to restrain him from using the cyphers:—Held, that there was nothing confidential in the cyphers, and that he was entitled to use them. *Reuter's Telegram Company v. Byron*, 43 L. J., Ch. 661.

**Privileged Communications by Telegram.**—When a communication, libellous in itself, but such that the occasion of it would have rendered it privileged if made by letter to the person alone to whom it was addressed, was in fact made by means of a telegram, it is not privileged, though made bona fide, because the mode of conveying the information necessarily involves publication to the post-office clerks:—Held, it was not less a publication because 31 & 32 Vict. c. 110, s. 20, makes the disclosure of the contents of a telegraphic message by any official in the post-office a misdemeanor. *Williamson v. Freer*, 9 L. R., C. P. 393; 43 L. J., C. P. 161; 30 L. T. 332; 22 W. R. 878.

Communications or messages transmitted through telegraph offices are not privileged, and the clerks transmitting the same must disclose their contents in a court of justice. *Waddell, In re*, 8 Jur., N. S. 181, Part 2; *S. P., Ince, In re*, 20 L. T. 421.

**Production of Telegrams—Subpoena to Post-office Officials.**—On a subpoena from the Court of Bankruptcy to produce all telegrams sent by

the bankrupt from a certain date, the secretary of the post-office was ordered to produce the documents sought for, the court intimating that such subpoenas should be prepared so as to meet the convenience of the officials. *Smith (Thomas), In re*, 7 L. R., 1r. 286.

—**In case of Election Petitions.**—The post-office authorities may be ordered to produce specified telegrams. *Tomline v. Tyler*, 44 L. T. 187.

**Notice of Injunction by, how made.**—Sufficient notice of the granting of an injunction may be given by telegram. *Langley, Ex parte, Smith, Ex parte, Bishop, In re*, 13 Ch. D. 110; 49 L. J., Bk. 1; 43 L. T. 181; 28 W. R. 174.

**Contracts by Telegram—Sufficiency within Statute of Frauds.**—When, in answer to an offer to buy land, written and signed instructions of acceptance are given in the usual way to a telegram company to be telegraphed, and a telegram is sent in the usual way in accordance therewith, there is a sufficient contract in writing within the Statute of Frauds. *Godwin v. Francis*, 5 L. R., C. P. 121; 39 L. J., C. P. 121; 22 L. T. 338.

B. having entered into a contract with C., the brother of the defendant, for the sale of hay, brought an action against the defendant for not accepting. The judge at the trial admitted letters and telegrams signed by C. as evidence against the defendant, and the jury found for the plaintiff:—Held, that there was sufficient evidence of the authority, and that the two telegrams, of which one was signed in C.'s name, and in the other the name of the defendant was not mentioned as buyer, together constituted a sufficient memorandum of the contract to satisfy the Statute of Frauds, on the ground that the defendant might be treated as the undisclosed principal of C., who appeared on the telegrams to be liable as principal. *McBlain v. Cross*, 25 L. T. 804.

—**Mistake in Telegram—Effect of.**—The defendant wrote a message for transmission by telegram to the plaintiff, ordering three rifles. By mistake the telegraph clerk telegraphed the word "the" for "three;" and the plaintiffs thereupon, acting upon a previous communication with the defendant to the effect that he might perhaps want as many as fifty rifles, sent that number to him. He declined to take more than three. In an action against him to recover the price of the fifty rifles:—Held, that he was not responsible for the mistake of the telegraph clerk, and that therefore the plaintiffs were not entitled to recover the price of more than three rifles. *Henkel v. Pape*, 6 L. R., Ex. 7; 40 L. J., Ex. 15; 23 L. T. 419; 19 W. R. 106.

—**Revocation of Offer.**—The defendant, being possessed of warrants for iron, wrote from London to the plaintiffs at Middlesbrough asking whether they could get him an offer for the warrants. Further correspondence ensued, and ultimately the defendant wrote to the plaintiffs fixing 40s. per ton, net cash, as the lowest price at which he could sell, and stating that he would hold the offer open till the following Monday. The plaintiffs on the Monday morning at 9.42 telegraphed to the defendant: "Please

wire whether you would accept forty for delivery over two months, or if not, longest limit you could give." The defendant sent no answer to this telegram, and after its receipt on the same day he sold the warrants, and at 1.25 P.M. telegraphed to plaintiffs that he had done so. Before the arrival of his telegram to that effect, the plaintiffs having at 1 P.M. found a purchaser for the iron, sent a telegram at 1.34 P.M. to the defendant stating that they had secured his price. The defendant refused to deliver the iron, and thereupon the plaintiffs brought an action against him for non-delivery thereof. The jury found at the trial that the relation between the parties was that of buyer and seller, not of principal and agent. The state of the iron market was very unsettled at the time of the transaction, and it was impossible to foresee when the plaintiffs' telegram was sent at 9.42 A.M. how prices would range during the day:—Held, by Lush, J., that under the circumstances the plaintiffs' telegram at 9.42 ought not to be construed as a rejection of the defendant's offer, but merely as an inquiry whether he would modify the terms of it, and that, although the defendant was at liberty to revoke his offer before the close of the day on Monday, such revocation was not effectual until it reached the plaintiffs; consequently the defendant's offer was still open when the plaintiffs accepted it, and the action was, therefore, maintainable. (*Cooke v. Osley* (3 T. R. 653) discussed. *Stevenson v. McLean*, 5 Q. B. D. 346; 49 L. J., Q. B. 701; 42 L. T. 897; 28 W. R. 916.

#### 5. LIABILITY OF COMPANY TO PAY RATES AND TAXES.

**Rating Telegraph Posts and Wires.**—A vestry applied by mandamus to compel the postmaster-general to pay poor rates upon the rateable value of telegraph posts and wires, as fixed by an assessment committee. The postmaster-general had tendered a smaller amount, proportionately to an assessment fixed by the commissioners of the Treasury, which the vestry had refused:—Held, that by the Telegraph Acts, 1868 (31 & 32 Vict. c. 110), and 1869 (32 & 33 Vict. c. 73), no duty is cast upon the postmaster-general to pay the rates imposed by those acts; and that there is no remedy by mandamus against him to enforce the payment of rates fixed by an assessment committee. *Reg. (or Marylebone Vestry) v. Postmaster-General*, 28 L. T. 337; 21 W. R. 459.

An electric telegraph company, incorporated by statute for transmitting messages between distant places by means of electric currents, laid down along the lines of a railway company an apparatus for that purpose, on terms agreed on between the companies. This apparatus consisted of posts fixed in the ground, with telegraphic wires suspended from post to post, the posts being, however, subject to removal to some other place at the option of the railway company, if their working or position interfered with the operations of the railway:—Held, that the telegraph company was rateable in the parish in which the posts were fixed. *Electric Telegraph Company v. Salford (Overseers)*, 11 Ex. 181; 24 L. J., M. C. 146; 1 Jur., N. S. 733.

**Foreign Telegraph Company—Income Tax, how Chargeable.**—The appellants, a foreign

company, domiciled in Copenhagen, had three marine cables in connection with Aberdeen and Newcastle, communicating with the telegraph lines of the post-office in the United Kingdom. They had also work-rooms with clerks in London, Newcastle, and Aberdeen. Messages from this country were forwarded over the lines of the post-office and the cables of the appellants to Denmark, and thence by their wires and the wires of foreign governments to Russia, China, Japan, and India. The total charges paid for transmitting such messages were collected by the post-office, who, after deducting their dues, handed the balance to the appellants, who retained the amount due to them for the transmission of messages over their cables and lines, and paid the residue to the various governments and companies respectively entitled to it. No profits were made by the appellants from the transmission of messages over the land lines in the United Kingdom:—Held, that the appellants must be taken to exercise a trade in the United Kingdom under 16 & 17 Vict. c. 34, s. 2, Sched. D, and that they were chargeable to income tax on the balance of profits or gains from the receipts in this country from the transmission of messages. *Erichsen v. East*, 8 Q. B. D. 414; 51 L. J., Q. B. 86; 45 L. T. 703; 30 W. R. 301; 46 J. P. 357—C. A. Affirming 7 Q. B. D. 12; 50 L. J., Q. B. 570; 45 L. T. 235; 46 J. P. 182.

#### 6. INJURING PROPERTY OF COMPANY.

**Cables.**—A ship's anchor got entangled with an electric cable, and the cable was cut by order of the master:—Held, that, under the circumstances, the master was guilty of a want of nautical skill, and that the Admiralty Court had jurisdiction to entertain a suit against the ship, and the ship was condemned in damages and costs. *The Clara Killam*, 3 L. R., Adm. 161; 39 L. J., Adm. 50; 23 L. T. 27; 19 W. R. 25.

The plaintiffs were the owners of a telegraphic cable lying at the bottom of the sea between England and France. The defendants were aliens, and their ship, while sailing upon the high seas more than three miles from the English coast, lowered an anchor, and injured the cable:—Held, that the court would presume that the masters of ships were aware of the existence and situation of submarine cables, and that a duty was thereby cast upon all such masters of ships to manage their vessels so carefully and skilfully as to avoid (if possible, in the exercise of reasonable precaution) injuring these cables. *Submarine Telegraphic Company v. Dickson*, 15 C. B., N. S. 759; 33 L. J., C. P. 139; 10 Jur., N. S. 211; 10 L. T. 32; 12 W. R. 384.

#### II. TELEPHONE.

**Telephone—Infringement of—Postmaster-General's Exclusive Privilege of Transmitting "Telegrams."**—Edison's telephone, for which patents were granted in 1877 and 1878, consists of a transmitter, a wire, and a receiver. When sounds are spoken into the transmitter, electric currents of varying intensity pass along the wire, so that corresponding or equivalent sounds are heard at the receiver, and two persons at a distance can thus converse with one another. A company leased these telephones to subscribers at yearly rents which produced a profit to the

company, and arranged the wires so that subscribers could converse with one another when put into communication by a servant of the company:—Held, that Edison's telephone was a "telegraph" within the meaning of the Telegraph Acts, 1863 and 1869, although the telephone was not invented or contemplated in 1869. *Attorney-General v. Edison Telephone Company*, 6 Q. B. D. 244; 50 L. J., Q. B. 145; 43 L. T. 697; 29 W. R. 428.

Held, also, that a conversation through the telephone was a "message," or at all events a "communication transmitted by a telegraph," and therefore a "telegram" within the meaning of those acts; and that since the company made a profit out of the rents, conversations held by subscribers through their telephones were infringements of the exclusive privilege of transmitting telegrams granted to the postmaster-general by the Act of 1869, and were not within the exceptions mentioned in s. 5. *Id.*

## TENANT.

See LANDLORD AND TENANT.

## TENDER.

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### I. IN WHAT ACTIONS.

Upon a bare covenant for the payment of money, the defendant may plead a tender. *Johnston v. Clay*, 1 Moore, 200; 7 Taunt. 486.

So, in covenant on an insurance against fire, a tender may be pleaded, and money paid into court under 19 Geo. 2, c. 37, s. 7. *Solomon v. Bewicke*, 2 Taunt. 317.

A tender before action is not pleadable to an action for unliquidated damages. *Searle v. Barrett*, 4 N. & M. 200; 3 D. P. C. 13.

An acceptor of a bill of exchange cannot plead a tender after the day of payment. *Dobie v. Larkin*, 10 Ex. 776.

### II. BY AND TO WHOM.

#### 1. AGENTS, CLERKS, OR SERVANTS.

##### To Authorized Agent, &c., is a Good Tender.]

—A tender of money to an agent or a servant, authorized to receive payment, is a good tender to the creditor himself. *Goodland v. Blewith*, 1 Camp. 477. And see *Anon.*, 1 Esp. 349.

**No Authority to Accept.**—A tender to a managing clerk is good, though he should have received orders not to accept it. *Muffatt v. Parsons*, 1 Marsh. 55; *S. C. nom. Moffat v. Parsons*, 5 Taunt. 307.

A creditor told his clerk, previously authorized to receive money, not to receive a sum if offered him by a certain debtor, for that he had put it into the hands of his attorney; and the clerk, on tender made, refused to receive the money, and assigned the reason:—Held, that this was a good tender to the principal. *Id.*

Money payable as a composition on a sum due to a solicitor for costs was tendered to a clerk in his office, who, saying that the solicitor was out, and that he, the clerk, had "no instructions," refused the money:—Held, per Lord Coleridge, C. J., that the clerk's statement did not amount to a disclaimer of his authority to receive the money; as he was apparently conducting his master's business in the office, such authority might be implied; and, therefore, the tender was good. Per Denman, J., that the statement was, in effect, a disclaimer of authority; the case was, therefore, indistinguishable from *Bingham v. Allport* (1 Nev. & M. 398), and the tender was bad. *Finch v. Boning*, 4 C. P. D. 143; 40 L. T. 484; 27 W. R. 872.

Where a person demands the payment of money at his office, such demand amounts to a special authority for his clerk there to receive it; therefore, in his absence, a tender to the clerk is a good tender although he states that he is not authorized to receive the money. *Kirton v. Braithwaite*, 1 M. & W. 310; 5 D. P. C. 101; 2 Gale, 48.

A tender made to the managing clerk of the plaintiff's attorney, who at the time disclaims authority from his master to receive the debt, is insufficient. *Bingham v. Allport*, 1 N. & M. 398.

A., the plaintiff's attorney, wrote to the defendant, stating that a debt due from the defendant to the plaintiff "must be paid to me" on the next day. A tender was made on the next day to a writing-clerk of A., in A.'s office, who said that he could not take the money, as A. was out, and the person must wait till he came in:—

Held, not a good tender, as not being made to a person authorized to receive money; but, that if A.'s letter had asked payment "at my office," a tender to any person in the office who was carrying on the business there would have been sufficient. *Watson v. Hetherington*, 1 C. & K. 36.

If an attorney sends a letter to demand payment, and the debtor makes a tender to him, that is a good tender, unless the attorney disclaims his authority at the time; and if the attorney is absent, he is bound by the acts of those whom he allows to represent him at his office. Therefore, after such a letter sent, a tender to the clerk of the attorney at his office (the attorney being absent) is good. *Wilnot v. Smith*, 3 C. & P. 453; *M. & M.* 238.

**Authority of Principal to tender Smaller Sum.]**—A tender by the agent of a debtor of the whole sum demanded by the creditor, by pulling out his pocket-book, and offering, if he would go into a neighbouring public-house, to pay it, which the creditor refused to take, is good, although the agent is only authorized by the debtor to tender a sum short of the whole sum demanded, and offered the rest at his own risk. *Read v. Goldring*, 2 M. & S. 86.

## 2. JOINT OR SEPARATE DEMANDS.

If A., B. and C. have a joint demand, and C. has a separate demand on D., and D. offers A. to pay him both the debts, which A. refuses, without objecting to the form of the tender, on account of his being entitled only to the joint demand, D. may plead this tender in bar of an action on the joint demand, and should state it as a tender to A., B. and C. *Douglas v. Patrick*, 3 T. R. 683.

If A. is indebted to several persons in different sums of money, and when they are all assembled together tenders them one gross sum sufficient to satisfy all their demands, which they refuse to receive, insisting on more being due, this is a good tender. *Black v. Smith*, Peake, 88.

Where a party has separate demands for unequal sums against several persons, an offer of one sum for the debts of all will not support a plea, stating that a certain portion of this sum was tendered for the debt of one. *Strong v. Harvey*, 3 Bing. 304; 11 Moore, 72.

## III. BEFORE ACTION BROUGHT.

**Replication to Plea of Tender.]**—It is no answer to a plea of tender before the commencement of the suit, that the plaintiff had, before such tender, retained an attorney and instructed him to sue out a writ against the defendant, and that the attorney had accordingly applied for such writ before the tender, which was afterwards sued out. *Briggs v. Culverly*, 8 T. R. 629.

**Tender before Writ.]**—The plaintiff's attorney, before bringing the action, wrote to the defendant to say, that, unless the debt, together with his (the attorney's) charge for that letter, was paid at his office on the Wednesday following, at twelve o'clock, proceedings would be commenced. On the Wednesday, at ten o'clock, an agent of the defendant went to the attorney's office, and

there saw a boy, to whom he tendered the amount of the debt only. The boy, after referring to the letter book, refused to accept it, unless the charge was also paid. The writ was issued at eleven o'clock on that day:—Held, that this was a good tender. *Kirton v. Braithwaite*, 1 M. & W. 310; 5 D. P. C. 101; 2 Gale, 48.

## IV. MODE OF MAKING.

### 1. WHAT MONEY.

**Legal Coin.]**—A tender to be strictly legal must be made in the coin of the realm, and the money should be produced; but an offer in fact may be made equivalent in law, by waiver of the legal requisites of a strict undeniable tender, by putting it on a ground which works a dispensation. *Polglass v. Oliver*, 2 C. & J. 15; 2 Tyr. 89.

**Waiver of Objection.]**—To invalidate a tender, or to divest an offer to pay of the legal effect of a tender, if the objection is to the medium of the offer to satisfy, and not to the sum offered, the ground of the rejection must be stated, or it is a waiver of the objection of insufficiency in that particular respect, and it cannot afterwards be taken advantage of in court, on the score of not being an effective legal tender; in other words, an objection on a point of fact works a waiver of objections on points of law. Such waiver may be implied, though not expressed. *Id.*

### 2. BANK NOTES AND CHEQUES.

**Notes.]**—Bank notes were not made a legal tender by 37 Geo. 3, c. 45. *Grigby v. Oakes*, 2 B. & P. 526.

**Not Objected to.]**—Yet a tender of a Bank of England note was good, if not objected to at the time. *Brown v. Saul*, 4 Esp. 267; *S. P.*, *Wright v. Read*, 3 T. R. 554.

So a tender of a country bank bill will be good if no objection is made to it on that account. *Lockyer v. Jones*, Peake, 180, n.; *S. P.*, *Tiley v. Courtier*, 2 C. & J. 16, n.; *Polglass v. Oliver*, 2 C. & J. 15; 2 Tyr. 89.

**Cheque—No Objection to.]**—A tender made in the form of a cheque in a letter is a good tender, where no objection is made to the quality but only to the quantum of the tender; and though the letter contains a request that a receipt may be sent back, yet such request does not vitiate the tender, for it is not a condition. *Jones v. Arthur*, 8 D. P. C. 442; 4 Jur. 359.

### 3. PRODUCTION OF MONEY.

**Is Necessary.]**—To make a legal tender, there must either be an actual offer of the money produced, or the production of it must be dispensed with by the express declaration or an equivalent act of the creditor. *Thomas v. Evans*, 10 East, 101.

A tender is not good where the money is not in sight, but the witness supposed it was in a desk and never saw it produced, so that it did not appear, that, if the party was willing to accept the money, it could be immediately paid;

the money should be at hand and capable of immediate delivery. *Glasscott v. Day*, 5 Esp. 48; *S. P., Hurham v. Smith*, 2 Camp. 21.

If a party tells his creditor that he will pay him so much, and puts his hand into his pocket to take out the money, but before he can get it out the creditor leaves the room, and the money, consequently, is not produced till he is gone, this is no tender. *Leatherdale v. Sweepstone*, 3 C. & P. 342.

A letter from a solicitor of B., to the solicitor of A., stating his willingness to pay the money due, and stating "Dr. B. now tenders," &c., but not actually tendering the amount, does not amount to a tender, although A.'s solicitor treated it as a tender, and wrote, in answer, "I decline your tender, and shall file a bill." *Powney v. Blomberg*, 14 Sim. 179; 13 L. J., Ch. 450; 8 Jur. 746.

**What is Sufficient Production.**—Where the plaintiff disputes the quantum, to prove a tender some money must be proved to have been produced, though it is not necessary to prove the exact sum. *Dickinson v. Shee*, 4 Esp. 68.

Where a person offers a sum of money, by way of tender, and states the precise sum he so offers, which he holds in his hand, it is a sufficient tender, although it is twisted up in bank notes and not shewn to the party. *Alexander v. Brown*, 1 C. & P. 288.

Where the defendant ordered A. to pay the plaintiff 7l. 12s., and the clerk of the plaintiff's attorney demanded 8l., on which A. said, that he was only ordered to pay 7l. 12s., which sum was in the hands of B., and B. put his hand to his pocket, with a view of pulling out his pocket-book to pay 7l. 12s., but did not do so, by the desire of A.; but B. could not say whether he had that sum about him, but swore that he had it in his house, at the door of which he was standing at the time:—Held, that this was not a legal tender, as the money should have been produced to the attorney's clerk. *Kraus v. Arnold*, 7 Moore, 59.

**Production Waived—By what Means.**—If at an interview between the plaintiff and the defendant, when the defendant is willing to pay 10l., a third person present offers to go up stairs and fetch that sum, but is prevented by the plaintiff's saying "he cannot take it;" such offer is a good tender; and although the defendant did not at the time take notice of what was done, yet his pleading it afterwards is a sufficient ratification of the act. *Harding v. Davis*, 2 C. & P. 77.

Where a vendor admits it would be fruitless, a tender is unnecessary. *Jackson v. Jacob*, 3 Bing. N. C. 869; 5 Scott, 79; 3 Hodges, 219.

Where the creditor insists on more being due, it is not necessary to produce the money tendered. *Black v. Smith*, Peake, 88.

On a plea of tender of 1l. 12s. 6d., the jury found specially, that the defendant's attorney called on the plaintiff, and said, "I come to pay you 1l. 12s. 6d., which the defendant owes you;" that the attorney put his hand into his pocket, but did not produce the money; the plaintiff said, "I cannot take it, the matter is now in the hands of my attorney:"—Held, that such finding did not warrant a judgment for the defendant. *Finch v. Brock*, 1 Scott,

70; 2 Scott, 511; 1 Bing. N. C. 253; 2 Hodges, 97.

In an action for non-delivery of a cargo, it was proved that a larger sum was demanded for freight by the master than was due, and that the demand was so made as to amount to an announcement by the master, that it was useless to tender a smaller sum, as it would be refused:—Held, that these facts amounted to a dispensation of a tender. *The Norway*, B. & L. 404; 3 Moore, P. C. C., N. S. 245; 11 Jur., N. S. 892; 13 L. T. 50; 13 W. R. 1085.

A trader who, under a trader debtor summons, served under 12 & 13 Vict. c. 106, s. 81, had signed an admission of a debt, went to his creditor with the amount of it in his pocket in money, and told the creditor that he had come for the purpose of paying that amount. The creditor said it was of no use, as it was too late, and that the debtor must see the creditor's attorney:—Held, that the production of the money was dispensed with, and that there was a good tender. *Danks, Ex parte*, 2 De G., M. & G. 936; 22 L. J., Bk. 73.

#### 4. REQUIRING CHANGE.

**If Change required, no Tender.**—A plea of a tender of 20l. is supported by evidence of the tender of a larger sum, though such larger sum was tendered as the sum which the creditor was to receive, and not as the sum out of which he was to take the 20l. *Dean v. James*, 1 N. & M. 303; 4 B. & Ad. 547.

Where a defendant tendered seven sovereigns in payment of a demand of 6l. 17s. 6d., and said to the plaintiff, "There, take your demand," and at the same time delivered a counter-claim upon the plaintiff of 1l. 5s., who said, "You must go to my attorney:"—Held, that this was not sufficient to support a plea of tender to an action for 6l. 17s. 6d. *Brady v. Jones*, 2 D. & R. 305. And see *Holland v. Phillips*, 6 Esp. 46.

A tender of a larger sum, requiring change, is not a good tender of a smaller sum. *Robinson v. Cook*, 6 Taunt. 336.

A plea of tender of a half-year's rent simply, is not supported by evidence of a tender of the half-year's rent, requiring the lessor to get change and pay back the property tax. *Id.*

It is not a good tender of a fractional sum for the debtor to offer the creditor a bank-note to a larger amount, and to desire him to take out of that the sum to be paid. *Betterbee v. Davis*, 3 Camp. 70.

**Waiver by Claiming More.**—A tender of 2l. to pay 1l. 13s. is good, if the plaintiff objects to receive it only because he is entitled to a larger sum, and not on the ground that he has no change. *Cadman v. Lubbock*, 5 D. & R. 289.

Where the defendant, who owed the plaintiff 108l. for principal and interest on two promissory notes, in consequence of an application from the plaintiff's attorney for the amount, sent a person to the attorney, who told him he came to settle the amount due on the notes, and desired to be informed what was due, and laid down 160 sovereigns on a desk, out of which he desired the attorney to take the principal and interest, but the attorney refused to do so, unless a shop account, due from the plaintiff to the defendant, was fixed at a certain amount:—Held, that this was a good tender of the 108l. *Berans v.*

*Rees*, 5 M. & W. 306; 7 D. P. C. 510; 3 Jur. 608.

A tender of a bank-note in payment of a fractional sum is good, if the creditor objects to receive it merely on the ground of the sum offered to be paid being less than the sum claimed, although the creditor is required to return the difference between the bank-note and the fractional sum. *Saunders v. Graham*, Gow, 111.

##### 5. DEMAND OF A RECEIPT.

**Providing Stamp for—Condition.**—A tender must be unconditional, and of the precise sum due; therefore a plea of tender is not supported by evidence that the defendant took a sum of money out of his pocket, and said to the plaintiff, "If you will give me a stamped receipt, I will pay you the money;" as by 43 Geo. 3, c. 126, s. 4, the person from whom the money is due may require the person receiving to give him a receipt and pay the amount of the stamp duty, and, if he refuses to do so, he is liable to a penalty. *Laing v. Meader*, 1 C. & P. 257.

Going with money in hand to make a tender, and demanding "whether the creditor has a receipt stamp," and receiving an answer in the negative, without an actual offer of the money, will not support a tender. *Ryder v. Townsend (Lord)*, 7 D. & R. 119.

Where a creditor, on a tender being made, refused to receive the money, on account of more being due:—Held, that he could not afterwards object to the tender, on the ground that the party making it required a receipt. *Richardson v. Jackson*, 8 M. & W. 298; 9 D. P. C. 715; *S. P., Cole v. Blake*, Peake, 179.

Where a sufficient tender is made in a letter which requests that a receipt may be sent back, such request does not vitiate the tender, for it is not a condition. *Jones v. Arthur*, 8 D. P. C. 442; 4 Jur. 859.

**Demand of Receipt in Full.**—Issue was joined upon a plea of tender of 7l. 16s. 8d. It was proved that the defendant's witness tendered that sum to the plaintiff, observing, "I offer you 7l. 16s. 8d., as the balance of 35l., and I demand a receipt in full." The plaintiff refused to receive it, alleging that the amount was insufficient:—Held, a conditional and therefore an invalid tender. *Foord or Ford v. Noll*, 2 D., N. S. 617; 12 L. J., C. P. 2.

A tender of a quarter's rent, coupled with a demand of a receipt to a particular day, the contest between the parties being whether one or two quarters' rent were due, is not a valid tender. *Finch v. Miller*, 5 C. B. 428.

If a person tenders money, but will not pay it unless the person to whom it is tendered will give him a receipt in full of all demands, such a tender is bad. *Griffith v. Hodges*, 1 C. & P. 419; *S. P., Glascott v. Day*, 5 Esp. 48.

A tender is not good where the debtor at the time required the creditor to sign a receipt, which expressed that the sum tendered was the balance due. *Higham v. Baddely*, Gow, 213.

##### 6. MUST BE UNCONDITIONAL.

A tender to be good must not be clogged with a condition. *Jennings v. Major*, 8 C. & P. 61.

The attorney of A. put down 18l., and said to

the other party, "I tender you 18l. for Mr. M.:"—Held, that this was a good tender. *Id.*

A tender to be good must be unconditional, so that if the creditor takes the money, and there is more due, he may still bring an action for the residue. *Mitchell v. King*, 6 C. & P. 237. *And see cases supra.*

**Questions for Jury.**—A defendant made a tender in these terms: "I have called to tender 8l. in settlement of the account." The judge thought this a conditional tender, but the jury found for the defendant:—Held, that it was for the jury to determine the meaning of the language used, and that the construction was not a question of law. *Eckstein v. Reynolds*, 7 A. & E. 80; 2 N. & P. 256.

The question, as to whether a tender was made conditionally or not, is for the jury. *Marsden v. Goole*, 2 C. & K. 133.

**Tender in Full Discharge.**—If ten sovereigns are offered to a person, and he is told that he may "take those ten sovereigns in full of his demand," that is not a good tender. *Cheminant v. Thornton*, 2 C. & P. 50.

An offer of a certain sum in full of a demand is not a legal tender. *Strong v. Harvey*, 3 Bing. 304; 11 Moore, 72.

An offer to pay a sum of money to be accepted as the whole balance due, where a larger sum is claimed, does not amount to a legal tender. *Evans v. Judkins*, 4 Camp. 166.

Where a plaintiff offered to take a sum tendered in part of his demand, and the defendant would only allow him to take it "as a settlement":—Held, not a good tender. *Mitchell v. King*, 6 C. & P. 237.

If a person puts down a sum of money, and the creditor offers to take it in part, and the debtor will not allow him to do so, saying that no more is owing; this is not a good tender, because a person tendering money should tender it without making any terms, and leaving it open for one party to say that more was due, and to the other, that the sum tendered was sufficient. *Peacock v. Dickerson*, 2 C. & P. 51, n.

**Creditor does not make Admission if Tender Valid.**—In support of a plea of tender, the evidence of the witness was, "I went to the plaintiff, and told him I came with the amount of Oliver's (the defendant's) bill. The plaintiff said he would not take it; it was not his bill. I offered it to him as the amount of his bill."—Held, that this tender was good, and that the plaintiff might have accepted the amount without thereby making any admission that no more was due. *Hennwood v. Oliver*, 1 G. & D. 25; 1 Q. B. 409.

A tender of a less sum than is due, accompanied with a statement, "that it is more than was due, but that the plaintiff might take it all," is a good tender of the amount offered. *Thorpe v. Burgess*, 8 D. P. C. 603.

The acceptance of such a tender does not preclude the party accepting it from proceeding for the remainder of his claim. *Id.*

If a person offers a sum, "as all that is due," that is not a good tender. A party by accepting a sum properly tendered, does not thereby compromise his claim to a larger sum, which he would do if he took a sum offered "as all that was due." *Sutton v. Hawkins*, 8 C. & P. 259.

A tender is not vitiated by the person making it saying, at the time of making it, that it was all the debtor considered to be due. *Robinson v. Ferreday*, 8 C. & P. 752.

A good tender cannot be made in terms which, by taking the money, would cause the other party to make an admission. *Hastings (Marquis) v. Thorley*, 8 C. & P. 573.

If a person in tendering a sum of money says, "I tender you 21l. in payment of the half-year's rent due at Lady-day last," this will make the tender bad, because, by accepting the money, the other party would admit that the sum was the amount of half a year's rent. *Id.*

A tender is valid if it implies merely that the party offers a given sum as being all that he admits to be due, but if it implies also that if the other party takes the money he is required to admit that no more is due, the tender is conditional and insufficient. *Bowen v. Owen*, 11 Q. B. 130; 17 L. J., Q. B. 5; 11 Jur. 972.

A tenant sent to his landlord 26l. with a letter, in these words; "I have sent with the bearer 26l. to settle one year's rent of Nant-y-pair." The landlord refused to take it, saying that more was due:—Held, a good tender. *Id.*

The plaintiff tendered rent to the defendants, his landlords, with the words, "Here is: your quarter's rent:—Held, that this did not require the landlord to make any admission as to the amount due, as a condition of its receipt, and was therefore a good tender. *Jones v. Bridgman*, 39 L. T. 500.

A tender of a certain sum as being "all that is due," is bad. *Field v. Newport, &c., Railway Company*, *infra*.

**Waiver by saying that Money not Enough.**—Where it was proved that an agent of the defendant had gone to the plaintiff and had offered him 4l. "in full discharge of his account," and the question of the meaning of these words was not left to the jury, but a verdict was directed to be entered for the plaintiff:—Held, that the tender was sufficient, the plaintiff having offered no objection at the time it was made, either to its form, or that he was called upon to accept the sum tendered in full discharge, but rejecting it simply on the ground that the money was not enough. *Bull v. Parker*, 2 D., N. S. 345; 12 L. J., Q. B. 93; 7 Jur. 282.

## 7. UNDER PROTEST.

**Validity.**—A. demanded 20l. as rent due from B., and B. having claimed deductions which A. would not allow, B. then put down twenty sovereigns, and said, "I tender you 20l. under protest:—Held, a good tender, as this was not a conditional tender, the words "under protest" merely importing that B. did not acquiesce in the demand of A., and did not mean to preclude himself from recovering the money back again if he could. *Manning v. Lunn*, 2 C. & K. 13.

An offer to pay under protest the sum claimed is a good tender. *Scott v. Uxbridge and Rickmansworth Railway Company*, 1 L. R., C. P. 596; 35 L. J., C. P. 293; 12 Jur., N. S. 602; 14 W. R. 893.

A tender accompanied by a protest is valid. *Sweeney v. Smith*, 7 L. R., Eq. 324; 38 L. J., Ch. 446.

A shareholder in a company formed for working certain patents owed 40l. to the company in

respect of calls on his shares. He sent a cheque for that amount to the secretary, along with a letter, which began thus:—"Herewith I forward a cheque for 40l., being the amount of the call made upon me for twenty shares which I hold in the company." Then followed a protest against the payment, on the ground that certain patents which had been sold to the company were invalid; and the letter concluded in these terms:—"I request that you will enter this my protest in the records of the company, and further, that this money be held in trust by the directors (each of whom I shall hold responsible for re-payment of the same) until the question of the vendor's patent rights has been settled:—Held, that this was a good tender of payment, and that the concluding words of the letter imposed no obligation or liability on the directors. *Id.*

## 8. ENTIRE DEMANDS.

**Two Sums Due.**—A demand of a certain sum, made up of two sums, claimed on two distinct grounds, is not a demand of either. *Field v. Newport, &c., Railway Company*, 3 H. & N. 409; 27 L. J., Ex. 396.

Therefore, where a railway company, entitled to distrain for tolls, demanded a sum in gross, made up of two sums, the one due for tolls, the other not so due, and the party tendered the amount due for tolls as being all that was due:—Held, that the company was not entitled to distrain, but was not precluded by the tender from recovering the toll. *Id.*

A tender of part of an entire demand is inoperative. *Dixon v. Clarke*, 5 C. B. 365; 5 D. & L. 155; 16 L. J., C. P. 237.

And a tender of part of a debt is not made valid by the debtor having a set-off for the balance. *Scarles v. Sadgrove*, 5 El. & Bl. 639; 25 L. J., Q. B. 15; 2 Jur., N. S. 21.

If A. demands from B. 1l. 7s. for several matters, including 10s. for a particular service performed by A., and B. tenders 19s. 6d., this will not support a plea of tender of 10s. on account of such service. *Hardingham v. Allen*, 5 C. B. 793; 17 L. J., C. P. 198; 12 Jur. 584.

## 9. WAIVER.

**Pleading.**—A declaration stated an agreement by the defendants to repair the plaintiff's ship for a reasonable price to be charged by them to the plaintiff, and upon completion to redeliver the ship to the plaintiff upon payment of such price so to be charged. That the repairs were completed, and the plaintiff was ready and willing to pay the defendants such price as aforesaid, whereof they had notice. Breach, that they did not charge a reasonable price, but demanded an exorbitant sum as the price of the repairs, and gave notice to the plaintiff that they would not redeliver the ship until payment thereof, and detained the ship after she was completed until payment of the exorbitant sum. Plea, no tender of a reasonable price, or of any sum in respect thereof. Replication, waiver of the tender:—Held, that the declaration was good and the plea bad. By the terms of the agreement the defendants were bound to deliver their bill of reasonable charges, and the plaintiff was relieved from the necessity of making a tender. *Watson*

v. *Parson*, 9 Jur., N. S. 501; 8 L. T. 395; 11 W. R. 702.

Held, also, that the replication was good, and not a departure in substance. *Ib.*

See also cases in preceding sub-heads.

#### V. DEMAND AFTER TENDER.

**Demand must be of Exact Sum.]**—If the plaintiff replies a subsequent demand and refusal, it is incumbent on him to prove, that, after the tender admitted in the pleadings, he demanded of the defendant the exact sum specified as having been before tendered and refused. *Spybey v. Hide*, 1 Camp. 181.

Where, to a declaration on a bill of exchange for 10*l.* 4*s.* the defendant pleaded non assumpsit as to all except 4*l.* 7*s.* 6*d.*, and as to that a tender, with an averment that the defendant was always ready and willing to pay the same; and the plaintiff replied, that the defendant was not always ready and willing to pay the said sum, and a demand thereof after the cause of action accrued, and before the tender, and issue was taken thereon; and on its being proved that the defendant had paid 7*l.* on account of the bill, and had tendered 3*l.* 4*s.*, a verdict was found for him:—Held, that the replication was not supported by proof of a demand of the whole debt due, but could only be supported by proof of the demand of the precise sum tendered. *Rivers v. Griffiths*, 1 D. & R. 215; 5 B. & A. 630.

**By whom Demand Made.]**—Where the issue is on a subsequent demand and refusal to a plea of tender, the demand of the debt, to do away the effect of the tender, must be by some one authorized to receive it, and to give the debtor a discharge. *Coles v. Bell*, 1 Camp. 478, n.; *S. P.*, *Coore v. Callaway*, 1 Esp. 115.

This principle applies even in replevin. *Pimm v. Grevill*, 6 Esp. 95.

**To whom Demand Made.]**—After a tender of what is due from two persons on a joint contract, a subsequent application to one of them is sufficient to support a replication, that the plaintiff subsequently demanded payment from both. *Peirse v. Bowles*, 1 Stark. 323.

**Evidence of Demand.]**—A letter demanding payment of a debt sent to the defendant's house, and to which an answer is returned that the demand should be settled, is sufficient evidence of a demand, on the issue of a subsequent demand and refusal to a plea of tender. *Hayward v. Haque*, 4 Esp. 93.

#### VI. PLEADINGS.

**Joinder of Pleas.]**—A plea of tender ought not to be joined with a plea containing a denial of the right of action for the same sum. *Dobie v. Larkin*, 10 Ex. 776.

**Pleas—Validity.]**—A plea of tender pleaded to the common counts is good in the usual form, alleging the defendant to have always been ready and willing to pay, and before the commencement of the action to have tendered the money. *Smith v. Mannors*, 5 C. B., N. S. 632; 28 L. J., C. P. 220; 5 Jur., N. S. 549.

Action for goods sold. Pleas: as to all the sums

demanded, except 5*l.* 16*s.* 10*d.*, nunquam indebitatus; as to 1*l.* 1*s.* 8*d.*, parcel of the 5*l.* 16*s.* 10*d.*, a set-off; as to the residue, that is, 4*l.* 2*s.* 2*d.*, that the defendant, when the same became due, was and has ever since been ready to pay the same; and that after it became due, he was ready to tender, and offered to tender, the same, but the plaintiff dispensed with an actual tender, because the matter was in the hands of his attorney, and the defendant brings the money into court, ready to be paid to the plaintiff:—Held, that this was an informal plea of tender, not a plea of payment into court, and the plaintiff having taken the money out of court, and entered a nolle prosequi, the defendant, who had succeeded on the other issues, was entitled to judgment on the whole record. *Turner v. Crossley*, 3 M. & W. 43.

In an action against the acceptor of a bill of exchange, he pleaded, that, after the bill of exchange became due, he tendered the plaintiff the amount thereof, together with interest for the same from the day it became due, and that the defendant has always, from the time when the bill became due, been still as ready to pay the amount of the bill with interest as aforesaid:—Held, that the meaning of a plea of tender is, that the defendant has always been ready to perform his contract, and that the plea therefore was bad upon special demurrer. *Poole v. Crompton*, 5 D. P. C. 468; *S. C.*, nom. *Poole v. Tunbridge*, 2 M. & W. 223; *S. P.*, *Hume v. Peplow*, 8 East, 168.

**Replications—Validity.]**—Action by payee against the maker of a promissory note for 15*l.* 9*s.* 4*d.*, payable on demand, averring a demand on a particular day. Plea, as to 3*l.*, parcel, &c., a set-off, due at the time when the note was demanded, and ever since; and as to 12*l.* 9*s.* 4*d.*, residue, &c., that at the time of the demand the defendant tendered the plaintiff 12*l.* 9*s.* 4*d.*, and has always from the time of making his promise, as to 12*l.* 9*s.* 4*d.*, been ready and willing to pay that sum, and now brings the same into court; replication to the first plea, a traverse that any set-off was due at the commencement of the suit; to the second, that, before making the alleged tender, and before and at the time of making the demand and refusal herein-after mentioned, a larger sum than 12*l.* 9*s.* 4*d.*, to wit, 15*l.* 9*s.* 4*d.*, including the 12*l.* 9*s.* 4*d.*, was due upon the note; and that before the tender, the plaintiff demanded payment of the 15*l.* 9*s.* 4*d.*, which so included the 12*l.* 9*s.* 4*d.*, but the defendant refused to pay the 15*l.* 9*s.* 4*d.*; and that, at the time of such demand and refusal, no set-off or other just cause for non-payment thereof existed:—Held, that the replication was good. *Cotton v. Godwin*, 7 M. & W. 147; 9 D. P. C. 763.

A replication, alleging the sum pleaded to, and brought into court, not being sufficient to satisfy the plaintiff's claims in respect thereof, is bad. *Smith v. Mannors*, 5 C. B., N. S. 632; 18 L. J., C. P. 220; 5 Jur., N. S. 549.

Action for work and labour, money paid, and on an account stated. Plea, as to 4*l.* 16*s.*, parcel, &c., that, after the making of the promises, the defendant tendered to the plaintiff 4*l.* 16*s.*, and as to that sum, he has always been ready to pay the 4*l.* 16*s.* to the plaintiff, and now brings the same into court. Replication, that before making the tender, and before and at the time of the demand and refusal herein-after mentioned, a larger sum than 4*l.* 16*s.*, to wit, 7*l.* 12*s.*, that sum including the 4*l.* 16*s.*, was due from the defen-

dant to the plaintiff on account of divers of the causes of action in the declaration; and that, before making the tender, the plaintiff demanded of the defendant payment of the 7l. 12s., which so included the 4l. 16s.; yet the defendant did not pay the 7l. 12s., but refused to pay the same, and that no set-off or other just cause then existed for the non-payment:—Held, that the replication was good. *Tyler v. Bland*, 9 M. & W. 338; 1 D., N. S. 608.

Replication in an action of trover, that the plaintiff tendered to the defendant a large sum, to wit, 100l., being a sufficient sum, in discharge of a lien set up by him. Rejoinder, that the sum so tendered was not sufficient:—Held, that the tender of the sum specified was the material point of the issue, notwithstanding it was alleged under a videlicet. *Marks v. Lahee*, 3 Bing. N. C. 408; 4 Scott, 137.

To a declaration for breaking into and entering the plaintiff's house and converting his goods, the defendant pleaded that the plaintiff's house was situate in a township in which a poor-rate had been made, that the plaintiff omitted to pay it, and that the churchwardens and overseers applied to two justices, who issued a warrant directing them to levy the amount and costs incurred by them. The plea then justified the trespasses under the warrant, as a servant of the overseers. Replication, a tender before distress of the amount of the rate (omitting the costs):—Held, that the replication was bad, as pleading a tender of part only of what was due. *Walsh v. Southworth*, 2 L., M. & P. 91; 6 Ex. 150; 20 L. J., M. C. 165.

A replication that, before and at the time of the tender, a larger sum was owing and was demanded, and not paid, is no answer to a plea of tender as to a smaller sum. *Brandon v. Newington*, 3 G. & D. 194; 3 Q. B. 915; 12 L. J., Q. B. 20; 7 Jur. 60.

A declaration alleged that the defendant was indebted to the plaintiff in 100l. for work and labour, and in 100l. on an account stated. The defendant pleaded, as to 10l., parcel, &c., a tender of that sum. Replication, that a larger sum than 10l., to wit, 31l., being part of the moneys in the declaration, including the 10l., was due on account of one and the same cause of action in the declaration, and that, before the tender, the plaintiff demanded the 31l., which the defendant refused to pay:—Held, that the replication was insufficient, as it did not shew that the sum of 31l. was due on one entire contract. *Heskett v. Fawcett*, 2 D., N. S. 827; 11 M. & W. 356; 12 L. J., Ex. 326.

Seemle, that, where a sum is due on an entire contract, as on a bill of exchange or a promissory note, and the defendant pleads a tender of a smaller sum, the plaintiff may reply, that he demanded the larger sum, and that the defendant refused to pay it. *Ib.*

A declaration on simple contract, containing two counts, in each of which 26l. was demanded. The defendant pleaded as to 5l. parcel, &c., a tender. The plaintiff replied, that before and at the time of the tender, and of the request and refusal after mentioned, and until and at the commencement of the action, a larger sum than 5l., to wit, 13l. 15s., part of the money in the declaration demanded, was due from the defendant to the plaintiff as one entire sum, and on one entire contract and liability, and inclusive of and not separate or divisible from the sum of

5l., and the same being a contract and liability by which the defendant was liable to pay to the plaintiff the whole of the larger sum in one entire sum, upon request; and that after the last-mentioned and larger sum had become so due, and while the same remained unpaid, the plaintiff requested of the defendant payment of the last-mentioned and larger sum, of which the 5l. in the plea mentioned was such indivisible parcel as aforesaid, yet that the defendant refused to pay the larger sum, wherefore the plaintiff refused the 5l.:—Held, that the replication was a good answer to the plea; and that if there was any set-off or other just cause for not paying the larger sum, it should come by way of rejoinder. *Dixon v. Clarke*, 5 C. B. 365; 5 D. & L. 155; 16 L. J., C. P. 237.

Action for money received. Pleas, except as to 7l., never indebted. Except as to the 7l. set-off. And as to 7l. a tender and payment into court. Replication to the last plea, that, at the time of tender, a larger sum was due as one entire sum on one entire contract. The judge, at the trial, having ruled that the tender was good, and that, if the payment into court and set-off made up the amount, the verdict should be for the defendant, and a verdict having been found accordingly, the court granted a rule absolute for a new trial. *Phillipotts v. Clifton*, 10 W. R. 135.

## VII. EFFECT AND PROOF.

**Effect of, as an Admission.]**—A tender admits the contract and facts stated in the declaration. *Cox v. Brain*, 3 Taunt. 95.

A plea of tender merely admits the defendant's liability on the contract to the amount tendered. *Willie v. Langridge*, 2 H. & W. 250.

When a declaration shews substantially a contract, and a tender in compliance with it, the plaintiff is not estopped from contending for the true interpretation of the contract by the fact that he has also set out in his declaration an alternative case of a tender which would not have been a compliance. *McConnell v. Murphy*, 5 L. R., P. C. 203.

**Effect of Plea.]**—A promise to pay the debt of another need not be proved to be in writing, when the defendant pleads a tender to the count on such promise. *Middleton v. Brewer*, Peake, 15.

After a plea of tender the plaintiff cannot be nonsuited. *Harding v. Spicer*, 1 Camp. 327.

**Payment into Court.]**—If a defendant brings money into court on a plea of tender, the plaintiff may take it out, though he replies that the tender was not made before action. *Le Grew v. Cooke*, 1 B. & P. 332.

Money deposited in court in lieu of bail cannot be transferred to the account of a payment into court on a plea of tender. *Stultz v. Heneage*, 10 Bing. 561.

A defendant pleaded the general issue as to part, and as to the other part a tender, but omitted to pay the money into court; judgment having been on that account signed as for want of a plea, the court set aside the judgment for irregularity. *Chapman v. Hicks*, 2 D. P. C. 641; 2 C. & M. 633.

If a defendant pleads a tender without paying the money into court, the plaintiff may sign judgment. *Incen*, 1 Tidd's Prac. 612.

**Proof.**—Proof of a tender of 20*l.* 9*s.* 6*d.* in bank-notes and silver is sufficient to support a plea of tender of 20*l.* *Dean v. James*, 4 B. & Ad. 547; 1 N. & M. 393.

A plea to an avowry of a tender of 16*l.* will not be supported by proof of a tender of 15*l.* 16*s.*, although no more rent was due than the sum proved to have been tendered. *John v. Jenkins*, 1 C. & M. 227; 3 Tyr. 170.

An entry of a tender and a refusal, made by the deceased clerk of the plaintiff's attorney, in a day-book kept for the purpose of minuting his daily transactions, is admissible in evidence to prove the tender. *Marks v. Lahee*, 3 Bing. N. C. 403; 4 Scott, 137.

In an action on an agreement to let the plaintiff a messuage for a year from the 25th March, the plaintiff to take the fixtures at a valuation and to pay the same on entry:—Held, that it was open to the plaintiff to shew a tender on the 10th April. *Edman v. Allen*, 6 Bing. N. C. 19.

Action for use and occupation, work and labour, money lent and money paid, and for money due on an account stated. Several pleas, as to all but 7*l.*, parcel of the moneys in the declaration; and a single plea, as to 7*l.*, parcel of the moneys in the declaration, of tender and payment of the sum into court. The pleas did not distinguish the counts. The plaintiff traversed the tender:—Held, that proof of a single tender of 7*l.*, in respect of the use and occupation, satisfied the plea of tender. *Robinson v. Ward*, 8 Q. B. 920; 15 L. J., Q. B. 271; 10 Jur. 409.

## VIII. TENDER OF AMENDS.

### 1. IN GENERAL.

**Replication to Plea of.**—Where a defendant in trespass pleads that he tendered to the plaintiff a certain sum, being a sufficient amends, the plaintiff should reply that the defendant did not tender the sum named, or that that sum was insufficient, and not that he did not tender sufficient amends. *Williams v. Price*, 3 B. & Ad. 695.

**Local Act where no Plea.**—By a local act commissioners were empowered to cause any present or future sewers, ditches, drains, &c., to be opened, enlarged, altered or cleansed; and in case any action should be brought against any person for anything done in pursuance of the act, or in relation to the matters therein contained, the plaintiff should not recover in any such action, if tender of amends should have been made to him, or his attorney, by or on behalf of the defendant before such action brought; and in case no such tender should be made, that it should be lawful for the defendant, by leave of the court, to pay money into court; and if the matter should appear to have been done in pursuance and under the authority of the act, and after sufficient satisfaction made or tendered, then that the jury should find for the defendant. The commissioners, of whom the defendant was one, appointed a committee to inspect a ditch, with a view to widening the same, and to report thereon. The committee having reported thereon in favour of widening the ditch, the commissioners appointed a second committee, of whom the defendant was one, to confer with a surveyor respecting the work, with power to two

of them to act. The defendant being afterwards told by the clerk to the commissioners that he might proceed without further instructions from the commissioners, took the plaintiff's land for the purpose of widening the drain, without having given him notice or obtained his consent. The land was taken for the bona fide purpose of widening the drain. The defendant, before action, tendered 10*l.* as amends, which the plaintiff refused to accept; but no tender was pleaded, nor was the amount paid into court. The jury found the trespass, and that the damage amounted to 5*l.*:—Held, first, that although neither the defendant was, nor the commissioners were, authorized to take the land without the plaintiff's consent in writing, yet the defendant was entitled to the protection of the act. *Jones v. Gooday*, 9 M. & W. 736; 1 D., N. S. 914.

Held, secondly, that the defendant was not bound to plead the tender, or pay the amount tendered into court. *Ib.*

## THAMES.

I. CONSERVANCY.—See WATER.

II. COLLISION ON.—See SHIPPING.

## THEATRE.

1. *Licence.*
2. *Privileges of Admission*, 29.
3. *Contracts relating to*, 31.
4. *Torts relating to*, 35.
5. *Spectators*, 36.
6. *Dramatic Authors*.—See COPYRIGHT.
7. *Dancing Places*.—See LICENCE.

### 1. LICENCE.

**Necessity for.**—The 10 Geo. 2, c. 28, s. 2, prohibited acting plays for gain, without patent from the king, or licence from the Lord Chamberlain. S. 5 provided, that no person shall be authorized by patent or licence to act except within the city and liberties of Westminster, or where the king shall be resident:—Held, that the prohibition in s. 2 was not merely co-extensive with the exempting power as limited by s. 5, but prevailed throughout the kingdom. *Rees v. Neville*, 1 B. & Ad. 489.

Neither letters patent from the crown, nor a licence from the Lord Chamberlain, could be granted for any dramatic performances within 10 Geo. 2, c. 28, except in Westminster or some place where her Majesty was residing. Dramatic performances, therefore, within twenty miles of London or Westminster, and not in Westminster, or in the place of her Majesty's residence, could not be rendered legal by any authority whatever; for 25 Geo. 2, c. 36, extends only to music and dancing. *Lery v. Yates*, 3 N. & P. 249; 1 W., W. & H. 219; 8 A. & E. 129.

theatre, in 1839, for valuable consideration, covenanted to confirm to certain debenture holders the privilege of free admission to a theatre. A. was entitled as a debenture holder to the benefits of the deed, but subsequently lost his debenture. Afterwards B. became lessee of the theatre, with notice of the deed:—Held, that A. was not entitled specifically to enforce against B. the privilege of free admission created by the deed. *Malone v. Harris*, 11 Ir. Ch. R. 33.

— **Determination of.]**—By lease not under seal, two trustees on behalf of themselves and the other proprietors of a theatre demised it to S. for three years, reserving to themselves and the other proprietors free liberty of admission to the theatre. S., by lease not under seal, let the theatre to the plaintiff for two nights, subject to the terms on which he held the theatre:—Held, that the licence was determined, and that trespass might be maintained by the plaintiff against the defendant, a proprietor, who entered the theatre during his tenancy. *Coleman v. Foster*. 1 H. & N. 37.

**Covenant in Lease not to Grant.]**—A lease contained a covenant not to grant away, assign, dispose of, &c., the stalls or boxes "for any longer period than one year or season." On the 21st December, 1851, the lessee leased certain boxes for one year, to commence from March, 1852. On the 1st of August, 1852, he made another lease of the same boxes to a different person, with this habendum, "from the 1st of February now next ensuing, or from such subsequent day during the year upon which the theatre shall be opened, and thenceforth for the full term of one year, to be computed from that day:—Held, that this was not a breach of the covenant. *Croft v. Lumley*, 5 El. & Bl. 648; 25 L. J., Ex. 223; 2 Jur., N. S. 279—Ex. Ch. Affirmed, 6 H. L. Cas. 672; 27 L. J., Q. B. 321; 4 Jur., N. S. 903.

**Rateability of Lessee of Box.]**—The lessee of a private box at a theatre is rateable to the poor rates in respect of it, under a local act, by which the rate was to be laid on every person who shall inhabit, hold, occupy, possess, or enjoy any land, house, shop, wharf, warehouse, or any other building, tenement, or hereditament; although the proprietors of the theatre were also rated for the theatre. *Reg. v. St. Martin's-in-the-Fields (Churchwardens)*, 3 Q. B. 204; 11 L. J., M. C. 112.

### 3. CONTRACTS RELATING TO.

**Refusal of Actor to Perform.]**—Where a father signed a letter, in which he agreed that his daughter should perform at a theatre during the remainder of a season, and consented that she should enter into articles for three following seasons; an action may be maintained on the first part of the agreement for the refusal of the daughter to perform, but the latter part is a mere consent, and not an agreement. *Morris v. Paton*, 1 C. & P. 189.

A declaration stated, that the defendant agreed that he and his wife should for three months perform as equestrians on the stage and in the ring on all entertainments which might be pro-

duced at A. or elsewhere under the direction of the plaintiff, in such parts as the plaintiff should require, and should attend all calls and rehearsals; that although the plaintiff had an establishment at P. under his direction for equestrian entertainments, and although the plaintiff required the defendant and his wife to join the plaintiff's establishment at P. for the purpose of performing in entertainments to be produced there, and although a reasonable time for joining elapsed before action, yet the defendant and his wife did not join or perform in the entertainments to be produced at P.:—Held, good, inasmuch as it sufficiently appeared that the requisition by the plaintiff was to appear and perform as equestrians on the stage or in the ring. *Batty v. McIlillo*, 10 C. B. 282; 1 L., M. & P. 571; 19 L. J., C. P. 362.

Held, also, that the breach was good, shewing substantially an entire refusal to perform the contract. *Id.*

— **Right of Actor to Notice—Condition Precedent.]**—A performer who is called on to resume, in consequence of the illness of another, a part in which by previous performances she had acquired celebrity, is entitled to reasonable notice previously to the time of the performance; such notice to be proportioned to the reputation at stake. *Graddon v. Price*, 2 C. & P. 610.

**Agreement by Actor "not to Perform elsewhere."]—**Where W. agreed with L. that she would sing at his theatre during a certain period of time, and would not sing elsewhere without his written authority:—Held, on a bill filed to restrain her from singing for a third party, and granting an injunction for that purpose, that the positive and negative stipulations of the agreement formed but one contract, and that the court would interfere to prevent the violation of the negative stipulation, although it could not enforce the specific performance of the entire contract. *Lumley v. Wagner*, 1 De G., M. & G. 604; 21 L. J., Ch. 898; 16 Jur. 871.

A manager of a London theatre engaged a provincial actor, desirous of appearing on the London stage, for two years. Though there was nothing expressed on the subject the court inferred an engagement on the part of the manager to employ the actor for a reasonable time, and on his part not to perform elsewhere. The manager having (under these circumstances) delayed the actor's appearance for five months, he broke his engagement and went to another theatre:—Held, that he had a right so to do, and that the manager was not entitled to an interlocutory injunction to prevent his performing there. *Fechter v. Montgomery*, 33 Beav. 22.

When an actor enters into a contract to perform at a particular theatre during a particular period, a negative stipulation to the effect that he will not perform elsewhere during that period, though not expressed, will be implied. *Montague v. Flockton*, 16 L. R., Eq. 189; 42 L. J., Ch. 677; 28 L. T. 580; 21 W. R. 668.

On the 16th August, 1871, F. agreed with M. to act for him "for the season of not less than nine months; to commence on the 2nd of October, 1871." F. subsequently, on the 2nd of March, 1872, agreed "to a renewal of his engagement on the same terms for the next

season :"—Held, that such second season commenced on the 2nd October, 1872, and terminated in July, 1873. *Id.*

**Injunction to Restrain from Acting.]**—Held, also, that a negative clause was not necessary, but that M. could obtain an injunction to restrain F. from acting at any other theatre, although such acting might not prevent his acting for M. *Id.*

**— Not on Interlocutory Application.]**—An opera singer, by an agreement dated only as to the year 1870, agreed to sing at a theatre for the whole London season, and nowhere else in the kingdom of Great Britain pendant l'année 1871, without the written consent of the employer. The salary did not extend beyond the season, which ended on the 5th August. On motion for an injunction to restrain him from singing elsewhere after the season was over but during 1871 :—Held, that the court would not under the circumstances grant an injunction on an interlocutory application. *Mapleson v. Bentham*, 20 W. R. 176.

**Agreement as to Rehearsals — Conditions precedent.]**—A declaration alleged that the plaintiff, a singer, agreed with the defendant, director of the Italian Opera in London, that he would undertake the part of first tenor in the theatres, halls, and drawing-rooms in the United Kingdom during his engagement, to begin on the 30th of March, 1875, and terminate on the 13th of July, 1875, at a salary of 150*l.* per month. That the plaintiff should sing in concerts as well as operas, but should not sing anywhere out of the theatre in the United Kingdom from the 1st of January to the 1st of December, 1875, without the written permission of the defendant, except at more than fifty miles from London, and out of the season of the theatre. The defendant agreed to be in London without fail at least six days before the commencement of his engagement, for the purpose of rehearsals. Averment, that the plaintiff did not sing anywhere in the United Kingdom from the 1st of January, 1875, to the date of the commencement of the action; that the plaintiff was prevented by temporary illness from being in London before the 28th of March, 1875, on which day he arrived in London; and that, save as aforesaid, he was and is ready to perform his part of the contract. Breach, that the defendant refused to receive the plaintiff into his service. Plea, that the plaintiff was not in London six days before the commencement of the engagement ready for rehearsals, as was necessary for him to be, wherefore the defendant refused to receive him into his service :—Held, that the stipulation as to rehearsals was not a condition precedent; for that it did not go to the root of the matter, as the plaintiff was to sing in concerts at halls and drawing-rooms as well as at the theatre, and was also to abstain from singing within fifty miles of London from the 1st of January previously to the commencement of the engagement on the 30th of March, and that the plea was therefore bad. *Bettini v. Gye*, 1 Q. B. D. 183; 45 L. J., Q. B. 209; 34 L. T. 246; 24 W. R. 551.

**Right of Proprietor to Dismiss Acting Manager.]**—If the acting manager of a theatre con-

ducts himself in such an improper manner as to make it injurious to the interests of the theatre to keep him, the lessee or proprietor may lawfully dismiss him. *Lacy v. Osbaldiston*, 8 C. & P. 80.

**Right of Proprietor to Rescind Contract.]**—The plaintiff agreed in writing with the defendant to sing and play in the chief female part in a new opera about to be brought out at the defendant's theatre, at a weekly salary of 11*l.* for three months, provided the opera ran for that time, commencing on or about the 14th November. The first performance was announced for Saturday, the 28th of November, and no objection was raised by the plaintiff as to this delay. She attended several rehearsals, such attendance, though not expressed in the written engagement, being an implied part of it. Owing to delays of the composer, the music of the latter part of the opera was not in the hands of the defendant till a few days before the 28th of November, and the final rehearsals did not take place till the beginning of the last week. The plaintiff was taken ill, and was unable to attend any of the rehearsals in that week; and, it being uncertain how long her illness might continue, the defendant's manager made a provisional engagement with another artiste, Miss L., to study the part and be ready to take it if the plaintiff was unable. If she was not wanted, Miss L. was to receive a *douceur*; if she was called on to perform, she was to receive 15*l.* a week till the 25th of December, if the piece ran so long. The plaintiff continued too ill to attend the rehearsals or the first performance on Saturday, the 28th of November, or on the first three days of the next week; Miss L. accordingly performed on those days. On Thursday, the 4th of December, the plaintiff was well enough to perform and tendered her services, which the defendant refused to accept; on which she brought an action for wrongful dismissal. The jury found that the employment of Miss L. by the defendant under the circumstances was reasonable :—Held, that the plaintiff's inability to perform on the opening and early performances went to the root of the matter, and justified the defendant in rescinding the contract. *Poussard v. Spiers*, 1 Q. B. D. 410; 45 L. J., Q. B. 621; 34 L. T. 572; 24 W. R. 819.

**Agreement by Member on Behalf of the whole Orchestra—In whose Names Action to be Brought.]**—The plaintiff, acting on behalf of the members of an orchestra to which he himself belonged, signed a proposal "on behalf of the members of the orchestra" to continue their services, provided the defendant would guarantee a certain salary then due to them. The defendant accepted this proposition, but failed to pay the salary due. The plaintiff alone brought an action for the whole money due to himself and the rest, and stated the contract to be with himself and the rest. The jury found that he acted on behalf of himself as well as of the rest :—Held, that the contract was joint, and that he could not recover. *Lucas v. Beale*, 10 C. B. 739; 20 L. J., C. P. 134.

**Parol Evidence to Prove Theatrical Usage.]**—An actress having been engaged by a manager of a theatre, for three years, at a salary of 5*l.*, 6*l.*,

and 7l. per week, in those years respectively :—Held, that this contract being ambiguous, parol evidence was admissible to shew, that, under such a contract, it was the theatrical usage to pay a proportion of salary for those nights only during which the theatre was open for performance. *Grant v. Maddox*, 15 M. & W. 737; 16 L. J., Ex. 227.

**Arrears of Salary—Form of Action.**—A performer at a theatre, who is to be paid for nights of performance on which he does not perform, as well as for those on which he does perform, should not declare for work and labour, but for arrears of salary as a hired performer. *Frazer v. Dunn*, 8 C. & P. 704.

**Acting Manager—Privileges of.**—An acting manager cannot, under the words "usual privileges of his situation," claim, as matter of right, the use of a private box, and the power of giving orders of admission, though both are usually allowed as matter of courtesy. *Lacy v. Osbaldeston*, 8 C. & P. 80.

—**Evidence as against Proprietor.**—What a stage manager says at the close of a season, in his farewell address from the stage, as to the success of the theatre, is evidence against the lessee or proprietor upon that subject. *Ib.*

**Lease of Opera House—Covenants therein—When Broken.**—A lease of the opera house contained covenants on the part of the lessee, first, not to use the house for any but purposes of a theatrical kind, and to use his best endeavours to improve the house for that purpose. The house was closed at the end of the season of 1852, and was not opened at all during the following year :—Held, that this was not a breach of the covenant. *Croft v. Lumley*, 6 H. L. Cas. 672; 27 L. J., Q. B. 321; 4 Jur., N. S. 903.

And a second covenant was, "not to charge nor incur the theatre, or the income thereof, or the terms hereby granted, by mortgaging the same, or granting any rent-charges, or any other incumbrance whatever." The lessee was greatly in debt. In respect of his debts, he granted warrants of attorney, one of which was to secure payment of bills not due, and another provided that it was a concurrent security, with an indenture therein recited, that judgment was to be entered up when the grantee thought fit, and to be registered; and judgments were signed against him on those warrants of attorney, and upon judges' orders, and registered :—Held, that no breach of this covenant had been committed. *Ib.*

**Relating to Unlicensed Theatres.**—See cases *ante*, col. 27.

#### 4. TORTS RELATING TO.

**Enticing Actress away from Theatre.**—A count stated a contract between the plaintiff and W. that she would perform at the plaintiff's theatre, in operas, for three months, on certain terms, and that she would not during that time sing or use her talents elsewhere than in his theatre. Averment, that the defendant, maliciously intending to injure the plaintiff, and to prevent W. from performing according to her contract, whilst the agreement was in force, and before the commencement of the period for

which W. was engaged, wrongfully and maliciously enticed and procured W. to refuse to sing or perform at the theatre, and to depart from and abandon her contract with the plaintiff, and all service thereunder; by means of which enticement and procurement W. unlawfully and wrongfully refused to perform her contract. Another count stated that W. was hired and engaged by the plaintiff to sing and perform at his theatre for a certain time as his dramatic artiste, for reward, and had become and was such dramatic artiste, and that the defendant, maliciously intending to injure him, enticed and procured her to depart from his employment :—Held, that the action was maintainable. *Lumley v. Gye*, 2 El. & Bl. 216; 22 L. J., Q. B. 463; 17 Jur. 827.

**Libel on Performer—Action by Manager.**—The proprietor of a theatre cannot maintain an action against a man for a libel on one of his performers, by reason whereof she was deterred from appearing on the stage. *Ashley v. Harrison*, Peake, 194; 1 Esp. 48.

**Assaulting Performer—Action by Manager for Loss of Service.**—An action with a per quod servitium amisit will not lie by the manager of a place of public entertainment against a person for beating one of the performers, who is thereby prevented from performing. *Taylor v. Neri*, 1 Esp. 386.

**Trespass to Sub-Lessee's Boxes and Stalls.**—The lessee of a theatre held it under a lease in which he covenanted not to convert it to any other use than for acting or performing operas or theatrical entertainments. He demised certain boxes and stalls to a sub-lessee, reserving power of access for the purpose of repairing; the sub-lessee covenanted only to use the same for the purpose of viewing and hearing the operas and other entertainments. The under-leases contained covenants for quiet enjoyment. The lessee demised the theatre for a term of three months for the purpose of holding religious meetings. To enable these meetings to be held, the stalls were covered with a flooring, the division between the boxes removed, and other temporary structural alterations made :—Held, that a trespass had been committed by the lessee and persons claiming under him in thus entering upon the sub-lessee's boxes and stalls without his licence, and the conversion of the theatre for other than theatrical purposes was a derogation from the grant and a breach of the covenant for quiet enjoyment. *Leader v. Moody*, 20 L. R., Eq. 145; 44 L. J., Ch. 711; 32 L. T. 422; 23 W. R. 606.

#### 5. SPECTATORS.

**Right of, to Hiss or Applaud.**—It is no riot of the spectators in a theatre to express their feelings spontaneously by applauding or hissing the piece or the actors. *Clifford v. Brandon*, 2 Camp. 358.

—**Conspiracy to Drive Actor from the Stage.**—The public, who go to a theatre, have a right to express their free and unbiassed opinions of the merits of the performers who appear upon the stage; but parties have no right to go to a theatre by a preconceived plan, to make such a

noise that an actor, without any judgment being formed of his performance, should be driven from the stage; and, if two persons are shewn to have laid a preconcerted plan to deprive a person who comes out as an actor of the benefits which he expected to result from his appearance on the stage, they are liable for a conspiracy. *Gregory v. Brunswick (Duke)*, 1 C. & K. 24. See *S. C.*, 6 M. & G. 205; 1 D. & L. 518; 6 Scott, N. R. 809.

In an action for conspiracy to hiss an actor, the defendant cannot, under the general issue, give in evidence libels published by the plaintiff, with a view of shewing that the plaintiff was hissed on account of those libels, and not by reason of any conspiracy of the defendants. *Ib.*

**Payment for Seats by—No Room in Theatre—Rights of.]**—If three persons are told on entering a theatre that there is room, when in fact there is not, their proper course is to leave the theatre, and demand the return of their money; and such persons are not justified in getting into a private box in the theatre, and if they do, the proprietor may remove them, using no more force than is necessary; and if in going out of the theatre one of them strikes a servant of the proprietor's in the presence of a constable, such constable will be justified in taking all the three persons into custody, if the jury is satisfied that they were acting with a common purpose. *Lewis v. Arnold*, 4 C. & P. 354.

## TREATS AND THREAT- ENING LETTERS.

See CRIMINAL LAW.

## TIMBER AND TREES.

**What are.]**—Where beech is admitted to be timber by the custom of the county, the general rule of law applicable to timber trees in general attaches upon it, so as to give it the properties and privileges of timber at twenty years' growth. *Aubrey v. Fisher*, 10 East, 446.

A tenant for life is not guilty of waste in cutting down willow trees for sale which spring up again from the stools, unless they serve to protect the house or support the bank of a stream. *Phillips v. Smith*, 14 M. & W. 589; 15 L. J., Ex. 201.

**When Rateable.]**—Beech trees, though looked upon as timber by the custom of that part of the country where they grow, are rateable as saleable underwood, within 43 Eliz. c. 2, s. 1, if they are cut and trained so as to produce, no matter at what interval, a succession of stems and shoots. *Fitzhardinge (Lord) v. Pritchett*, 2 L. R., Q. B. 135; 36 L. J., M. C. 49; 15 L. T. 502; 15 W. R. 640; 8 B. & S. 216. See also RATES AND RATING.

**Age of Timber.]**—A tree must have attained a growth of twenty years before it can be deemed timber. *Dunn v. Bryen*, 7 Ir. R., Eq. 143.

A tenant for life cannot as a general rule cut down timber at all (except periodically on a timber estate) or as a general rule trees which could become timber if they were of the age of twenty years or upwards, yet he may cut down timber-like trees under twenty years of age for the necessary purpose of preserving or allowing the growth of other trees, and is entitled to the proceeds of such cuttings. *Honeywood v. Honeywood*, 18 L. R., Eq. 306; 43 L. J., Ch. 652; 30 L. T. 671; 22 W. R. 749.

**Windfalls.]**—Branches of trees cut down for the king's use do not pass by a grant to a ranger of a forest of all wood blown or thrown down by the wind, and all dead wood, and the boughs and branches of trees and wood in the forest cut off or thrown down. *Att.-Gen. v. Stowell (Lord)*, 2 Anst. 592.

Where timber is cut or blown down the property in it belongs to the owner of the first estate of inheritance. *Honeywood v. Honeywood*, *supra*.

**On adjoining Premises.]**—If a tree grows near the confines of the land of two parties, so that the roots extend into the soil of each, the property in the tree belongs to the owner of that land in which the tree was first sown or planted. *Holder v. Coates, M. & M.* 112. And see *Waterman v. Soper*, 1 Ld. Raym. 737; *Masters v. Pollie*, 2 Roll. Rep. 141; *Anon.*, 2 Roll. Rep. 255.

**Poisonous Trees and Clippings.]**—A declaration alleging that the defendant was possessed of yew trees, the clippings off which he knew to be poisonous, and that it was his duty to prevent the clippings from being placed on land not occupied by him, and that he took so little care of the clippings that they were placed upon land not occupied by him, whereby the horses of the plaintiff were poisoned, discloses no facts from which a duty can be inferred on the part of the defendant to take care of the clippings. *Wilson v. Neuberry*, 7 L. R., Q. B. 31; 41 L. J., Q. B. 31; 25 L. T. 695; 20 W. R. 111.

A tenant for life of an estate, in 1868 leased a farm adjoining plantations in which yew trees were growing, and which the lessor reserved to himself. In March and September, 1869, sheep belonging to the lessee died from having eaten of the yew that protruded through the fence surrounding the plantations, and clippings of yew that had been thrown over the fence by the lessor's gardener. The lessor died in February, 1870; the tenant continued to hold the farm as the tenant of the trustees of the will by which the estate was settled. In September and October, 1870, four steers belonging to him got over a ditch, which happened to be nearly dried up, on to land in the hands of the trustees, and died from eating yew there. A bill for the administration of the lessor's estate was filed in February, 1871, and the lessee brought in under the decree a claim against his executors for damages on account of the loss of his sheep and cattle so poisoned:—Held, that the claim for the losses which occurred in the lessor's life, if ever sustainable, was one in respect of an injury to property coming within 3 & 4 Will. 4, c. 42, s. 2,

and was made too late. *Erskine v. Adeane, Bennett's claim*, 8 L. R., Ch. 756; 42 L. J., Ch. 835; 29 L. T. 234; 21 W. R. 802.

If a man knowingly plants in his own land and suffers to grow over the land of his neighbour a noxious tree, by which his neighbour's cattle are injured, an action will lie against him at the suit of such neighbour. *Crowhurst v. Amer-sham Burial Board*, 4 Ex. D. 5; 48 L. J., Ex. 109; 39 L. T. 355; 27 W. R. 95.

**Cutting Trees—Land Let for Shooting.]—**A landowner who has demised for a term of years the right of shooting over his lands, is not thereby prevented from cutting timber as he thinks fit in the ordinary management of his land, although injurious to the shooting. *Gearns v. Baker*, 10 L. R., Ch. 355; 44 L. J., Ch. 334; 33 L. T. 86; 23 W. R. 543.

**Possession of—Mortgagee and Mortgagor.]—**Mortgagees of a freehold estate gave notice to the tenant of farm land to pay rent to them. The tenant was not entitled to the shooting over the land, to the underwood in the copses, or to cut the timber:—Held, that the taking possession of the rents of the farm land did not involve possession of the shooting over the property or of the copses or timber. *Simmins v. Shirley*, 6 Ch. D. 173; 46 L. J., Ch. 875; 37 L. T. 121; 26 W. R. 25.

A mortgagee applying for an injunction to restrain the mortgagor from cutting timber, and thereby obtaining an undertaking from the mortgagor not to cut timber, is not thereby proved to have taken possession of the timber. *Id.*

**Sale.]—**A sale of growing timber, to be taken away as soon as possible by the purchaser, is not a contract or sale of lands, or any interest therein, within s. 4 of the Statute of Frauds. *Marshall v. Green*, 1 C. P. D. 35; 45 L. J., C. P. 153; 24 W. R. 175.

An owner of real estate can maintain an action against a person for, and prevent him from, entering on his land and cutting down his timber under an alleged verbal contract said to have been made with that person and the testator, although part of such timber may have been cut, carried away, and paid for in the lifetime of the testator. *Wakley v. Froggatt*, 2 H. & C. 669; 33 L. J., Ex. 5; 9 Jur., N. S. 1248; 9 L. T. 340; 12 W. R. 86.

**Overhanging Highway.]—**Suffering trees and underwood to grow over and across a highway so as to obstruct the free passage is not a wilful obstruction of the free passage within the meaning of s. 6 Will. 4, c. 50, s. 72. *Walker v. Horner*, 1 Q. B. D. 4; 45 L. J., M. C. 34; 33 L. T. 601. See also *WAT.*

**Right of Tenants under Settlements to Cut.]—**See *WASTE*.

**Right of Ecclesiastical Corporations.]—**See *WASTE*.

**Right of Tenants under Leases.]—**See *LANDLORD AND TENANT*.

## TIME, COMPUTATION OF.

1. *Generally*.
2. *Days*.
3. *Months*, 46.
4. *Terms and Years*, 47.
5. *Particular Words as to*, 48.
6. *Reasonable Time*, 49.
7. *Extension of*.—See *PRACTICE*.
8. *For Appeal*.—See *APPEAL*.

### 1. GENERALLY.

**Relation Back—Issuing of Writ.]—**To issue a writ of summons is not a judicial act, and the court may inquire at what period of the day it was issued. It appeared from the statement of claim that the writ of summons in the action was issued on the 2nd of July, and that the cause of action arose on the same day, but before the issue of the writ. The statement of claim was demurred to on the ground that the issuing of the writ was a judicial act, and must, therefore, be presumed to have taken place at the earliest moment of the day, before the cause of action accrued:—Held, that the court could inquire whether or not the writ was in fact issued after the cause of action accrued. *Clarke v. Bradlaugh*, 8 Q. B. D. 63; 51 L. J., Q. B. 1; 46 L. T. 49; 30 W. R. 53; 46 J. P. 278—C. A. Affirming 7 Q. B. D. 151; 50 L. J., Q. B. 678; 44 L. T. 779; 29 W. R. 822; 46 J. P. 118.

**— Signing Judgment.]—**Judicial proceedings are to be considered as taking place at the earliest period of the day on which they are done. *Wright v. Mills*, 4 H. & N. 488; 28 L. J., Ex. 223; 5 Jur., N. S. 771.

Therefore where judgment was signed at the opening of the office at its usual hour, eleven A.M., the defendant having died at half-past nine A.M. on the same morning:—Held, regular. *Id.*

### Time for Sitting of Court—Greenwich Time.]

—The time appointed for the sitting of the court must be understood as the mean time at the place where the court sits, and not Greenwich time, unless it is so expressed. *Curtis v. March*, 3 H. & N. 866; 28 L. J., Ex. 36; 4 Jur., N. S. 1112.

### 2. DAYS.

**Hours.]—**A policy upon a ship contained a printed clause covering her "until she had moored at anchor twenty hours in good safety," and also a written stipulation extending the period of the risk "during thirty days' stay in her last port of discharge:—Held, that the thirty days were not substituted for the twenty-four hours, and that they did not begin to run until the twenty-four hours had elapsed. *Mer-cantile Marine Insurance Company v. Tithering-ton*, 5 B. & S. 765; 34 L. J., Q. B. 11; 11 L. T. 340; 13 W. R. 141.

**Clear Days.]—**Where there was a right of forfeiture of shares, on giving ten clear days' notice:—Held, that a notice to forfeit "on Monday the 9th" was insufficient, the 9th being on a Friday. *Watson v. Eales*, 23 Beav. 294.

**Days Inclusive, or Exclusive—Generally.]—**There is no general rule, in computing time from

an act or event, that the day is to be inclusive or exclusive; it depends on the reason of the thing according to the circumstances. *Lester v. Garland*, 15 Ves. 248.

— **In Notices.]**—In the computation of a calendar month's notice of action to a justice, required by 24 Geo. 2, c. 44, s. 1, the day of giving the notice and the day of suing out the writ were both to be excluded. *Young v. Higgon*, 6 M. & W. 49; 8 D. P. C. 212.

Where a certain number of days' notice of an intention to do an act is required, the day of the service of the notice is excluded from the computation, and that on which the act is to be done is included,—unless there are some special provisions requiring a different mode of computation. *Rex v. Cumberland (Justices)*, 4 N. & M. 378; 1 H. & W. 16.

— **In Notices of Appeal.]**—Where a statute empowers justices, on information laid at special sessions, to make orders on specified parties for the payment of money, notice of the intended information being first given to such parties, and empowers them to appeal, giving notice of such appeal within six days after such order shall be made or given, the time for notice of appeal runs from the making of the order, not from the service. *Reg. v. Derbyshire (Justices)*, 7 Q. B. 193.

A conviction having taken place under the Turnpike Act, on Monday, the 2nd of May, and notice of appeal served on the following Monday, the 9th of May:—Held, that it was too late, for that it was not "within six days after the cause of complaint," within 4 Geo. 4, c. 95, s. 87. *Reg. v. Middlesex (Justices)*, 2 D., N. S. 716; 7 Jur. 396.

— **Sale of Goods Distrained.]**—In construing the 2 Will. & M. stat. 1, c. 5, s. 2, which authorizes the sale of goods distrained within five days next after the taking, the days must be so calculated as the rule now is in other cases, inclusively of the last, and exclusively of the day of taking. *Robinson v. Waddington*, 13 Q. B. 753; 18 L. J., Q. B. 250; 13 Jur. 537.

— **Matters relating to Letters Patent.]**—Original letters patent, for a term of fourteen years, were dated on the 26th of February, 1825; and renewed letters patent were dated on the 26th day of February, 1839:—Held, that the day of the date must be reckoned inclusively, and that the former term expired on the 25th of February, 1839, and, consequently, the renewed letters patent were granted after the original letters patent had expired. *Russell v. Ledgam*, 14 M. & W. 574; 14 L. J., Ex. 353; 9 Jur. 557.

A patent dated 10th May contained a proviso that a specification should be inrolled within one calendar month next and immediately after the date thereof. The specification was inrolled on the 10th of June following:—Held, that the month did not begin to run till the day after the date of the patent, and that the specification was in time. *Watson v. Pears*, 2 Camp. 294.

In computing time, under 15 & 16 Vict. c. 5, s. 2, avoiding letters patent, on failure in payment of stamp duties:—Held, that the day of the date is excluded, and that the three years do not expire until twelve o'clock at night of the

anniversary of the day on which the letters patent were granted. *Williams v. Nash*, 28 Beav. 93; 28 L. J., Ch. 886; 5 Jur., N. S. 696.

— **Enlargement of Time for making Award.]**—Where an arbitrator enlarges the time for making an award till a given day, the time is to be computed as including that day. *Kerr v. Jeston*, 1 D., N. S. 538.

— **Filing Warrant of Attorney.]**—Under 3 Geo. 4, c. 39, which makes void, as against the assignees of a bankrupt, any warrant of attorney executed by him unless filed "within twenty-one days after execution," the days are to be reckoned exclusively of the day of execution; and a warrant therefore executed on the 9th is duly filed on the 30th of the month. *Williams v. Burgess*, 4 P. & D. 348; 12 A. & E. 635; 9 D. P. C. 544.

— **Licence from Creditors to Debtors.]**—In a letter of licence from creditors to a debtor, "for and during the term of one year from the date hereof," the day of the date should be excluded from the computation of the year. *Ammerman v. Digges*, 12 Ir. C. L. R., App. i.

— **Application for Certiorari.]**—The 13 Geo. 2, c. 18, s. 5, directs, that no order of justices shall be removed, unless the certiorari is applied for within six months after the order is made. Where an act directs justices to make an order, and that it should be subsequently confirmed by an order of sessions, the period of six months is to be calculated from the date of the latter order. *Rex v. Middlesex (Justices)*, 1 N. & P. 92; 2 H. & W. 407.

— **"Until" a certain Day.]**—A trader having petitioned the Court of Bankruptcy for arrangement under 12 & 13 Vict. c. 106, s. 211, praying that "his person and property might be protected from all process until further order," the commissioner made an order, which, after reciting the petition, proceeded thus, "I hereby grant such protection, and order that the person and property of the trader be protected from process until the 29th July next;" and the court appointed a meeting for twelve o'clock on that day, for the creditors to assent to or dissent from the arrangement proposed by the trader:—Held, that the word "until" in the order must be understood inclusive of the 29th July, the day until which the protection was given. *Backhouse v. Mellor*, 4 H. & N. 116; 28 L. J., Ex. 141; 5 Jur., N. S. 175.

A party insured his goods against fire with an insurance company by a policy for six months, whereby it was provided that, from the 14th of February, 1868, until the 14th of August, 1868, and for so long after as the assured should pay the sum of 225 dollars, and the company, at the time above mentioned, accept the same, the funds should be liable to make good losses by fire to the goods. The assured intended to keep up this policy, and the company knew his intention, but the renewal premium was not demanded or paid on the 14th of August, 1868. On that day a fire took place which destroyed the goods. The course of business between the assured and the company was, that the company should come to the assured and demand the renewal premium:

—Held, that under the terms of the policy the whole of the 14th of August was protected; and that the company was therefore liable for loss caused by a fire happening on that day. *Isaacs v. Royal Insurance Company*, 5 L. R., Ex. 296; 39 L. J., Ex. 189; 22 L. T. 681; 18 W. R. 982.

— **Scotch Marriage.**—D. and L., being both domiciled in England, left London for Scotland on the evening of the 30th June, 1870, for the purpose of contracting a clandestine marriage. They arrived at Edinburgh between five and six on the following morning, July 1st, and lived in Scotland until the 21st July, when they contracted an irregular marriage before the registrar at Edinburgh about 11.30 on the morning of that day. By 19 & 20 Vict. c. 96, s. 1, no irregular marriage contracted in Scotland by declaration, acknowledgment, or ceremony, shall be valid, unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage:—Held, that, according to the mode of computing time by Scotch law, the parties had not lived the prescribed time in Scotland, and that therefore the marriage was invalid. *Lawford (otherwise Davies) v. Davies*, 4 P. D. 61; 47 L. J., P. 38; 39 L. T. 111; 26 W. R. 424.

**So many Days "at the least."**—Where an act is required by a statute to be done so many days at least before a given event, the time must be reckoned excluding both the day of the act and that of the event. *Reg. v. Shropshire (Justices)*, 8 A. & E. 173.

Where an act directed that seven days' notice at least should be given of an appeal:—Held, that the meaning was, that so many clear days should be given; and, therefore, the day on which the notice was given should be excluded from the computation. *Reg. v. Middlesex (Justices)*, 2 New Sess. Cas. 73; 3 D. & L. 109; 14 L. J., M. C. 139; 9 Jur. 758.

The 4 & 5 Will. 4, c. 51, requires that a summons to appear before justices, and answer a summons, shall be served ten days, at least, before the hearing. A party was summoned on the 20th day of the month to appear on the 30th, and was convicted for default of appearance:—Held, that the justices had no jurisdiction, as the ten days must be reckoned exclusively of the day of serving the summons and that of convicting. *Mitchell v. Foster*, 4 P. & D. 150; 12 A. & E. 472; 9 D. P. C. 527.

By a local act it was enacted, that no meeting of the commissioners should be held for putting in execution any of its powers, unless previous notice should be given in some local newspaper, published and circulated in the county, at least sixteen days before such meeting. Notice of a meeting of the commissioners to be held on the 12th February was inserted in a county newspaper, dated the 27th January, on which day the notice itself also was dated, but the newspaper was printed and partially circulated on the 26th January:—Held, that the notice was not given until the 27th January, and therefore was not given "at least sixteen days before such meeting," in pursuance of the act, the sixteen days being reckoned exclusively of the day of notice and the day of meeting. *Reg. v. Aberdare Canal Company*, 14 Q. B. 854; 19 L. J., Q. B. 251; 14 Jur. 735.

**Fractions of a Day.**—A pauper entered upon the occupation of premises at twelve o'clock on the 30th September, 1850, and on the same evening signed a memorandum, which stated that the tenancy was for one year, commencing on the 30th September instant. He continued in possession until the 29th September, 1851, about four o'clock in the afternoon of which day he gave up possession to an incoming tenant:—Held, that the fractions of the days on which the pauper entered and gave up possession were not to be regarded, and therefore he had occupied the premises "for one whole year at the least," within 1 Will. 4, c. 18, s. 1. *Reg. v. St. Mary, Warwick*, 1 El. & Bl. 816; 1 C. L. R. 192; 22 L. J., M. C. 109; 17 Jur. 551.

Where an adjudication in bankruptcy and appointment of an official assignee take place at an earlier period of the same day on which a writ of extent is issued against the bankrupt for a crown debt, a fraction of a day cannot be taken in account where the conflict is between the right of the crown and the right of the subject, and the title of the crown must prevail against the right of the subject. *Edwards v. Reg. (in error)*, 9 Ex. 628; 2 C. L. R. 590; 23 L. J., Ex. 165; 18 Jur. 384—Ex. Ch.

Where it is necessary to shew which of two events first took place, the court may enter into the question of the fractions of a day; therefore, the court will regard the particular hour at which a defendant dies, so as to see whether execution issued previously to his demise. *Clinch v. Smith*, 8 D. P. C. 337.

By 20 Vict. c. 5, s. 8, if any person shall keep a dog without having in force a licence granted under this act, he shall forfeit 5*l*. Sect. 5 provides that every licence shall commence on the day on which the same shall be granted:—Held, that "on the day on which" must be taken to mean "at and from the time when," and that it is no answer to a charge of having kept a dog without a licence on a particular day to produce a licence taken out on that day, if it is proved that the licence was applied for later in the day than the detection of the offence charged. *Campbell v. Strangeways*, 3 C. P. D. 105; 47 L. J., M. C. 6; 37 L. T. 672. See also cases ante, col. 40.

**Sundays—When Reckoned.**—The general rule of law is, that "days" mean "consecutive days," except Sunday is the first or the last day; but in commercial cases it is sometimes otherwise, because mercantile contracts are to be construed with reference to mercantile usage. *Brown v. Johnson*, Car. & M. 440; 10 M. & W. 331.

A charterparty by which it was agreed that a ship should receive on board a cargo of coals, and proceed with them to Constantinople (and, or) Odessa, contained these words: "The vessel to be loaded in Liverpool in fourteen days, and to be discharged, weather permitting, at not less than twenty-five tons per working-day (holidays excepted), the days to commence on the ship's being in turn and ready to deliver; all days above the said days to be paid demurrage at the rate of 5*l*. sterling per day:—Held, that the words "holidays excepted" did not apply to the fourteen days within which the vessel was to be loaded; and therefore, that, although two Sundays occurred within the fourteen days, still that was the period of fourteen days only within which she was to be loaded. *Niemann v. Moss*, 29 L. J., Q. B. 206; 6 Jur., N. S. 775.

— When Last Day for doing Act is a. ]—

Sunday is to be computed in the three days allowed for an application to justices to state a case for the opinion of one of the superior courts, under 20 & 21 Vict. c. 43, s. 2, although it is the last day. *Paacock v. Reg.*, 4 C. B., N. S. 264; 27 L. J., C. P. 224; *S. P., Wynne v. Ronaldson*, 12 L. T. 711; 13 W. R. 899.

So in computing the two days allowed by the Nuisances Removal Act (18 & 19 Vict. c. 121), s. 40, to an appellant for entering into recognizance after giving notice of appeal, Sunday is to be reckoned as one, though it falls on the last day. *Simkin, Ex parte*, 2 El. & El. 392; 29 L. J., M. C. 23; 6 Jur., N. S. 144.

But under 18 & 19 Vict. c. 67 (the Bills of Exchange Act), Sunday was not included in the days for appearance, if it was the last day, as r. 174, H. T., 16 Vict. applied. *Lewis v. Calor*, 1 F. & F. 906.

In the computation of time, where the last day falls on a Sunday or a holiday, and the act is to be done by the court, and not by the party, ex. gr. the sealing of a writ, it may be done on the next practicable day. *Hughes v. Griffiths*, 13 C. B., N. S. 324; 32 L. J., C. P. 47.

A warrant under 14 & 15 Vict. c. 52, was issued by a county court judge, upon an affidavit that the defendant was about to go abroad. The seven days limited for issuing a *capias* expired on Good Friday:—Held, that a *capias* issued on the following Wednesday was in time, that being the earliest day on which it was practicable to issue the writ. *Id.*

By a judge's order, debt and costs were to be paid by instalments of 2l. on the 25th of each month. The 25th happened to be on a Sunday; the instalment was offered on Monday and refused, and judgment was signed on the following day. The court set aside the judgment, holding that the defendant had the whole of Monday to pay the money. *Morris v. Barrett*, 7 C. B., N. S. 139; 29 L. J., C. P. 102; 6 Jur., N. S. 609.

In computing the eight days allowed by 15 & 16 Vict. c. 76, s. 27, to a defendant who is proceeded against by a writ of summons specially indorsed, Sunday must be reckoned as one, whether it falls on the last day or not. *Rowberry v. Morgan*, 2 C. L. R. 1026; 9 Ex. 730; 23 L. J., Ex. 191; 18 Jur. 452.

— Promissory Note due on. ]—The plaintiff in the action sued on a promissory note at three months, dated the 11th March, 1874; the note was therefore *prima facie* due on the 14th June of the same year. The 14th of June was a Sunday. The writ in the action bore date the 14th June, 1880, which was a Monday. It was contended that the right of action was barred by the Statute of Limitations:—Held, that the action was barred, and that, as the mercantile usage in the matter of days of grace had the effect of law, it had the like effect on the custom of bills and notes falling due on a Sunday becoming payable on the previous Saturday, and that Ord. LVII. r. 3, of the Judicature Act of 1875 did not apply to such a case as the present one, as it was not intended to extend the time fixed by the Statute of Limitations. *Morris v. Richards*, 45 L. T. 210; 46 J. P. 37.

— Under Rules of Supreme Court, 1883. ]—  
See Ord. LXIV. rr. 2 and 3.

— Other Matters relating to. ]—See SUNDAY.

### 3. MONTHS.

Meaning of. ]—Before 13 & 14 Vict. c. 21, when the word "month" was used in a statute, without the addition of "calendar," or any other words to shew that the legislature intended "calendar," it was understood to mean a lunar month. *Lacon v. Hooper*, 6 T. R. 224; 1 Esp. 246.

The plaintiff hired chattels of the defendant by a hiring agreement, by which he agreed to pay him a certain sum once a week, the hiring to be for twenty-six months from the date of the first payment. The plaintiff afterwards gave the defendant a bill of sale of the same and other chattels to secure money owed by him to the defendant. An account was ordered of the dealings between the plaintiff and defendant, the bill of sale to be a security for what should be found due on such account. The defendant claimed that in taking the account the twenty-six months should be taken to be calendar, and not lunar months:—Held, that the months must be taken to be lunar. *Hulton v. Brown*, 45 L. T. 343; 29 W. R. 928.

A house and land were taken by lease "for the term of six months from the first day of January next" (1830), "and so on, for six months to six months, until one of the parties shall give to the other of them six calendar months' notice in writing to determine the tenancy, at and under the rent of 13l. for every six months, the first payment to be made on the 1st day of July, 1830:—Held, that the months here spoken of were shewn by the context to be calendar months, and that this was a taking for a year at least. *Reg. v. Chawton*, 1 Q. B. 247; 4 P. & D. 525.

In legal matters, a month means a lunar month; but in commercial matters, a month always means a calendar month. *Hart v. Middleton*, 2 C. & K. 9; *S. P., Att.-Gen. v. Newbury (Corporation)*, 1 Coop. 383.

An auctioneer was employed to sell land, under a written contract that he should be paid one per cent. commission; but if the estate was not sold within two months after the day of the auction, only one-half per cent.:—Held, that this by itself meant two lunar months, unless there was evidence that the parties meant calendar months. *Simpson v. Margitson*, 11 Q. B. 23; 17 L. J., Q. B. 81; 12 Jur. 155.

Where parties contract that the purchase of lands shall be completed within so many months, calendar and not lunar months are intended. *Hipwell v. Knight*, 1 Y. & C. 401.

The word "month" may mean lunar or calendar month, according to the intention of the contracting parties; therefore, where, upon a sale of land on the 24th of January, it was agreed by the conditions of sale that an abstract of the title should be delivered to the purchaser within a fortnight from the date thereof, to be returned by him at the end of two months from the said date, and that a draft of the conveyance should be delivered within three months from the said date, to be redelivered within four months from said date, and the purchase to be completed on the 24th of June, making a period of precisely five calendar months from the date of the sale and conditions; the word "months" was held to mean calendar and not lunar months, by reference to the whole period fixed for the completion of the contract. *Lang v. Gale*, 1 M. & S. 111.

The word "month," in all contracts, except

there is some evidence to shew that calendar month is meant, means lunar month, except in mercantile transactions in the city of London, where month means calendar month. *Turner v. Barlow*, 3 F. & F. 946.

Therefore, where an artist agreed to engrave a copy of a picture in twenty-one months from the date of its receipt by him, having it in his possession at intervals as might be agreed upon for fourteen months for that purpose:—Held, that the word "months" in this contract meant lunar months in the absence of evidence to the contrary, and that such a work was not a mercantile transaction to bring it within the custom in the city of London, to construe the word "month" to mean calendar month in mercantile transactions. *Id.*

**How Calculated.]**—In calculating a calendar month, if the computation commences during the course of a month, the right method is to proceed from a given day in one month to the day with the corresponding number in the ensuing month. *Freeman v. Read*, 4 B. & S. 174; 10 Jur., N. S. 149; 8 L. T. 458; 11 W. R. 802.

Where one calendar month's notice of action at least was necessary, a notice was given on the 28th of April, and an action was commenced on the 29th of May:—Held, that the action was rightly commenced. *Id.*

If a party purchases goods, to be paid for in two calendar months, the credit does not expire till the end of the corresponding day of the second month. *Webb v. Fairmanner*, 3 M. & W. 473; 6 D. P. C. 493.

A., in London, consigned goods to B. at Bristol, to be disposed of for him by B., and, after they were shipped off, wrote to B., inclosing the bill of lading, and requesting leave to draw on B. in about three months; to which B. replied, "that the moment the goods arrived A. might depend on hearing from him, when he might draw upon him; or that B. would send him a banker's draft." The goods arrived, and a bill at two months' sight was presented to B., which he, being a creditor of A., refused to accept:—Held, that the three months were to be reckoned from the date of the letter, and not from the arrival of the goods. *Smith v. Brown*, 2 Marsh. 41; 6 Taunt. 340.

**Computation of Time of Imprisonment.]**—Where a term of one calendar month's imprisonment begins in one month and ends in another, the month must be calculated from the day on which the imprisonment commences to the day before the (numerically) corresponding day in the following month. If there be no such numerically corresponding day, the term will end on the last day of the following month. *Migotti v. Colville*, 4 C. P. D. 233; 48 L. J., C. P. 695; 40 L. T. 747; 27 W. R. 744; 14 Cox's C. C. 305—C. A.

#### 4. TERMS AND YEARS.

**Terms.]**—The terms into which the legal year was formerly divided are kept alive by s. 26 of the Judicature Act, 1873, in cases where they are used as a measure for determining the time within which any act is required to be done. *Christ's Hospital (Governors), Brecknock v. Martin*, 3 Q. B. D. 16; 46 L. J., Q. B. 591; 36 L. T. 537; 25 W. R. 637.

Therefore when, after the Judicature Acts, an award was made before Easter Term, and an ap-

plication was made during Easter Sittings, but after the 8th of May (the last day of Easter Term), to set it aside, under 9 & 10 Will. 3, c. 15, s. 2:—Held, that the application was too late. *Id.*

When all the days included between the Thursday before, and the Wednesday after Easter day (both inclusive), fall within Easter Term, that term must be prolonged by five business days, and Trinity Term commence five days later accordingly. *Doune v. Bostock*, 5 Jur. 103.

**Years—How Reckoned.]**—By 1 & 2 Vict. c. 106, s. 58, if a living continues "for the space of one whole year" under sequestration for non-residence, such living shall be deemed void, and the patron may appoint thereto:—Held, that this meant one whole year on which the sequestration issued, and not a year commencing on the 1st January, and ending on the 31st December, both inclusive, as defined in s. 120. *Bartlett v. Kirwood*, 1 El. & Bl. 771; 23 L. J., Q. B. 9; 18 Jur. 173.

B., by an indenture, dated and made 19th July, 1851, demised to A. premises, habendum to A. from 25th December, 1849, for and during and until the full end and term of fourteen years thence next ensuing, determinable as therein mentioned: proviso that it should be lawful for either B. or A. to determine the demise at the expiration of the first seven years thereof, by six months' notice; and thereupon that demise, and every covenant therein contained, should cease and determine accordingly:—Held, that the seven years were to be reckoned from 25th December, 1849, and that the lease might be determined on the 25th December, 1856. *Bird v. Baker*, 1 El. & Bl. 12; 28 L. J., Q. B. 7; 4 Jur., N. S. 1148.

#### 5. PARTICULAR WORDS AS TO.

**Directly.]**—A contract to be performed "directly" means to be performed not "within a reasonable time," but "speedily," or at least, "as soon as practicable." *Duncan v. Topham*, 8 C. B. 255; 18 L. J., C. P. 810.

On the 18th of February A. wrote to B., offering to supply him with linseed cake at 10l. 15s. per ton. On the 19th B. replied, "I can take five tons at 10l. 10s., but it must be put on board directly," and on the 22nd A. again wrote, "I shall ship you five tons best cakes to-morrow:—Held, that this correspondence did not prove a contract on the part of B. to accept cake, "to be delivered within a reasonable time." *Id.*

**As soon as Possible.]**—A contract by a manufacturer to furnish certain specified goods "as soon as possible," means within a reasonable time, regard being had to the manufacturer's ability to produce them, and the orders he may already have in hand. *Attwood v. Emery*, 1 C. B., N. S. 110; 26 L. J., C. P. 73.

**Forthwith.]**—The word "forthwith" in a notice to a party charged criminally, and out on bail to appear, on pain of forfeiting his recognizance, means, within a reasonable time from the service, and not from the date of the notice. *Reg. v. Price*, 8 Moore, P. C. C. 203.

"Forthwith" in a contract held not to mean immediately. *Roberts v. Brett*, 34 L. J., C. P. 241.

**Immediately.]**—A., being indebted to B., exe-

cuted in his favour, by way of security, a bill of sale of his furniture, thereby covenanting that he would, "immediately upon demand in writing," pay the principal and interest; and in case he did not immediately upon such demand pay the money, B. was empowered to seize and sell. A demand in writing, signed by B.'s attorney, of the immediate payment of the principal and interest, was served upon A. by a bailiff, who had authority to receive the money, but did not communicate the fact to A.; and who, in default of payment, seized the goods, which were afterwards sold:—Held, that there was a sufficient demand of payment, but no default, inasmuch as no reasonable time was afforded to A. for compliance with it, and that the action, therefore, was maintainable. *Toms v. Wilson*, 4 B. & S. 442; 32 L. J., Q. B. 382; 10 Jur., N. S. 201; 7 L. T. 421; 11 W. R. 117; *S. P.*, *Moore v. Shelley*, 8 App. Cas. 285; 52 L. J., P. C. 35; 48 L. T. 918.

**Next following.**—By an award, dated the 13th of October, 1840, it was ordered that a sum of money be paid on the 28th day of October next:—Held, that the money was payable on the 28th day of that present month of October. *Brown v. Smith*, 8 D. P. C. 867.

A proviso for payment "on the — of February next ensuing," properly means of next February; but "on the 29th of February next ensuing," means the 29th of February in next leap-year, in order to give effect to the words. *Chapman v. Beecham*, 3 G. & D. 71; 3 Q. B. 723; 12 L. J., Q. B. 42.

#### 6. REASONABLE TIME.

**What is.**—The overseers of a township agreed with the plaintiff and several other persons, who had given notices of appeal against a poor-rate, that all matters in difference between the overseers and the plaintiff, and the other appellants, should be referred; and that the costs of the plaintiff and the other appellants, incurred in relation to the appeals, up to the time of the agreement, should be taxed and paid by the overseers. A declaration against the overseers for nonpayment of such costs, alleged that they were taxed in a reasonable time after the making of the agreement, and they were requested to pay the amount, but they had not paid it. They pleaded, that the costs were not taxed in a reasonable time after the making of the agreement, on which issue was joined and found for the overseers:—Held, that the question whether such a reasonable time had elapsed was a question for the decision of the jury and not of the judge. *Burton v. Griffiths*, 11 M. & W. 817.

**To elapse between Summons and Hearing.**—The 11 & 12 Vict. c. 43, s. 2, authorizes justices to proceed ex parte, where it is proved on oath that the summons has been served upon the defendant a reasonable time before the time appointed for the hearing. A summons to answer a charge of assault was served upon the defendant's wife, at his house, at nine o'clock in the morning, to appear the next day at eleven o'clock, at a place eight miles distant. The defendant, who was a collier, had gone to his work at the time, and did not return till eleven at night. The next morning, having left some work unfinished, he went to the mine. The justices proceeded to hear in his absence, and adjudged

him guilty of an assault, and sentenced him to pay a fine or be imprisoned:—Held, that it was for the justices to decide whether the time was reasonable under the circumstances; and that, having so decided, the court would not review their decision. *Williams, Ex parte*, 2 L. M. & P. 580; 21 L. J., M. C. 46.

**— For Notice.**—By deed made on the 30th January, 1860, in consideration of 410*l.* lent to A. by B., A. assigned household furniture, farming stock, and goods and chattels and future personal estate and effects to A., subject to a proviso for redemption if A. should pay to B. 410*l.* "on the 30th January, 1870, or at such earlier day or time as B., or his attorney or agent, should appoint for payment, by notice in writing, sent by post, or delivered to or left at the house or last known place of abode" of A.; with a power of immediate entry and sale on default of payment contrary to the proviso and the true intent and meaning of the deed; and there was a proviso, that until default A. should hold possession, and use the goods, chattels, and effects, without any hindrance or disturbance by B. B. at noon of the 20th February, 1860, gave A. notice to pay the money to him at half-past twelve of the same day, and at that time, he not paying the money, seized the goods, and afterwards sold them:—Held, that the notice under the proviso must be reasonable, and that the notice given was not given in a reasonable time. *Brighty v. Norton*, 3 B. & S. 305; 32 L. J., Q. B. 38; 9 Jur., N. S. 495; 7 L. T. 422; 11 W. R. 167.

**— For Rescission of Contract for Sale of Land.**—When, after a contract for the sale of land has been entered into, a notice is given to make time of the essence of the contract, the question whether the notice is reasonable or not must be judged of as at the date when it is given. The plaintiff held a lease from the defendant which gave him an option of purchasing the demised property at any time during the term, on giving the lessor three months' previous notice in writing. On the 24th of March, 1877, the plaintiff gave the defendant notice of his intention to exercise the option. There were some difficulties in completing the defendant's title to the property, and an abstract of title was not delivered to the plaintiff's solicitor till the 17th of June, 1878. The plaintiff's solicitor not having acknowledged the receipt of the abstract, and having neglected to answer several letters from the defendant's solicitors, they, on the 16th of September, wrote to the plaintiff himself, asking whether he intended to complete the purchase. The plaintiff replied the next day that he would write at once to his solicitor. On the 24th of September, 1878, no further communication having been received from the plaintiff or his solicitor, the defendant gave the plaintiff a notice in writing, requiring him to complete the purchase, and stating that, unless he completed it on or before the 31st of October, 1878, the defendant would treat the contract as rescinded, and that in that respect time should be deemed of the essence of the contract. On the 26th of September, 1878, the plaintiff acknowledged the receipt of the notice, and said that he had seen his solicitor, who had promised to proceed as soon as possible. On the 1st of November, 1878, no further communications having been received from the plaintiff or his

solicitor, the defendant's solicitors wrote to the plaintiff that the defendant, in pursuance of his notice, declared the contract at an end; and they requested the return of the abstract, and demanded payment of rent for the property. The plaintiff had been in possession of the property ever since his notice to purchase, but had refused to pay any rent after the 24th of June, 1877. On the 21st of November, 1878, the plaintiff commenced his action for the specific performance of the contract to purchase:—Held, that the notice of the 24th of September fixed an unreasonably short time for the completion of the purchase, and was therefore invalid. Specific performance was decreed, and the defendant was ordered to pay the costs of the action up to and including the trial. *Crawford v. Toogood*, 13 Ch. D. 153; 49 L. J., Ch. 108; 41 L. T. 549; 28 W. R. 248.

When time is not originally made of the essence of a contract for the sale of land, one of the parties is not entitled afterwards by notice to make it of the essence, unless there has been some default or unreasonable delay by the other party. After a delay of two years on the part of a vendor, he gave notice to the purchaser to complete his contract within three weeks, and that, if he did not do so, the vendor would treat the contract as at an end:—Held, that the time limited for completion was, under the circumstances, unreasonably short, and the notice thereof of no effect. *Green v. Sevin*, 13 Ch. D. 589; 49 L. J., Ch. 166; 41 L. T. 724; 44 J. P. 282.

## TIPPLING ACT.

See INTOXICATING LIQUORS.

## TITHES.

See ECCLESIASTICAL LAW.

## TITLE-DEEDS.

See DEED AND BOND.

## TOLLS.

### I. GENERALLY.

1. *Validity of, and Right to.*
2. *Rate of Charge*, 54.
3. *Levy*, 56.

### II. CANAL.—See WATER.

### III. MARKET.—See MARKET.

### IV. PORT, HARBOUR AND LIGHTHOUSE.— See SHIPPING.

### V. TURNPIKE.—See WAY.

### VI. RATEABILITY.—See RATES AND RATING.

### VII. ON CARRIAGE OF GOODS.—See CARRIER.

### I. GENERALLY.

#### 1. VALIDITY OF, AND RIGHT TO.

**Bad Custom.**—A custom that a meter of a borough should have a toll on all goods imported within the borough, whether meted or not, is bad in law, unless it can be connected with some obligation to do something beneficial to the person to be charged with the toll. *Jenkins v. Harcree*, 1 Gale, 454; 5 Tyr. 871. See *Layburn v. Crisp*, 4 M. & W. 320; 8 C. & P. 397.

**Rankness.**—No objection can be made on the ground of rankness to a toll, the right to levy which depends upon a correspondent obligation to do something beneficially to the payers of the toll. *Id.*

**Tolls Traverse and Thorough.**—A toll traverse, i. e., a toll for the mere use of a public way, is bad. *Lawrence v. Hitch*, 3 L. R., Q. B. 521; 37 L. J., Q. B. 209; 18 L. T. 483; 16 W. R. 813; 9 B. & S. 467—Ex. Ch.

The repair of some streets in a town is not sufficient consideration to support a claim of toll-thorough in all parts of the town. *Brett v. Beales*, 10 B. & C. 508; M. & M. 416.

**Right to.**—Under charters granting to a dean and chapter, "that they and all their men shall be quit of toll, passage, cheminage, &c., in city and borough, fair and market, in the passage of bridges, and all parts of the sea, in all places throughout England," their lay tenant of lands included in the charters is exempt from market toll and toll traverse, not only for articles going to or coming from the lands for the necessary manurance and enjoyment of them, but also for the goods sent out or coming in for the purpose of merchandize. *Middleton (Lord) v. Lambert*, 1 A. & E. 401; 3 N. & M. 841.

If a person, claiming a toll for passing over a highway, can shew an immemorial usage, and that the soil and toll were, before the time of legal memory, in the same hands, though severed since, it will be presumed that the soil was originally granted to the public in consideration of the toll. *Pelham (Lord) v. Pickersgill*, 1 T. R. 660.

— **Evidence of.**]—Where the crown granted to S. the castle and honour of H., and "all that toll and all those tolls called 'traverse,' to be taken in manner accustomed, i. e., of all saleable things passing through the town of H. and also through the towns of Ware, B., T., and elsewhere, in divers places in the same county;" and it appeared that a toll had always been taken at Ware Bridge, and that in various ancient documents it had been described as "the traverse," and "the toll traverse" of the bridge of W., and that S. and his ancestors for twenty years past had repaired the bridge:—Held, that the burden was cast on S. to shew that the toll was a toll-thorough and not traverse, although the bridge was a public highway; and that the sessions, in the absence of any such evidence, were warranted in inferring that it was a toll traverse. *Reg. v. Salisbury (Marquis)*, 3 N. & P. 476; 8 A. & E. 716; 1 W., W. & H. 444.

— **Right of Corporation to.**]—In an action for tolls upon live stock driven through a borough and upon waggons and carriages with four wheels, passing to, through and from a borough and manor, a market company claimed—as representing by virtue of a statute a municipal corporation which was the lord of the manor in which the borough was, and holder of land within the borough, and entitled by prescription or grant to drift tolls and dues payable within the borough on horned cattle, sheep and swine driven through the borough, and waggons and carriages with four wheels passing to, through and from the borough,—to be entitled to such tolls from a railway company, incorporated by acts passed in 1862 and 1863, who had made a portion of their line of railway and station on lands within the borough, acquired by them for the purposes of their railway, and used their line and station for the conveyance of goods and live stock and passengers in carriages and trucks, in, to and through the borough:—Held, that such tolls could only be claimed as tolls traverse, but that inasmuch as the enjoyment of the railway company was a proprietary one of their own land acquired by them without any reservation of any rights by their vendors, enabling them to earn such a toll (if such rights could legally exist), neither the corporation, as a grantee of any such toll, nor the market company, as their representative, could have a right to take such tolls. *Brecon Markets Company v. Neath and Brecon Railway Company*, 7 L. R., C. P. 555; 41 L. J., C. P. 257; 27 L. T. 316. Affirmed, 8 L. R., C. P. 157; 42 L. J., C. P. 63—Ex. Ch.

**Railway Trucks or Carriages.**]—Where, by an act for paving, lighting, and cleansing a town, tolls were imposed on all stage-coaches and other such public carriages carrying passengers for hire, and coming to or going from or out of the town and the precincts, and also on all wains, waggons, carts, or other such carriages carrying goods for hire, and coming to or going from or out of the town and the precincts:—Held, that railway carriages carrying passengers for hire, and coming into the town by a railway, and railway trucks carrying goods for hire, and coming into the town by a railway, were not liable to the tolls. *Newmarket Railway Company v. Foster*, 2 C. L. R. 1617.

**On Coals brought by Railway into Town.**]—A

private act of parliament imposed a duty of 2s. per chaldron upon all coal "imported and landed at the town of H., or otherwise brought or delivered within the limits of the town." The act gave a remedy against the shipowner by distraining the ship and tackle as well as the coals in default of payment. At the time that the act was passed no coals were brought into H. except by sea:—Held, that coals brought into the town by railway were liable to the duty, and not only sea-borne coals; and that the railway company, as the persons who brought the coals into the town, were primarily liable to pay the duty. *Great Eastern Railway Company v. Harwich (Mayor)*, 41 L. T. 533; 44 J. P. 104—H. L. (E.).

See also sub tit. COALS.

**Letting of.**]—Tolls traverse of a bridge cannot be let by parol, the demise must be by deed. *Reg. v. Salisbury (Marquis)*, 3 N. & P. 476; 8 A. & E. 716; 1 W., W. & H. 444.

Action on a deed made between five commissioners of an inland navigation, under the authority of several acts of parliament, and the defendant, whereby the commissioners, in consideration of rent, demised the tolls of the navigation to the defendant for a year, from the 1st January, 1850, at the rent of 3,470l., together with other payments, and the defendant covenanted with them, and also with the whole body of commissioners, in a separate covenant, for the payment of the rent. The declaration alleged an entry by virtue of the demise, and the occupying and receiving of the tolls during the entire year. Breach, nonpayment of the rent. Plea, that the commissioners never executed the lease, and that the entry and occupation were at the will of the commissioners only, and not under the demise. Replication, that the defendant entered and received and enjoyed the tolls, by the permission of the commissioners, under the terms of the deed:—Held, that as the lessors had not executed the lease, the lessee had never received the consideration for which he had stipulated, namely, a permanent estate during the demise and under its terms, and therefore that he was not liable to be sued upon his covenant in the lease. *Swatman v. Ambler*, 8 Ex. 72; 22 L. J., Ex. 81.

**Liability of Persons receiving.**]—A private person or a company having a right to levy tolls in respect of the performance of a particular work, will be liable for injuries occasioned by performing it improperly. *Mersey Dock Trustees v. Gibbs*, 11 H. L. Cas. 686; 35 L. J., Ex. 225; 12 Jur., N. S. 571; 14 L. T. 677; 14 W. R. 872.

A corporate body authorized to perform such a work, and receiving tolls in respect of it, though obtaining no profit for itself from such tolls, but collecting them for the maintenance of the work and the possible future benefit of the public, is equally responsible for injuries arising from the improper performance of such work, and the funds thus obtained must discharge that liability. *Id.*

## 2. RATE OF CHARGE.

**Right to Tolls for Fractional Parts of Mile Traversed.**]—By a local act of 1739, s. 23, the plaintiffs are empowered to take from every

person conveying goods upon the river between Maidstone and Forest-row, or any part thereof (which all person and persons should and might lawfully do), such rates and duties for lockage and riverage as the plaintiffs should think fit, not exceeding 4*d.* per mile for every ton weight of goods from Maidstone up the river to Branbridge, and not exceeding 6*d.* per mile for every ton weight of goods from Branbridge up the river to Forest-row, and so in proportion for a greater or less quantity. By s. 28, the plaintiffs are from time to time to publicly fix up the duties for lockage and riverage charged by them. By s. 31, nothing in the act is to be construed to extend the plaintiff's authority to the execution of any works below Mrs. Edmonds' wharf in Maidstone. By s. 38, any action, suit or information for anything done in pursuance of this act, or in relation to the premises, shall be commenced within three months after the facts committed. Maidstone extends along the river upwards about three furlongs from Mrs. Edmonds' wharf to the College Lock, constructed by the plaintiffs, Maidstone bridge being between the two. The plaintiffs, besides other works on the river, had scoured a shoal between the bridge and Mrs. Edmonds' wharf, and on their annual survey they always disembarked at that wharf. In 1874, the plaintiffs amended their toll list, so as to charge, for the first time, tolls proportioned to a fractional part of a mile traversed. An owner of oil mills situate on the Medway, less than a mile above the College Lock, but more than a mile above Mrs. Edmonds' wharf, refused to pay to the plaintiffs any toll upon barges coming up the river to his mills:—Held, that they were entitled to charge tolls proportioned to a fractional part of a mile traversed since the amendment of their list, without reference to the three months' limitation provided by s. 38. *Medway Navigation v. Brook*, 33 L. T. 843.

A clause in a private act granted tolls for "a fraction of a mile beyond four miles," &c.; the company claimed such tolls when the whole distance traversed was less than four miles. The lord chancellor (Earl Cairns) and Lord Selborne were of opinion that the charge was, on the whole, warranted by the words of the act, and that the judgment of the court below must on this point also be affirmed. Lord Penzance and Lord O'Hagan, applying the principle that no charge could be imposed on the public but by the clearly expressed intention of the legislature, held that in this case the legislature had not clearly expressed an intention, nor had intended to authorize such a charge. *Price v. Monmouthshire Canal and Railway Companies*, 4 App. Cas. 197; 49 L. J., Ex. 130; 40 L. T. 630; 27 W. R. 666.

**Publication of Tolls.**—A company obtained an act (8 & 9 Vict. c. clxix.) authorizing it to construct a railway and to demand tolls for the conveyance of passengers and goods thereon. The charge for the conveyance of goods was generally thus expressed, "per ton per mile not exceeding," &c. One clause provided that "for articles or persons conveyed on the railway for a less distance than four miles" there might be, "in addition to the prescribed tolls for conveyance, a reasonable charge for the expense of stopping, loading, and unloading." No publication of this charge in the form of a "toll" had been made upon the toll board:—Held, that this

"charge" for stopping was not properly a "toll," and that the non-publication of it on the toll-board in the form required by the Railways Clauses Consolidation Act, 1845, ss. 93 and 95, did not prevent the company from demanding it. *Ib.*

A pier company was authorized by act of parliament to charge, for goods laden or unladen on the pier, the rates specified in a schedule to the act; but they could only demand them so long as "the rates for the time being authorized to be taken as thereinbefore mentioned" were painted on a board affixed to the premises. By a subsequent section power was given to lower the tolls or to raise them to such sums as the company should think proper, not exceeding the sums authorized by the act. The company lowered some of the rates, but put up a board shewing the tolls contained in the schedule to the act:—Held, that the act required the actual tolls in force for the time being, and not the maximum tolls authorized by the act, to be painted on the board. *Gregson v. Potter*, 4 Ex. D. 142; 48 L. J., M. C. 86; 27 W. R. 840.

**Alteration and Variation.**—A toll reasonable in amount, but varying from time to time according to the value of money, is valid in point of law. *Lawrence v. Hitch*, 3 L. R., Q. B. 521; 37 L. J., Q. B. 209; 18 L. T. 483; 16 W. R. 813; 9 B. & S. 467—Ex. Ch.

If the lessee of tolls under a corporation varies, by temporary agreement, the amount of toll claimed of individuals, it will not affect the right to the tolls, if it appears to have been a variation, not for the purpose of claiming more at one time than another, but for the convenience of both parties. *Lancum v. Lovell*, 6 C. & P. 463.

Trustees empowered, by one section of a local act, to take such tolls as they might at any meeting direct, up to a certain maximum, are not entitled, under that power, to remit a half toll on return loads, imposed by another section. Any alteration of tolls must affect the different classes mentioned in the act equally. *Barton v. Bennett*, 12 W. R. 709.

But one who had taken a lease of the tolls, subject to an order purporting to remit the half tolls:—Held, not entitled to exact them. *Ib.*

A trading company empowered by statute to take tolls for certain matters, is not bound, unless there is an enactment to that effect, to exact one uniform toll from all persons alike, but may charge a smaller toll to a particular class than to another. *Hungerford Market Company v. City Steamboat Company*, 3 El. & Bl. 365; 30 L. J., Q. B. 25; 7 Jur., N. S. 67; 3 L. T. 732.

### 3. LEVY.

**Conviction for Wrongful Levy.**—A mere claim of a right to take tolls, without shewing clearly that it is a bona fide claim, is not sufficient to oust justices of the jurisdiction to convict for taking them improperly. *Rex v. Hampshire (Justices)*, 3 D. P. C. 47.

**By Action.**—Indebitatus assumpsit lies for fish claimed as toll for the use of a capstan and windlass in drawing fishing-boats up on the beach out of the sea. *Falmouth (Earl) v. Penrose*, 9 D. & R. 452; 8 B. & C. 452.

A power of distress implies an antecedent right of action. *Great Eastern Railway Com-*

*pany v. Harwich (Mayor)*, 41 L. T. 533; 44 J. P. 44—H. L. (E.).

## TOLZEY COURT.

See COURT.

## TOTAL LOSS.

See INSURANCE.

## TOWAGE.

See SHIPPING.

## TOWING PATH.

See WATER.

## TOWN.

**What is.]**—On the trial of an issue whether a railway was passing through a town, within the meaning of the Railways Clauses Act (8 & 9 Vict. c. 20), s. 11, the judge merely told the jury that the word "town" was to be understood in its ordinary and popular sense:—Held, a misdirection, inasmuch as the judge ought to have given such a definition of the word "town" as would have enabled the jury to decide the issue. *Elliott v. South Devon Railway Company*, 2 Ex. 725; 5 Railw. Cas. 500; 17 L. J., Ex. 262.

"Town," in that act, means a collection of inhabited houses, so near to each other that they may reasonably be said to be continuous; and the term will include a space of open ground, surrounded by continuous houses. *Ib.*

A local act created trustees of turnpike roads, which were described by definite points, some in the town of T. The act was to be in operation for thirty-one years. It enacted, that it should not be lawful for the trustees to continue or erect any turnpike or toll gate across the roads, in the towns of T. and W., or in any other town through or into which the roads might pass or be

made:—Held, on an indictment for erecting and continuing a turnpike gate within the town of T., that the jury was rightly directed that the word "town" was to be understood in a popular sense, as a congregation of houses, and they were to consider whether the spot where the gate stood was surrounded by houses so reasonably near that the inhabitants might fairly be said to dwell together. *Reg. v. Cottle*, 16 Q. B. 412; 20 L. J., M. C. 162; 15 Jur. 721.

The 1 & 2 Vict. c. ii., for better paving, &c. the town of M., by s. 23 required the commissioners to repair, &c. all or any of the streets then paved or thereafter to be paved, cleansed and lighted under the provisions of the act: and s. 35 empowered the commissioners to light streets "within the town," although they were not public. The limits of the act were not defined. In pursuance of 25 & 26 Vict. c. 61, s. 7, the county was divided into highway districts, one of which included that part of the parish of M. "not within the town of M." Since 1862 certain highways in the parish of M. had been lighted by the commissioners: before they were so lighted they were not within the town. Upon complaint before justices against the highway district board for not repairing them:—Held, first, that the word "town" in the local act meant the town of M., not as it existed at the time of the passing of the act, but as it extended from time to time. *Milton-next-Sittingborne (Commissioners) v. Futersham Highway Board*, 10 B. & S. 548.

Held, secondly, that a highway was within the town if there was a continuous series of houses in it so contiguous as to form a congregation of human habitations. *Ib.*

Held, thirdly, that the fact of lighting the highways was not conclusive as to their being in the town. *Ib.*

By a local act passed in 1822 it was enacted that no person should sell any fish within the town of Rochdale except in the market-places, and that any person offending against this provision should forfeit a sum of money. In 1876, W. sold fish in Molesworth-street, which then was a main thoroughfare of the town of Rochdale; but in 1822 its site was green fields; Molesworth-street was not within the market-places of Rochdale:—Held, that the word "town," as used in the local act, meant the collection of buildings from time to time called the town of Rochdale, and that W. had been guilty of an offence against that act. *Collier v. Worth or North*, 1 Ex. D. 464; 35 L. T. 345.

**— Within the Lands Clauses Act.]**—Quære, whether Teddington, in Middlesex, is a town within the Lands Clauses Act (8 & 9 Vict. c. 18), s. 128. The lands near it situated close to the railway station, and not continuously built upon, are not lands within a town, nor lands used for building purposes, within the meaning of that section. *London and South-Western Railway Company v. Blackmore*, 4 L. R., H. L. 610; 39 L. J., Ch. 713; 23 L. T. 504; 19 W. R. 305.

When premises are within the municipal boundaries of a town, but not surrounded by houses:—Held, that they were not in a town within the meaning of s. 93 of the Lands Clauses Consolidation Act, 1845. *Falkner v. Somerset and Dorset Railway Company*, 16 L. R., Eq. 458; 42 L. J., Ch. 851.

The words "lands situate within a town"

in s. 128 of the Lands Clauses Consolidation Act, 1845, mean lands surrounded by buildings which constitute the town; and therefore lands outside the buildings, although within the borough boundary, are not within the exception of the section. *Carington v. Wycombe Railway Company*, 3 L. R., Ch. 377; 37 L. J., Ch. 213; 18 L. T. 96; 16 W. R. 494.

**Improvement and Government.]—See HEALTH—LOCAL GOVERNMENT.**

— **Of London.]—See METROPOLIS.**

## TRADE AND TRADE-MARK.

### I. TRADE.

1. *Generally.*
2. *In Time of War.*—**See WAR.**

### II. TRADE UNION, 61.

### III. TRADE-MARK.

1. *What is, and Infringement of*, 65.
2. *Actions to Restrain Infringement of*, 78.
3. *Assignment and User by Firms and Representatives*, 86.
4. *Registration*, 90.

### IV. NOXIOUS OR OFFENSIVE TRADE.—**See HEALTH—NUISANCE.**

### V. CONTRACTS IN RESTRAINT OF.—**See CONTRACT.**

### VI. TRADE FIXTURES.—**See FIXTURES.**

### VII. SLANDER OF TITLE.—**See DEFAMATION.**

#### I. TRADE.

##### 1. GENERALLY.

**Injuring Trade by Interception of Customers.]**  
—A declaration stated that the plaintiff was possessed of stores where he carried on the business of a corn merchant in a town; that the defendant, unjustly intending to injure him in his business, prevented certain persons from selling their corn to him by requiring from them the payment of tolls not legally demandable, and stopped and detained the carts and animals of the persons proceeding with corn to his stores, whereby he lost great gains and profits:—Held, as no contract was alleged between the plaintiff and the persons obstructed, and as no right of property or franchise of the plaintiff was shewn to have been injured by the obstruction, that such obstruction did not give a cause of action for the loss sustained by the plaintiff. *Higgins v. O'Donnell*, 4 Ir. R., C. L. 91; 18 W. R. 378.

**Loss of Trade by Non-Access to Shop.]—A cor-**

poration being authorized by act of parliament to stop up or level a street for the purpose of its act, in the course of operations wrongfully cut into the cellars of a house, which were under the street, leaving them open and exposed; the corporation also, in the course of the works, partially stopped the traffic along the streets; an injunction having been obtained restraining the corporation from cutting into the cellars, with an inquiry as to damages:—Held, that although the owner was entitled to damages for the structural injury to his cellars, he was not entitled to damages for depression caused to his trade by reason of the difficulty of access to his shop, it not being shewn that the depression arose from the wrongful, as distinguished from the authorized, act of the corporation. *Bigg v. London (Corporation)*, 15 L. R., Eq. 376; 28 L. T. 336.

The erection of a building will not be restrained because it injures the plaintiff by obstructing the view of his place of business. *Butt v. Imperial Gas Company*, 2 L. R., Ch. 158; 16 L. T. 820; 15 W. R. 92.

**Highway—Unreasonable User of, causing particular Injury to Individual.]**—When the private right of the owner of a house adjoining a highway to access from his house to the highway is interfered with by an unreasonable user of the highway, he is entitled to recover damages from the wrongdoer in respect of loss of custom in the business which he carries on in his house. He is entitled also to recover damages on the ground that he has suffered a particular injury from a public nuisance. *Fritz v. Hobson*, 14 Ch. D. 542; 49 L. J., Ch. 321; 42 L. T. 225; 28 W. R. 459.

**Circular warning against Infringement of Patent—Balance of Convenience.]**—The defendants, who were the owners of patents in Belgium and England for an invention for making glass lamp globes, by a deed executed in Belgium granted a licence to the plaintiffs to manufacture articles under their invention in Belgium, but not elsewhere. The deed contained a clause for submitting disputes to arbitration. The plaintiffs under this licence manufactured articles in Belgium and sold them in England. The defendants issued a circular warning persons engaged in the trade that the importation and sale of articles made in foreign countries under their invention, except by themselves, would be a violation of their patent. The plaintiffs brought an action to restrain the issue of this circular until the matters in dispute had been determined by arbitration:—Held, that the grant of the licence to use the patent in Belgium did not imply permission to sell the manufactured article in England in violation of the defendants' English patent. *Betts v. Willmott* (6 L. R., Ch. 239) distinguished:—Held, also, that where a trade circular is issued bonâ fide, an interim injunction will not be granted to restrain it unless it is in violation of some contract between the plaintiff and defendant, however much the balance of convenience may be in favour of granting it. *Société Anonyme des Manufactures de Glaces v. Tilghman's Patent Sand Blast Company*, 25 Ch. D. 1; 53 L. J., Ch. 1; 49 L. T. 451; 32 W. R. 71—C. A.

*See also cases under DEFAMATION (Slander of Title).*

## II. TRADE UNION.

**Validity at Common Law.**—Every man has a right to work for the best price he can get; but if others choose to work for less than the usual prices, the law will not permit that violence should be committed towards them, or towards those by whom they are employed, or those with whom they are connected. *Rea v. Batt*, 6 C. & P. 329.

The condition of a bond recited that the obligors were manufacturers in Wigan and the neighbourhood, and that combinations of workmen preventing free labour by fear of social persecution, injuriously interfered with the management of their manufactories, and that these combinations were sustained by funds extorted from workmen employed by the manufacturers, and that measures were necessary to protect as well the manufacturers in the free management of their capital as the workmen in the free disposal of their labour; wherefore the manufacturers had agreed, in regard to the amount of wages, the periods of engagement, the hours of work and the general management of their establishments, to act for twelve calendar months in conformity with the lawful resolutions of a majority of the manufacturers present at a meeting, and declared that the bond should be void if this agreement was performed:—Held, that the bond was illegal at common law, and could not be enforced, as being contrary to public policy and in restraint of trade. *Hilton v. Eckersley*, 6 El. & Bl. 47; 25 L. J., Q. B. 199; 2 Jur., N. S. 587.

**Statutes.**—34 & 35 Vict. c. 31, amends the law of trade unions, and is amended by 39 & 40 Vict. c. 22 (*Trade Union Act (1871) Amendment Act*, 1876).

**Cases decided before 34 & 35 Vict. c. 31.**—A threat by a workman to his employer, made in pursuance of a combination (which is illegal) between that workman and fellow-workmen to carry it out, that all the workmen so combining will immediately leave work, unless the employer discharges other workmen who are then in the same service, renders such workmen liable to conviction for the offence under 6 Geo. 4, c. 129, s. 3. *Walsby v. Anley*, 3 El. & Bl. 516; 30 L. J., M. C. 121; 7 Jur., N. S. 465; 3 L. T. 666; 9 W. R. 271.

L., a workman, and member of a working-man's society, being in the employ of a master who employed men not qualified by the rules thereof, O., the president, said he would use his influence to have him turned out of the society. L. continuing to work for his master, a meeting was called, to which he was summoned, the object of which was to discover whether he would leave his employ or be turned out of the society. G., another of the members, made a report of the proceedings, of a previous deputation to the master of L. upon the subject, and O. then asked L. "whether he intended to remain an honourable member of the club and leave the shop (his work), or continue it, be despised by the club, and have his name sent all over the country in the report, and be put to all sorts of unpleasantness?"—Held, that this was evidence on which O. might be convicted of unlawfully, by threats and intimidation, endeavouring to force L. to depart from his hiring, within the

6 Geo. 4, c. 129, s. 3, but was not sufficient as against G. *O'Neil v. Longman*, 4 B. & S. 376; 9 Cox, C. C. 360; 8 L. T. 657; 11 W. R. 947.

O. and G. were convicted upon an information for endeavouring by threats and intimidation to force K. to make an alteration in his mode of conducting his business, contrary to the 6 Geo. 4, c. 129, s. 3. The evidence was as stated in the preceding case:—Held, first (per Cockburn, C. J., Wightman and Mellor, JJ.), that there was no evidence against O. *O'Neil v. Kruger*, 4 B. & S. 389; 32 L. J., M. C. 259; 8 L. T. 657; 12 W. R. 47.

Held, secondly, per Cockburn, C. J., and Mellor, J. (Wightman, J., dissentiente), that the object of G. was to discuss with K. the terms of arranging the dispute between him and the club-men in his employ rather than to intimidate him, and therefore there was not sufficient evidence against G. *Id.*

A resolution was passed by a society of bricklayers, that no society bricklayer would work for B. until such time as he parted with some of his apprentices. The men in B.'s employment were accordingly withdrawn. In reply to a letter from B., requiring to be informed why the men were taken away, the resolution was communicated to him in a letter from the secretary. The secretary and the president of the meeting at which the letter was written having been convicted under 6 Geo. 4, c. 129, s. 3, of using threats to compel B. to limit the number of his apprentices:—Held, that in the absence of any evidence to shew that the letter communicating the resolution, though apparently an explanation, was, in fact, meant as a threat, the conviction could not be sustained. *Wood v. Bowron*, 2 L. R., Q. B. 21; 36 L. J., M. C. 5; 15 L. T. 207; 15 W. R. 58; 7 B. & S. 931.

A master builder had in his employ several carpenters who were members of a carpenters' union, and also J., who was not a member. The secretary to a branch lodge served the master with the following notice in the middle of a week: "I am requested by the committee of carpenters to give the men in your employ notice to come out on strike against J., unless he becomes a member of the society. This notice will be carried out after the end of this week, unless settled in accordance with the society's laws:—"—Held, that the secretary was rightly convicted, under 6 Geo. 4, c. 129, s. 3, of having by threats endeavoured to force the master builder to limit the description of his workmen. *Skinner v. Kitch*, 2 L. R., Q. B. 393; 36 L. J., M. C. 116; 16 L. T. 413; 15 W. R. 830; 10 Cox, C. C. 493.

The defendants were members of a trade union of tailors. The workmen having, at the instigation of the union, struck for wages, and the masters having employed workpeople, men and women, not being members of the union, the defendants, who were members of the managing committee of the union, caused pickets to be stationed about the doors of such employers to note workpeople who went in and out, for the purpose of deterring them from continuing in such employ and inducing them to join the union. Proof was given of the use of insulting expressions and gestures used by the pickets to the non-union workpeople:—Held, to be an intimidation, molestation, and obstruction, within 6 Geo. 4, c. 129, s. 3, and 22 Vict. c. 34, s. 1. *Reg. v. Druitt*, 10 Cox, C. C. 593; 16 L. T. 855.

The defendants, who were officers of a trade union, gave notice to workmen, by means of placards and advertisements, that they were not to hire themselves to the plaintiffs pending a dispute between the union and the plaintiffs. A bill in equity prayed an injunction to restrain the issuing of the placards and advertisements, alleging that by means thereof the defendants had, in fact, intimidated and prevented workmen from hiring themselves to the plaintiffs, and that the plaintiffs were thereby prevented from continuing their business, and the value of their property was seriously injured and materially diminished:—Held, that the acts of the defendants, as alleged by the bill, amounted to a crime, and that a court of equity would interfere by injunction to restrain such acts, inasmuch as they also tended to the destruction or deterioration of property. *Springhead Spinning Company v. Riley*, 6 L. R., Eq. 551; 37 L. J., Ch. 889; 19 L. T. 64; 16 W. R. 1138.

When a trade is regulated by committees of the masters and workmen respectively, which committees make rules from time to time, and by one of such rules, in case of disputes between a master and his men, an arbitration committee, presided over by a barrister, is to decide, and a particular dispute has been so decided, such decision is not to be considered as imported into all future engagements between masters and men, nor is it binding on persons not parties to that particular reference. *Lecey v. Hill*, 3 H. & N. 702; 27 L. J., Ex. 259; 4 Jur., N. S. 589—Ex. Ch.

— **Form and Validity of Convictions.**—The 6 Geo. 4, c. 129, s. 3, makes it an offence to endeavour, by threat, to force any workman hired for any work to leave his hiring; and the 2 & 3 Vict. c. 71, provides that a conviction in the words of any statute declaring the offence shall be sufficient. A conviction by a metropolitan police magistrate stated that the defendant did by threats endeavour to force W. J. to leave his hiring:—Held, that the conviction was sufficient; that the nature of the threats need not be shewn, nor the threats set out, the essence of the offence being the endeavour to force a workman to depart from his employ, and that the threats were matter of evidence only. *Perham, Ex parte*, 5 H. & N. 30; 29 L. J., M. C. 33; 5 Jur., N. S. 1221; *S. P. and S. C.*, 2 El. & El. 383; 29 L. J., M. C. 31; 5 Jur., N. S. 1212.

Held, also, for the same reason, that neither the conviction nor the information need allege that the threats were to any particular person. *Id.*

**Cases decided after 34 & 35 Vict. c. 81—Registration.**—The Home Secretary made a regulation providing that upon an application for the registration of a trade union which was already in operation, the registrar, if he had reason to believe that the applicants had not been duly authorized by such trade union to make the same, might, for the purpose of ascertaining the fact, require from the applicants such evidence as might seem to him necessary. An application was made to the registrar, dated December 28th, requiring him to register the Amalgamated Society of Carpenters and Joiners, signed by persons who stated that they were authorized to make it by resolution passed by the

executive council of the society. A second application was made, dated December 30th, by different persons, to register a society under the same title, the applicants stating that they were authorized to make it by a vote of the whole of the members of the society. The registrar required evidence from both sets of applicants in support of their applications, and being satisfied from the evidence that differences had arisen which had led to the division of the society into two sections, which were represented by the respective applicants, he refused to register the society upon either application:—Held, that, apart from any question as to the validity of the regulations made by the Home Secretary, the registrar had properly refused the applications, as he was not bound upon an application for registration to inquire into differences which existed within the society, and to alter the position of one party by granting registration upon the application of the other. *Reg. v. Registrar of Friendly Societies*, 7 L. R., Q. B. 741; 41 L. J., Q. B. 366; 27 L. T. 229.

— **Agreement—Direct Enforcement.**—By the Trade Unions Act, 1871, s. 4, it is provided that nothing in the act shall enable the court to entertain any legal proceeding instituted with the object of directly enforcing an agreement for the application of the funds of a trade union to provide benefits to its members. The plaintiffs, members of a trade union within the act, sought for an injunction to restrain other members from applying the funds in a manner contrary to an agreement to provide benefits to members:—Held, that such an injunction would not be a direct enforcement of the alleged agreement, and that the court might entertain the proceeding. *Wolfe v. Matthews*, 21 Ch. D. 194; 51 L. J., Ch. 833; 47 L. T. 158; 30 W. R. 838.

— **Central Society suing Branch for wrongfully dividing Funds.**—The central body of a society brought an action against a branch to restrain the latter from dividing certain funds in possession of the latter. Some of the rules of the society provided for benefits to members, and there were others which were in restraint of freedom of trade:—Held, that the action could not be maintained—(1) as it was brought to enforce an agreement between members of a trade union to provide benefits to members within the meaning of s. 4 of the Trade Unions Act, 1871; and (2) as the agreement could not have been enforced previously to that act. *Duke v. Littleboy*, 49 L. J., Ch. 802; 43 L. T. 216; 28 W. R. 977.

In such cases it makes no difference whether a central society sues a branch, a society sues an individual, or an individual sues a society. *Id.*

— **Claim by expelled Member to participate in Property and Benefit of Union.**—The rules of a trade union provided that the money arising from the subscriptions of its members should be applicable in various ways for their benefit. They also purported to regulate the affairs of that trade, and provided that any journeyman binding his son in a "foul shop" (being a shop in which non-union men were employed) should be fined, and not be entitled to any benefit until such fine had been paid. The plaintiff, a mem-

ber of the union, who was alleged to have broken the rule as to apprenticeship, and who, having refused to pay the fine, had been expelled from the union, brought an action against the committee and trustees of the union claiming to be entitled to participate in its benefits, and that the defendants might be restrained from excluding him from such participation:—Held, that as the action was brought to enforce an agreement between members of a trade union “to provide benefits to members,” within the meaning of the Trade Union Act, 1871, s. 4, which the court was not by that section enabled to enforce; and as, apart from the act, the union was an illegal association, the plaintiff was not entitled to any relief. *Rigby v. Connol*, 14 Ch. D. 482; 49 L. J., Ch. 328; 42 L. T. 139; 28 W. R. 650.

— **Expulsion of Member of Voluntary Association.**—The foundation of the jurisdiction of the court to prevent a member of a voluntary association from being improperly expelled is the right of property vested in such member of which he is deprived. *Id.*

### III. TRADE-MARK.

#### 1. WHAT IS, AND INFRINGEMENT OF.

**Name.**—The name of the first maker of an article may in time become a mere sign of the quality of the article, and cease to be a representation that the article is the manufacture of any particular person. *Hall v. Barrows*, 4 De G., J. & S. 150; 3 N. R. 259; 33 L. J., Ch. 204; 10 Jur., N. S. 55; 9 L. T. 561; 12 W. R. 322.

A name may become a trade denomination, and as such the property of a particular person who first gives it to a particular article of manufacture. The employment of the name by another person for the purpose of describing an imitation of that article is an invasion of the right of the original manufacturer, who is entitled to protection by injunction. *Wotherspoon v. Currie*, 5 L. R., H. L. 508; 42 L. J., Ch. 130; 27 L. T. 393.

The use for many years of two words of common use, *Newcastle Chronicle*, as the name of a newspaper, does not give the owner of the newspaper an exclusive right to the use of one of the words, *Chronicle*, so as to entitle him to restrain the defendant from publishing in the same town a newspaper having for its name the word *Chronicle*, in conjunction with another, that is to say, *Sporting Chronicle*; the appearance and contents of the two papers being dissimilar, there being no evidence of anyone having been deceived, and no apparent intention to deceive on the part of the defendant. *Coven v. Hulton*, 46 L. T. 897—C. A.

The name of a manufacturer, or a system of numbers adopted and used by him in order to designate goods of his make, may be the subject of the same protection in equity as an ordinary trade-mark. *Ainsworth v. Walsley*, 1 L. R., Eq. 518; 35 L. J., Ch. 352; 12 Jur., N. S. 205; 14 L. T. 220; 14 W. R. 363.

— **Right of Outgoing Partner to use Trade Name.**—B., an outgoing partner, claimed that by the terms of the deed of dissolution between himself and L., he was entitled to manufacture a particular article from an original recipe, the property of the late partnership, and to sell it as

“L.’s soap” prepared by B.:—Held, that he was entitled to use the old trade name of the article as his trade-mark, and to have it registered, although identical with that of the successors of the old firm. *Bembow v. Low, Low v. Bembow*, 44 L. T. 875; 29 W. R. 837.

See also **PARTNERSHIP.**

**Similarity in Name of Company.**—Where one company assumed a name somewhat similar to the name of another company, but it did not appear that the first company was likely to suffer any injury thereby, a court of equity refused to grant an injunction, leaving the plaintiffs to bring their action. *London and Provincial Law Assurance Society v. London and Provincial Joint-Stock Life Insurance Company*, 11 Jur. 938.

A company cannot acquire the right to the exclusive user of a name which is merely descriptive of the class of business carried on by it. *Colonial Life Insurance Company v. Home and Colonial Insurance Company*, 33 Beav. 548; 33 L. J., Ch. 741; 10 Jur., N. S. 967; 10 L. T. 448; 12 W. R. 783.

There is nothing in the Companies Act, 1862, to affect the right of a company registered under a particular name to an injunction restraining another company which, notwithstanding the prohibition of s. 20, against identity of names, has been registered under an identical or a similar name, from carrying on its business under that name, if it is proved that that name is calculated to deceive; the principles applicable to individuals trading under identical or similar names applying equally to companies. *Merchant Banking Company of London v. Merchants' Joint Stock Bank*, 9 Ch. D. 560; 47 L. J., Ch. 828; 26 W. R. 847.

A limited company having once obtained a registered name has the same rights and limitations as to trading under that name as an individual trading in his own name. *Id.*

The plaintiffs, the *Guardian Fire and Life Assurance Company*, were established in 1821, and carried on the business of fire and life insurance at 11, Lombard-street. A company called the *Guardian Horse and Vehicle Insurance Association (Limited)* was established in 1877, and carried on, at No. 31, Lombard-street, the business of insurance of horses and vehicles against accident until the year 1880, when the company transferred its business to the defendants, a new company incorporated in March, 1880, and called the *Guardian and General Insurance Company (Limited)*. This new company, in addition to insuring horses and vehicles and persons against accident, proposed to engage in fire insurance business:—Held, in an action by the plaintiffs to restrain the defendants from carrying on their business so as to deceive, that the plaintiffs’ and defendants’ names were so similar as to lead to confusion, and that an injunction would have been granted to restrain the defendants from carrying on business under the name of the *Guardian and General Insurance Company (Limited)* had they not given an undertaking to change their name to the *Guardian Horse, Vehicle and General Insurance Company (Limited)*. *Guardian Fire and Life Assurance Company v. Guardian and General Insurance Company*, 50 L. J., Ch. 253; 43 L. T. 791.

The plaintiff was the proprietor of an old-established library business at the West-end of

London. The defendants being the promoters of a projected company, having for a principal object the carrying on of a library business in another quarter of the West-end, proposed to adopt as the title of their undertaking the same trade name as that which the plaintiff had used for a considerable period, but with the addition of the word "Limited."—Held, that the defendants must be restrained from carrying on, in or near London, the business in question under the proposed title, or under any other title only colourably differing from the name of the plaintiff's business, and also from advertising the intended commencement thereof under such title. *Hoby v. Grosvenor Library Company*, 28 W. R. 386.

**Person assuming Name.]**—In England the assumption of a name, the patronymic of a family, by a stranger, who has never before been called by that name, is not the subject of a civil action, as by the English law there is no right of property in a person to the use of a particular name, to the extent of enabling him to prevent the assumption of his name by another. *Du Boulay v. Du Boulay*, 2 L. R., P. C. 430; 38 L. J., P. C. 35; 17 W. R. 594; 6 Moore, P. C. C., N. S. 31.

Aliter, as to the exclusive use of a name in connexion with a trade or a business, which right is recognized, and a party's assuming it, colourably or otherwise, being an invasion of another's rights, is a fraud, for which a remedy lies either at law or equity. *Id.*

**Name of Place of Origin.]**—The name of the place of origin of an article may become a trade-mark. *Radde v. Norman*, 14 L. R., Eq. 348; 41 L. J., Ch. 525; 26 L. T. 788; 20 W. R. 766.

Although where a word is chosen as a trade-mark which is in fact a geographical designation of a whole tract of country, where the raw material is grown whence a manufactured article is produced, there cannot be property in the word for all purposes, yet property in the word, as applied by way of stamp upon a particular vendible article, does exist the moment the article goes into the market so stamped, and there obtains acceptance and reputation, whereby the stamp gets currency as an indication of superior quality or of some other circumstance which renders the article so stamped acceptable to the public. *M'Andrew v. Bassett*, *infra*.

**Device on Label.]**—The plaintiffs and the defendants were bottlers of beer for export. The plaintiffs' label consisted of a bulldog's head on a black ground surrounded by a circular band on which were the words "Read Brothers, London. The Bull Dog Bottling." The defendants' label represented a rough terrier's head on a black ground surrounded by a red circular band on which were the words "Celebrated Terrier Bottling, E. Richardson." The plaintiffs' beer was well known in the colonies as the "Dog's Head" beer, and they alleged that the defendants, by exporting to certain colonies beer with the terrier's head label, led to their beer being substituted and taken for the plaintiffs' beer:—Held, that the plaintiffs were entitled to an interim injunction restraining the continuance of the terrier's head in the label on the bottles of beer exported to such colonies by the defendants. *Read v. Richardson*, 45 L. T. 54—C. A.

**Use of Word "Patent."]**—The use of the word "patent" as part of the description in a label or trade-mark of goods not protected by a patent, is not such a misrepresentation as to deprive the owner of his right to be protected against an infringement of his label where the goods have, from the usage of many years, acquired the designation, in the trade generally, of patent. *Marshall v. Ross*, 8 L. R., Eq. 651; 39 L. J., Ch. 225; 17 W. R. 1086.

**Fancy Name for New Pattern in Cloth.]**—A manufacturer who has produced an article of merchandise, e.g. a new pattern of cloth, and applied to it a particular fancy name, and sold it with a particular mark, under which name and mark it has obtained currency in the market, acquires an exclusive right to the use of such name and mark, and is entitled to restrain all other persons from using such name and mark to denote articles similar in kind and appearance, although he may have no exclusive right of manufacturing the article. *Hirst v. Denham*, 14 L. R., Eq. 542; 41 L. J., Ch. 752; 27 L. T. 56.

If the use of such name and mark, by any other person than the first inventor, has been adopted for the purpose of selling goods of an inferior quality, though of similar external appearance, so that purchasers may be misled into the belief that they are buying the goods of the first inventor, the injury to the first inventor is one for which he is entitled to compensation in damages, and relief by injunction. *Id.*

The test whether a fancy name adopted by a manufacturer as a trade-mark for certain goods has become publici juris is the question whether the use of it by other persons in connexion with the same goods is calculated to deceive the public, so as to induce them to believe that in purchasing the goods so named they are purchasing goods of the original manufacturer. Consequently, a trade-mark may have become publici juris among a certain class, as between the wholesale and retail dealers who will not be deceived by it, and yet may not have become publici juris as between the retail dealers and their ordinary customers. The misrepresentation, such, for example, as falsely calling himself a patentee, which will disentitle a person to relief in equity in respect of an infringement of his trade-mark, must be such a misrepresentation as would prevent him from recovering nominal damages in an action brought to establish his right to the trade-mark. *Ford v. Foster*, 7 L. R., Ch. 611; 41 L. J., Ch. 682; 27 L. T. 219; 20 W. R. 311, 818.

**Property in Trade-Mark.]**—Property in a trade-mark is the right to the exclusive use of some mark, name or symbol in connexion with a particular manufacture or vendible commodity. *Leather Cloth Company v. American Leather Cloth Company*, 11 H. L. Cas. 523; 35 L. J., Ch. 53; 11 Jur., N. S. 513; 12 L. T. 742; 13 W. R. 873.

An element in the right to property in a trade-mark is the fact of the article to which the stamp or mark is affixed being in the market as a vendible article, with the stamp or mark, at the time when it is imitated. *M'Andrew v. Bassett*, 4 De G., J. & S. 380; 4 N. R. 123; 33 L. J., Ch. 561; 10 Jur., N. S. 550; 10 L. T. 442; 12 W. R. 777.

There is no property in a trade-mark, but a person who has been in the habit of using a par-

ticular mark may prevent other persons from fraudulently taking advantage of the reputation which his goods have acquired, by using his mark in order to pass off their goods as his, to his injury. *Collins Company v. Brown*, 3 Kay & J. 423; 3 Jur., N. S. 929. *S. P., Boulnois v. Peake, infra.*

**No Copyright in Trade-Mark.**—There is no copyright in a trade-mark. *Farina v. Silverlock*, 6 De G., M. & G. 214; 26 L. J., Ch. 11; 2 Jur., N. S. 1008.

A manufacturer who has adopted a trade-mark, in order to designate some particular article as made by him, has a right to the assistance of a court of equity to prevent any one from so using the same, or any similar mark, as to induce purchasers to believe, contrary to the fact, that they are buying that particular article to which the mark was originally applied. *Id.*

**To what extent Trade-Mark may be Used.**—The office of a trade-mark is to denote that the article bearing it was manufactured by the owner of the trade-mark; and a man has no right to affix a trade-mark to an article not manufactured by himself, except for the purpose of shewing that the article was selected or examined or certified by himself. *Hirsch v. Jones*, 3 Ch. D. 584; 45 L. J., Ch. 364; 35 L. T. 228.

— **When Suggested by Purchaser not Manufacturer of Goods.**—H., a London cigar dealer, registered a label at Stationers' Hall, and communicated the same to a manufacturer of cigars at Havannah, who supplied H. with a particular description of cigars under that label, with the addition of the manufacturer's name and address. Afterwards, the manufacturer commenced to sell the same description of cigars under the same label through a London agent. Upon motion by H., who alleged that he had an exclusive right, in the nature of trade-mark, to the label:—Held, that the trade-mark was the manufacturer's; and in the absence of evidence of a contract binding him to supply cigars of the particular brand to no one but H., the court refused to grant an interim injunction to restrain the London agent from selling the cigars under the same label. *Id.*

**User with Knowledge that another intends to use Name.**—A tradesman may use a name, although he is aware that a neighbouring tradesman intends to use that name. A bootmaker having a shop running up Bedford-street, with the front and entrance in the Strand, wrote up over his shop the words "Civil Service Boot Supply." The Civil Service Supply Association were at that time building a large store at the other end of Bedford-street, in which when finished they opened a general shop, and they afterwards opened a boot and shoe shop in Tavistock-street, which was not far off. One of the customers of the association had gone to the shop of the bootmaker, mistaking it for that of the association. The association brought an action to restrain the bootmaker from using the words:—Held, that under the circumstances there was no intention on the part of the bootmaker to deceive, and that no rational person would have been deceived by the words so used; and action dismissed. *Civil Service Supply Association v. Dean*, 13 Ch. D. 512.

**On what Grounds Name Protected.**—The plaintiff in these cases has not any property in the particular title, but he has a right to prevent others from personating his business by using such a description as would lead customers to suppose they were trading with the plaintiff. *Boulnois v. Peake*, 13 Ch. D. 513, n.

**Title of Book.**—There may be a trade mark in a title of a book, and an action for fraud will lie against a person using the title of a book already published for the purpose of passing off such book as that of a former author. *Dicks v. Yates*, 18 Ch. D. 76; 50 L. J., Ch. 809; 44 L. T. 660—C. A.

— **True, but calculated to Deceive.**—"Hemy's Modern Tutor for the Pianoforte."—The plaintiffs were the publishers of a work entitled "Hemy's Royal Modern Tutor for the Pianoforte," a revised edition of which had been brought out in 1867, and which was well known and had an extensive sale, but was not so registered as to secure copyright. In 1874 the defendant employed Hemy to revise an old work, entitled "Jousse's Royal Standard Pianoforte Tutor," which had formerly been in high repute, but had entirely fallen into disuse. This revised work the defendant brought out under the title "Hemy's New and Revised Edition of Jousse's Royal Standard Pianoforte Tutor," the word "Hemy's," both on the outside of the book and on the title-page, being printed in much larger and more conspicuous type than any other of the words:—Held, that the plaintiffs were entitled to an injunction restraining the defendant from offering his work for sale with its present form, title-page, and cover, or any other form, title-page, or cover calculated to deceive persons into the belief that it was the plaintiff's work. *Metzler v. Wood*, 8 Ch. D. 606; 47 L. J., Ch. 625; 38 L. T. 544; 26 W. R. 577—C. A.

**"The Singer" Sewing Machines—Circulars, &c., whether likely to Deceive.**—In an action to restrain the use by the defendant of the plaintiffs' trade name, the issues were whether the name was a designation of machines of the plaintiffs' manufacture, or of machines of a particular kind of construction; whether the defendant had used the name for the purpose of appropriating the reputation acquired by machines manufactured by the plaintiff company or not; and whether the defendant had by using the name induced purchasers to believe they were buying machines manufactured by the plaintiff company. Defendant, who sold (as wholesale agent in London of a company in Berlin) to persons in the trade only, described his machines in his circulars and price list as machines manufactured on the "Singer" system, or the "Singer improved system," and by his statement of defence alleged that, as the plaintiffs' patent had long since elapsed, they were not entitled to any monopoly of the right of advertising or selling machines manufactured on what was known in the trade as the "Singer system":—Held, that the plaintiff company had no exclusive right to use the word "Singer" as applied to sewing machines, and that there was nothing in the defendant's circular, price lists, and invoices calculated to deceive and induce purchasers to believe they were buying machines manufactured by the plaintiffs. Injunction overruled. *Singer*  
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*Manufacturing Company v. Loog*, 8 App. Cas. 15; 52 L. J., Ch. 481; 48 L. T. 3; 31 W. R. 325—H. L. (E.).

**Colourable Imitation — Evidence as to, on Interlocutory Application.**]—The plaintiffs registered a trade-mark for worsted goods described as “a white selvage on each side of the piece having a red and white mottled thread interwoven the full length of the selvage between the edge of the piece and the edge of the selvage,” and deposited a specimen at the Patent Office Museum. The specimen so deposited was undyed, and the selvage was white, the warp being white cotton and the woof white mohair, and nearly in the middle of the selvage was a compound warp thread composed of a thread of white cotton and a thread of Turkey red cotton twisted together. When the goods were dyed black the cotton threads took the dye imperfectly, so that the warp threads in the selvage became grey, while the woof became black, so as to make the selvage dark grey, with a dark red mottled line running along it. The defendants sold black mohair goods with a dark grey selvage of nearly the same shade as that of the plaintiffs, with a twisted thread running along its inner edge, which thread was originally white, red, and yellow, but in the course of dyeing the white became dark grey, and the yellow a dark olive, which could hardly be distinguished. The plaintiffs sought to restrain the sale of these goods as an infringement, and moved for an injunction. There was evidence that the selvage, though not actually white, was what was known in the trade as a white selvage:—Held, by Jessel, M. R., that as the plaintiffs’ selvage was not white, and the mottled thread of the defendants was different, and in a different position from that of the plaintiffs, there was no infringement, and that an injunction must be refused. But held by the Court of Appeal that the principles according to which the court acts in preventing a man from passing off his goods as those of another are not altered by the Trade Marks Registration Act, and that the question could not be disposed of by simple inspection of the patterns without considering whether the selvage was not, according to the understanding of the trade, a white selvage, and if it was, then whether the differences in quality and position of the defendants’ mottled thread were sufficient to distinguish the defendants’ goods from those of the plaintiffs, so as to prevent purchasers from being misled, and that as there was a conflict of evidence on these points the motion must stand over till the trial, the defendants undertaking to keep an account. *Mitchell v. Henry*, 15 Ch. D. 181; 43 L. T. 186—C. A.

**Name calculated to Deceive — “Angostura Bitters.”**]—An article, the secret making of which was known only to one maker, had acquired a trade name. An injunction was granted, restraining the application of that name to a different article of the same class, so as to induce the belief that it was the plaintiff’s article. *Siebert v. Findlater*, 7 Ch. D. 801; 47 L. J., Ch. 233; 38 L. T. 349; 26 W. R. 459.

The plaintiff manufactured a fluid which he sold under the name of “Aromatic Bitters,” and it was described by this name upon the wrappers of the bottles in which it was sold. It became, however, generally known in the market by

the name of “Angostura Bitters,” it having been originally manufactured at the town of Angostura in Venezuela. The name of this town was afterwards, by a decree of the state, changed to Ciudad Bolivar. After this change had taken place, the defendant began to manufacture in the same town a different fluid, which he at first sold under the name of “Aromatic Bitters,” but, having been restrained in an English colony from using that name, he adopted the name “Angostura Bitters,” and placed it upon the wrappers of his bottles, also registering his wrapper at Stationers’ Hall. His wrappers were very similar to those of the plaintiff, but they contained a statement that the fluid was prepared by the defendant. After this the plaintiff adopted the name “Angostura Bitters,” and placed it upon his wrappers, and he brought an action against the defendant, claiming an injunction to restrain him from imitating the plaintiff’s wrappers, and from using the name “Angostura Bitters.” At the time when the action was brought the plaintiff had ceased to carry on his manufacture at Ciudad Bolivar:—Held, that the defendant had been guilty of an attempt to deceive, and that, though he could not be restrained from using the name “Angostura Bitters,” in case he should ever discover the plaintiff’s secret, and manufacture the same fluid, yet he must be restrained from using the name so as to deceive the public into the belief that his fluid was the plaintiff’s. *Id.*

It was alleged by the defendant that the plaintiff was disentitled to relief, because, at the time of the trial he was using wrappers which contained a misrepresentation. The plaintiff did not begin to use those wrappers until after the action had been brought:—Held, that there was in fact no misrepresentation in the wrappers in question, but that, even if there had been, a misrepresentation not made till after the commencement of the action would not have affected the plaintiff’s title to relief. *Id.*

**Different, but calculated to Deceive — “Glenfield Starch.”**]—When a trade-mark is not actually copied, the existence of a fraudulent intention is a necessary element in the consideration of a case of this description. The party complained of must be proved to have done the act with the fraudulent design of passing off his own goods as those of the complainant. It is not necessary, however, to shew an exact resemblance between the original and the counterfeit—it is sufficient if there is such a resemblance as will mislead an unwary purchaser. *Wotherpoon v. Currie*, 5 L. R., H. L. 508; 42 L. J., Ch. 130; 27 L. T. 393.

In order to constitute a ground for interference by a court of equity to protect a manufacturer against the use, by another person, of the particular name of his manufactured article, it is not necessary that there should be a mala mens towards the first purchaser of the article thus imitatively designated. The fault of the imitator is, that the first purchaser may be enabled, through this unwarranted designation, to retail a simulated article at a lower price than would be demanded for the original article, and so the original manufacturer may be injured. *Id.*

W. had been for many years a manufacturer of starch at a small hamlet in Scotland, called Glenfield, where there was a stream of water particularly suited for use in the manufacture. Under the name of “Glenfield Starch” his goods

had acquired a great reputation. In 1868, C. set up starch works at Glenfield, and sold starch in packets labelled "Currie & Co., starch manufacturers, Glenfield." In colour these labels resembled those of W., but this colour was used by most starch manufacturers. C.'s agent represented his starch as "Glenfield Starch," and he thereby obtained an increased sale for the article:—Held, that W. was entitled to an injunction to restrain C. from using the word "Glenfield" on his labels, and from representing his starch as Glenfield starch. *Id.*

**Infringement—Colour cannot be Considered.]**

—In deciding the question of piracy of a trade-mark, the colour of the marks cannot be taken into account, and the only test is a comparison of the uncoloured diagrams. *Nuthall v. Vining*, 28 W. R. 330—C. A.

**Precautions to be taken whilst using Name describing a Secret Process of Manufacture.]**

—Joseph Thorley for many years manufactured and sold extensively an article called "Thorley's Food for Cattle," made according to a recipe communicated to him and not known to the public, and down to his death he was the only person who made it. His executors continued the business. Shortly after his death a company was formed by other persons under the name of J. W. Thorley's Cattle Food Company, in which J. W. Thorley, a brother of Joseph Thorley, took a 1s. share. J. W. Thorley had been employed by Joseph Thorley, and knew the secret of the manufacture, and was employed by the company to conduct it. The company sold the same article under the name of "Thorley's Food for Cattle:—"—Held, that the company were not at liberty to use the name "Thorley's Food for Cattle" unless they took such precautions as would prevent purchasers from supposing that the article sold by them was manufactured at the original establishment of Joseph Thorley. *Massam v. Thorley's Cattle Food Company*, 14 Ch. D. 748; 42 L. T. 851; 28 W. R. 966—C. A.

**Rival Trader cannot use a Ticket likely to cause Wares to be called by Name already Known.]**—If the goods of a trader have acquired in the market a name derived from a part of the trade-mark which he affixes to them, a rival trader is not entitled to use a ticket which is likely to lead to the application of the same name to his goods, even though that name is not the only name by which the goods of the first trader have been known, or though it has been always used in conjunction with some other words. *Johnston v. Orr-Ewing*, 7 App. Cas. 219; 51 L. J., Ch. 797; 46 L. T. 216; 30 W. R. 417—H. L. (K.). Varying *S. C.*, 13 Ch. D. 434; 41 L. T. 67; 28 W. R. 330, sub nom. *Orr-Ewing v. Johnston*—C. A.

**Quack advertising Medicine as sanctioned by Eminent Physician.]**

—A court of equity refused to interfere to prevent a vendor of a quack medicine from advertising such medicine in such a manner as to induce the public to believe it was sanctioned by the plaintiff, a physician of eminence, and sold by the defendant as his agent; the injury being, in the opinion of the court, one rather of defamation than of injury to property; and it being incumbent on the plain-

tiff to establish at law the defamatory character of the advertisements before he applied for the interference of the court. *Clark v. Freeman*, 17 L. J., Ch. 142; 12 Jur. 149.

**Right of Assignee to use Trade-Mark.]**

—Where a trade-mark contains an emblem, with such a collocation of words as amounts to an advertisement of the character and quality of the goods, and contains statements which, though true as regards the original adopter of the trade-mark, are calculated to deceive the public when used by his assignee, the assignee is not to be entitled to protection in the use of such trade-mark. *Leather Cloth Company v. American Leather Cloth Company*, 11 H. L. Cas. 523; 35 L. J., Ch. 53; 11 Jur., N. S. 513; 12 L. T. 742; 13 W. R. 873.

Although a trader may have a property in a trade-mark, giving him a right to exclude all others from using it, if his goods derive their increased value from the personal skill or ability of the adopter of the trade-mark, he cannot give any other person the right to affix his name or mark upon their goods, for the effect thereof would be to give them the right to practise a fraud upon the public. *Id.*

**Introduction of New Article under known Name—Right to Name.]**

—Where A. introduces into the market an article which, though previously known to exist, is new as an article of commerce, and has acquired a reputation therefrom in the market by a name not merely descriptive of the article, B. will not be permitted to sell a similar article under the same name; and this, although the peculiarity of the name has long been in common use as applied to goods of a different kind. *Braham v. Bustard*, 1 Hem. & M. 447; 9 L. T. 199; 11 W. R. 1061.

**Using Words constituting Trade-Mark with Additional Words—"The Guinea Coal Company"]**

—"The Pall Mall Guinea Coal Company."—The plaintiffs were in August, 1869, and had for some time previously been carrying on business under the style of the Guinea Coal Company, their offices being at No. 22, Pall Mall. In the early part of 1869, the defendant, who had formerly managed their business, established a business on his own account under the style of the Pall Mall Guinea Coal Company; his offices being first at Beaufort-buildings, whence in August, 1869, he removed to No. 46, Pall Mall. The defendant solicited orders principally by circular, sending circulars to many of the plaintiffs' customers, and succeeded in obtaining orders, which the customers afterwards said they had intended for the plaintiffs:—Held, that they were entitled to restrain him from using the name "The Pall Mall Guinea Coal Company" in Pall Mall. *Lee v. Huley*, 5 L. R., Ch. 155; 39 L. J., Ch. 284; 22 L. T. 258; 18 W. R. 242.

The bill was filed on the 24th November, 1869:—Held, that there was no laches, inasmuch as the plaintiffs must wait until sufficient proof of the injury they had received was collected. *Id.*

—"Reading Sauce"—"The Original Reading Sauce."—"Reading Sauce" was first invented and introduced to the public by one

James Cocks, but subsequently many manufacturers by unrestrained usage acquired the right to call their articles the "Reading Sauce:"—Held, that the description "The Original Reading Sauce" applied only to that made by James Cocks, and those claiming under him, and that they had a right to restrain other parties from using that designation without shewing that any purchaser was actually deceived. *Cocks v. Chandler*, 11 L. R., Eq. 446; 40 L. J., Ch. 575; 24 L. T. 379; 19 W. R. 593.

— "Eureka Shirts"—"Ford's Eureka Shirts."—The user by a dealer or a manufacturer in connexion with an article of manufacture, of a single word, being a material part of a particular title to which as a trade-mark another manufacturer has a right in connexion with the same article, may be an infringement of the trade-mark. *Ford v. Foster*, 7 L. R., Ch. 611; 41 L. J., Ch. 682; 27 L. T. 219; 20 W. R. 311, 318.

Since a misrepresentation, not forming a part of the trade-mark itself, although used in connexion with the trade-mark, and with the article to which the trade-mark applies, would be no answer to an action of a party to establish his title at law, neither will such a misrepresentation disentitle him to a relief in equity. *Ib.*

Ford, a shirt manufacturer, gave the name Eureka to a particular shape of shirt invented by him, and stamped all such shirts with the words "Ford's Eureka Shirts," and with a statement that such words were his trade-mark. He advertised the shirts, falsely calling himself the patentee of them, and he falsely described himself on his billheads, &c., as patentee of the shirts. Shirts of the particular shape came to be commonly known in the trade as Eureka. Certain wholesale shirt manufacturers made shirts of the same shape, and stamped them in the same part of the shirts as "Eureka Shirts:"—Held, that Ford was entitled to an injunction to restrain the wholesale manufacturers from using the word "Eureka" as applied to shirts not of Ford's manufacture, except that they were to be at liberty to advertise their shirts as "Eureka" in their trade lists. But having regard to his misrepresentations, the account against them was confined to the time from the filing the bill. *Ib.*

— "Apollinaris Water"—"London Apollinaris Water."—A company under a grant from the owners, acquired the exclusive right of importing and selling in Great Britain the mineral water produced by a natural spring, called "Apollinaris," at Ahrweiler, in Prussia, which had for some years been known and sold in the English market under the name of "Apollinaris Water," and advertised and sold the same as "Apollinaris Water." Subsequently, the defendant made and sold an artificial mineral water, being the chemical equivalent of the natural water, under the name and description of "London Apollinaris Water, possessing all the properties of the natural water:"—Held, that the company was entitled to an interim injunction to restrain the use of the words "London Apollinaris Water," or of any other name of which the word "Apollinaris" so formed part as to be calculated to mislead the public. *Apollinaris Company v. Norrish*, 33 L. T. 242.

— "Post Office Directory"—"The Post Office Bradford Directory."—The plaintiff was the proprietor of a directory entitled the "Post Office Directory of the West Riding of Yorkshire," and he had for several years published post office directories of other counties. The defendants published a directory for the town of Bradford, which is within the West Riding, entitled "The Post Office Bradford Directory," but it was not similar to the plaintiff's directory in price or appearance. There being no evidence to satisfy the court that the words "Post-office," in connexion with directories, had become necessarily connected in the minds of the public with the name of Kelly:—Held, that the plaintiff had no right to the exclusive use of the words "Post Office Directory." *Kelly v. Byles*, 13 Ch. D. 682; 49 L. J., Ch. 181; 42 L. T. 338; 28 W. R. 585—C. A.

— "Radstock Collieries"—"The Radstock Colliery Proprietors and Factors."—B. was the owner of and worked all the collieries in the parish of Radstock in Somersetshire, and owned all the coal in that parish, with a small exception. She carried on the business of working the collieries and selling the coal in her own name, adding to it on her waggons and billheads the words "Radstock Collieries." The defendants, from 1868, carried on at Radstock the business of coal merchants as the "Radstock Coal Company," having depôts at various railway stations in the south and west of England, at which they sold different kinds of coal. They became in 1876 the lessees of and worked a colliery outside the parish of Radstock, but in a district or basin in which coal was raised similar to that raised within the parish; coal raised in the district, but outside the parish, being known in the market as Radstock coal. In 1873 the defendants began to sell coals at G. in Surrey, by means of a local agent, and in 1875 they bought the goodwill of a retail coal dealer named C. at G., who had become bankrupt. They then advertised themselves in the Surrey newspapers, and otherwise in the neighbourhood, as "The Radstock Colliery Proprietors and Factors, Coal and Coke Merchants (late C. & Co.)," and offered to supply coal of every description direct from the collieries:—Held, that the defendants were not entitled to use the name "The Radstock Colliery Proprietors," unless and until they should acquire a colliery within the parish of Radstock, or to use any style implying that their coal came from the parish of Radstock, unless and until they should become authorized to sell coals raised from a colliery within that parish. *Braham v. Beacham*, 7 Ch. D. 848; 47 L. J., Ch. 348; 38 L. T. 640; 26 W. R. 654.

Held, also, that the acts of the defendants being calculated to induce purchasers to believe that the defendants were selling the plaintiff's coal, it was not necessary for the plaintiff to prove any instance of actual deception, or any actual damage. *Ib.*

After Expiration of Patent—Filter.]—C., a patentee of a filter, after the expiration of his patent, sold filters marked "C.'s patent filter." W., a rival manufacturer, sold filters made according to the expired patent, marked "C.'s patent filter, manufactured by W.:"—Held, to be no infringement of C.'s trade-mark. *Cheavin v. Walker*, 5 Ch. D. 850; 46 L. J., Ch. 686; 37 L. T. 300—C. A.

Held, also, that the label was not a trade-mark, but only a description of the article sold. *Ib.*

— **New Substance—"Linoleum."**—Where the inventor of a new substance has given to it a name, and, having taken out a patent for his invention, has, during the continuance of the patent, alone made and sold the substance by that name, he is nevertheless not entitled to the exclusive use of that name after the expiration of the patent. *Linoleum Manufacturing Company v. Nairn*, 9 Ch. D. 834; 47 L. J., Ch. 430; 38 L. T. 44; 26 W. R. 463.

A company, under patents, made floor-cloth of a new substance marked with the word "linoleum":—Held, that "linoleum" being the only name of the new substance, the company, at the expiration of the patents, was not entitled to the exclusive use of that word. *Ib.*

**Maker using Name of another Maker—"Singer's Sewing Machines."**—A manufacturer using, to describe articles made by him, the name of another manufacturer, must justify the use thus made of a name not his own, by shewing that such name is understood by the trade and the public to denote a patented or other article of a particular type, structure or arrangement of parts, and not a mark or sign of a particular manufacturer. It makes no difference in this principle that such name does not appear upon the articles sold, but only in advertisements or price lists; nor that the articles bear the selling manufacturers' own trade-mark and labels, stating them to be manufactured by him, and that statements to the same effect appear in the advertisements and price lists. *Singer Manufacturing Company v. Wilson*, 3 App. Cas. 376; 47 L. J., Ch. 481; 38 L. T. 303; 26 W. R. 664—H. L.

When the first producer of an article of manufacture has identified with it a particular name, whether his own name or a name which is a word descriptive of the article itself, such name becomes a trade-mark, and cannot be adopted and employed by another person in advertising a similar article. *Ib.*

Such adoption and employment will be restrained by injunction. *Ib.*

Singer made a sewing-machine, to which he gave his own name; it became known by that name. He afterwards took other persons into partnership with him for the sale of the machines known as the Singer sewing-machines, and which were made in great variety, and with many modifications, but though not protected by patents, were established in public favour under that name. W. sold sewing-machines, and advertised, among others, Singer sewing-machines, but used his own trade-mark on the machines, and expressly stated in his advertisements that the machines sold by him were manufactured by himself:—Held, that this, nevertheless, constituted a wrongful invasion of the property of Singer, and that W. might be restrained by injunction. *Ib.*

Fraud is not necessary to be averred or proved in order to obtain protection for a trade-mark. *Ib.*

**Cannot exist in Gross—"Licensed Victuallers' Relish."**—The inventor of a sauce gave it the name of the Licensed Victuallers' Relish, and designed a trade-mark for labels on the bottles containing it, and employed his son

to sell it. He permitted his son to describe himself in his circulars and invoices as the sole proprietor of the sauce. The son became bankrupt and his trustee sold his interest in the sauce and its trade-mark to the plaintiff, who sought to restrain the inventor from infringing the trade-mark. The plaintiff did not know the defendant's receipt, but made a sauce which the witnesses deposed to be undistinguishable from the defendant's:—Held, that a trade-mark could not exist in gross, and that as the plaintiff did not know the receipt for the original article, he could not have a right to affix the trade-mark to a sham article for the purpose of imposing on the public. *Cotton v. Gillard*, 44 L. J., Ch. 90.

**Imitation—Delay—"Estcourt's Hop Supplement."**—The plaintiff, who was a manufacturer of an article used as a substitute for hops called "Estcourt's Hop Supplement," employed his son C. as his agent, who thereupon undertook not to disclose the secret of the compound, or at any time be connected with the sale of any article which could be used as a substitute for hops. During the time of his agency C. discovered the secret of the manufacture. He shortly afterwards terminated his agency, and began to sell a practically similar compound, which he called "Hop Essence." A bill was filed against him by the plaintiff to restrain him from continuing the sale, when he submitted and signed an agreement binding himself to observe the former agreement and do the plaintiff no injury in his trade. Subsequently, C. associated himself with Taylor, and circulars were issued advertising the sale of "Estcourt's Hop Essence; sole proprietor, James Taylor." A company was formed for the purpose of selling the "Hop Essence" under the name of "Estcourt's Hop Essence." Although the plaintiff ascertained in January, 1874, that a circular had been issued by Taylor, headed "Estcourt's Hop Essence Company," he did not apply to the court until the following August:—Held, that the plaintiff was precluded by delay from any right to relief. *Estcourt v. Estcourt Hop Essence Company*, 10 L. R., Ch. 276; 44 L. J., Ch. 223; 32 L. T. 80; 23 W. R. 313.

**More Description of Quality—"Nourishing London Stout."**—An adjective, merely describing the quality of a manufactured article, will not be protected by the court as a trade-mark. *Raggett v. Findlater*, 17 L. R., Eq. 29; 43 L. J., Ch. 64; 29 L. T. 448; 22 W. R. 53.

Therefore, when the plaintiff, who dealt in malt liquors in London, sold stout, which was subjected by him to a particular treatment, under the name of Nourishing London Stout:—Held, that he was not entitled to an injunction restraining the defendant from selling stout under the name of Nourishing Stout. *Ib.*

## 2. ACTIONS TO RESTRAIN INFRINGEMENT OF.

**Jurisdiction of Court.**—The jurisdiction of the Court of Chancery in the protection given to trade-marks rests upon property, and the court interferes by injunction, because that is the only mode by which property of this description can be effectually protected. *Leather Cloth Company v. American Leather Cloth Company*, 3 N. R. 264; 4 De G., J. & S. 227; 33 L. J., Ch. 199; 10 Jur., N. S. 81

558; 12 W. R. 289.—Per Westbury, C. Affirmed in *H. L. ante*, col. 68.

The jurisdiction of the Court of Chancery, in the protection of trade-marks, rests upon property, and fraud in the defendant is not necessary for the exercise of the jurisdiction. *Hall v. Barrows*, 4 De G., J. & S. 150; 3 N. R. 259; 33 L. J., Ch. 204; 10 Jur., N. S. 55; 9 L. T. 561; 12 W. R. 322.

Where a name, once affixed to a manufactured article, continues to be used after the death of the manufacturer, the name in time becomes a mere trade-mark or sign of quality, and ceases to denote, or to be current as indicating, that any particular person was the maker, and would, therefore, be protected. *Ib.*

#### Action at Common Law for Infringement.]—

If A., a manufacturer, uses the mark of B. for the purpose of giving to articles manufactured by A. the appearance of being of the manufacture of B., B. may maintain an action against A., although A.'s articles are not inferior in quality to B.'s, and although it is not shewn that B. has sustained actual damage. *Blofeld v. Payne*, 1 N. & M. 353; 4 B. & Ad. 410.

Where a plaintiff marked his goods, "Sykes' Patent," to shew that they were his own manufacture, and the defendant copied the mark on his goods to shew that they were the plaintiff's manufacture, and sold them, so marked, as and for his manufacture:—Held, that an action would lie for the injury, though neither party had a valid patent, and both were named "Sykes." *Sykes v. Sykes*, 5 D. & R. 292; 3 B. & C. 541.

An action may be maintained by a manufacturer against another manufacturer who marks his goods with the known and accustomed mark of the plaintiff, where the mark used by the defendant resembles the plaintiff's mark so closely as to be calculated to deceive, and as to induce persons to believe the defendant's goods to be of the plaintiff's manufacture, and the defendant uses such mark with intent to deceive and sells the goods so marked as and for goods of the plaintiff's manufacture, and proof of special damage is not necessary. *Rodgers v. Nowill*, 5 C. B. 109; 17 L. J., C. P. 52; 11 Jur. 1039.

In such cases it is enough, at least after verdict, to allege generally that by means of the premises the plaintiff was deprived of the sale of divers large quantities of goods, and lost the profits that would otherwise have accrued to him therefrom. *Ib.*

A declaration alleged that the plaintiffs prepared, vended and sold for profit, medicines called "Morison's Universal Medicines," which they sold in boxes wrapped up in paper, having those words printed thereon; that the defendant, intending to injure the plaintiffs in the sale of the medicines, and to deprive them of profits, deceitfully and fraudulently prepared and made medicines in imitation of the medicines so prepared by the plaintiffs, and wrapped up the same in paper, having "Morison's Universal Medicines" printed thereon, in order to denote that such medicine was the genuine medicine prepared, vended and sold by the plaintiffs; and that the defendant deceitfully and fraudulently vended and sold for his own lucre and gain the last-mentioned boxes of the articles, represented and termed by him to be medicine, by the name and description of "Morison's Universal Medicines," which had

been prepared, vended and sold by the plaintiffs; whereas, in truth, the plaintiffs had never been the preparers, vendors or sellers thereof:—Held, that the declaration disclosed a good cause of action. *Morison v. Salmon*, 2 Scott, N. R. 449; 2 M. & G. 385.

— Jury to say if Imitation calculated to Mislead.]—Action for wrongfully, knowingly and fraudulently stamping bars of iron, made by the defendants, with a stamp resembling one used by the plaintiff, which the defendants knew and intended to be in imitation of the plaintiff's, and which was used by the defendants in order to denote that their iron was made by the plaintiff; and for knowingly selling the iron so marked as and for the plaintiff's iron. A correspondence between the parties was given in evidence, in which the plaintiff charged the defendants with using the mark, as being a fraud upon him. The defendants, in answer, asserted that they had used the mark for many years continuously. This was not so in fact; but it was shewn that the mark had been adopted by them in the execution of orders received from foreign correspondents:—Held, that it was properly left to the jury to say, first, whether the defendants' mark bore such a close resemblance to the plaintiff's as was calculated to deceive the unwary and injure the sale of the plaintiff's goods; and secondly, whether the defendants used the mark with the intention of supplanting the plaintiff, or whether it was done in the ordinary course of business in execution of orders. *Craushay v. Thompson*, 4 M. & G. 357; 5 Scott, N. R. 562; 11 L. J., C. P. 301.

Principles upon which Injunction will be Granted.]—The principles explained on which interlocutory injunctions to restrain infringements of trade-marks and names should be granted. *Read v. Richardson*, 45 L. T. 54—C. A.

The right to ask for the interference of the court in respect of a trade-mark is founded, first, on the fact that the plaintiff has acquired the right of using the mark properly: that is to say, that it has not been copied, and does not involve any false representation; secondly, that the article so marked is actually a vendible article in the market; and, thirdly, that the defendant, knowing that to be so, has imitated the mark for the purpose of passing in the market other articles of a similar description. *McAndrew v. Bassett*, 4 De G., J. & S. 380; 4 N. R. 123; 33 L. J., Ch. 561; 10 Jur., N. S. 550; 10 L. T. 442; 12 W. R. 777.

The essential ingredients for constituting an infringement of a right to a trade-mark are—(1) that the mark has been applied by the plaintiffs properly, i.e., that they have not copied any other person's mark, and that the mark does not involve any false representation; (2) that the article so marked is actually a vendible article in the market; (3) that the defendants, knowing that to be so, have imitated the mark for the purpose of passing in the market other articles of a similar description. *Ib.*

The court will grant a perpetual injunction against the use by one tradesman of the trade-marks of another, although such marks have been so used in ignorance of their being any person's property, and under the belief that they were merely technical terms. *Millington v. Fox*, 3 Mylne & C. 338.

A perpetual injunction will be granted to restrain a trader from filling and sending out to the public articles of his own manufacture in bottles, casks, or other receptacles having indelibly impressed thereon the name of another trader who manufactures an article of a like description, even although such trader places on such bottles, casks, or receptacles a label having his own name thereon. *Rose v. Loftus*, 47 L. J., Ch. 576; 38 L. T. 409.

An injunction will be granted on an interlocutory motion to restrain the use or imitation of the name of a place, used as a trade-mark, if the plaintiff proves *prima facie* that such name in the market has come to mean his article obtained from such place. *Radde v. Norman*, 14 L. R., Eq. 348; 41 L. J., Ch. 525; 26 L. T. 788; 20 W. R. 766.

It is not necessary, in order to give a right to an injunction, that a specific trade-mark should be infringed; it is sufficient that the court should be satisfied that there was on the whole a fraudulent intention of palming off the defendant's goods as those of the plaintiff; but in such a case it is essential that the imitation should be necessarily calculated to deceive. *Woolam v. Ratcliff*, 1 Hem. & M. 259.

To entitle a trader to relief against an illegal use of his trade-mark, it is not necessary that the imitation should be so close as to deceive persons seeing the two marks side by side; but the degree of resemblance must be such, that ordinary purchasers proceeding with ordinary caution are likely to be misled. *Seiro v. Procezzende*, 1 L. R., Ch. 192; 12 Jur., N. S. 215; 14 L. T. 314; 14 W. R. 357.

The actual physical resemblance of the two marks is not the sole question for the court, for if the plaintiff's goods have, from his trade-mark, become known in the market by a particular name, the adoption by the defendant of a mark or name which will cause his goods to bear the same name in the market, is as much a violation of the plaintiff's rights as the actual copy of his mark. *Ib.*

Although the defendant may have some title to the use of a name or mark, he will not be justified in adopting it, if the probable effect of his so doing is to lead the public to suppose, that in purchasing his goods they are purchasing those of the plaintiff. *Ib.* See also *Mitchell v. Henry*, *ante*, col. 71.

**Using Patented Lockplates to Inferior Rifles.]**—The plaintiff was a gunmaker, who manufactured rifles, purchasing some of the different parts from various makers, and putting them together to form a complete rifle, which after having been viewed and approved by him, was stamped with his name and trade-mark on the lockplate as a guarantee that it had been examined and approved by him. He also fitted to the rifles levers manufactured by himself, for which he had taken out a patent, and these levers were also marked with his name. The plaintiff's rifles so marked with his name had a great reputation. He supplied rifles so marked and guaranteed by him to the government, and when they became unsuitable for government purposes, they were taken to pieces and some of the parts mutilated and sold as old stores. The defendant bought some of these old stores, including levers and lockplates with the plaintiff's name and trade-mark upon them, and fitted them

to old rifle barrels, which had been cut down to the size of carbine barrels, and were not suited to the action which formed part of the rifles as passed and guaranteed by the plaintiff. At this time his patent for the levers had expired:—Held, that the defendant might be restrained from making and selling such firearms. *Richards v. Williamson*, 30 L. T. 746; 22 W. R. 765.

#### **Plaintiff must seek Remedy with Clean Hands.]**

—Where the owner of a trade-mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not in his trade-mark or in the business connected with it, be himself guilty of any false or misleading representation. *Leather Cloth Company v. American Leather Cloth Company*, 4 De G., J. & S. 137; 3 N. R. 264; 33 L. J., Ch. 199; 10 Jur., N. S. 81; 9 L. T. 558; 12 W. R. 289. Affirmed in H. L., *ante*, col. 68.

It is not a rule, either of morality or equity, that a person is not answerable for a falsehood in his trade-mark, because it may be so gross and palpable as that no one is likely to be deceived by it. *Ib.*

#### **When Injunction Granted—Effect of Delay.]**

No trader has a right to use a trade-mark so nearly resembling that of another trader as to be calculated to mislead incautious purchasers. The use of such a trade-mark may be restrained by injunction, although no purchaser has actually been misled; for the very life of a trade-mark depends upon the promptitude with which it is vindicated. *Johnston v. Orr-Ewing*, 7 App. Cas. 219; 51 L. J., Ch. 797; 46 L. T. 216; 30 W. R. 417—H. L. (E.). Varying *S. C.*, 13 Ch. D. 434; 41 L. T. 67; 28 W. R. 330, sub nom. *Orr-Ewing v. Johnston*—C. A.

The court will not refuse to grant an injunction to restrain the infringement of a trade-mark, on the mere ground that a great number of years have elapsed since it was first infringed by the defendant. But when many years have elapsed before the plaintiff takes steps to restrain the infringement, the court will require clearer proof than it would otherwise have done that the trade-mark was adopted by the defendant originally with fraudulent intent, and will require the plaintiff to prove that he has been actually injured by the infringement. *Rodgers v. Rodgers*, 31 L. T. 285; 22 W. R. 887—L. J.J.

Infringement took place early in 1869. The bill was filed on the 24th November:—Held, that there was no laches, inasmuch as the plaintiffs must wait until sufficient proof of the injury they had received was collected. *Lec v. Halsey*, 5 L. R., Ch. 155; 39 L. J., Ch. 284; 22 L. T. 251; 18 W. R. 242.

**Name—Injunction to restrain Company from applying for Registration.]**—An injunction was granted to restrain a proposed new company from applying to the registrar of joint-stock companies for registration under a name which, in the opinion of the court, was calculated to deceive, although the company had not begun to carry on its business. It is not necessary, to entitle the plaintiffs to an injunction, that the defendants should have a fraudulent intent. They are responsible for the reasonable consequences of their actions. The statutory right to register must not be exercised in such way

as to violate some other right or offend against the law. *Hendriks v. Montagu*, 17 Ch. D. 638; 50 L. J., Ch. 456; 44 L. T. 879; 30 W. R. 168.—C. A. Reversing 50 L. J., Ch. 257; 44 L. T. 89.

**Power of Excluding Goods from particular Markets.]**—Your lordships are not called upon to decide whether a ticket, which was a rightful and bona fide trade-mark of a trader using it, could be excluded by injunction from particular markets (though unimpeachable everywhere else) merely because in those markets it might be liable to be called by a name which the mark of another trader had already acquired there. To that proposition I should not myself, as at present advised, be prepared to assent. *Johnston v. Orr-Ewing*, *supra*—Per Blackburn (Lord).

**Imitation made Innocently.]**—A declaration alleged that the plaintiff agreed with the defendant to manufacture for him fire-bricks, to be marked as he should direct; that he directed that they should be marked with R.'s name, he well knowing that R. manufactured fire-bricks marked with that name, to indicate that they were manufactured by him; that the plaintiff, ignorant of the manufacture of fire-bricks by R., and that marking fire-bricks according to the direction of the defendant would be wrongful, manufactured fire-bricks for the defendant, and marked them with the name of R.; that R. filed a bill in chancery for an injunction and account against the plaintiff, and that the plaintiff, in order to compromise the suit, paid R. a sum of money:—Held, that the declaration disclosed two grounds of action; first, because the plaintiff was liable to the injunction, although he used the trade-mark of R. innocently, and secondly, because the natural consequence of the defendant's act was to involve the plaintiff in a chancery suit, even if he had the means of defending it, by reason of his having used the trade-mark of R. innocently. *Dixon or Dickson v. Fawcus*, 3 El. & El. 537; 30 L. J., Q. B. 137; 7 Jur., N. S. 895; 3 L. T. 693; 9 W. R. 414. See also *Millington v. Fox*, *ante*, col. 80.

If A. has acquired property in a trade-mark, which is afterwards adopted and used by B., in ignorance of A.'s right, A. is entitled to an injunction, but not to an account of profits or to compensation, except in respect of any user, by B. after he became aware of the prior ownership. *Edelston v. Edelston*, 1 De G., J & S. 185; 9 Jur., N. S. 479; 7 L. T. 768; 11 W. R. 328.

At law the proper remedy is by an action for deceit, and proof of fraud on the part of the defendant is of the essence of that action; but the court will act on the principle of protecting property alone, and it is not therefore necessary for the party applying for the injunction to prove fraud, or that the credit of the plaintiff was injured by the sale of an inferior article. *Id.*

**Alleged Custom that Shipping Agent has Right to.]**—An arrangement was made between W., R., and G., that W., a manufacturer, should consign cotton cloths to G. in Rangoon, paying him an inclusive commission. The goods were to be exported through R., who acted as shipping agent, and was to see to the goods being finished and packed, for which services he received a commission from G. A particular mark was by arrangement between the three parties

adopted for the goods, of which some portions and the general arrangement were new, and other portions consisted of R.'s name and arms, and of a symbol which had formerly been used by G. After goods had been regularly exported for some years under this arrangement, W. ceased to send goods through R., and commenced exporting them to Rangoon through the agency of F., continuing to use the old mark, except that the name and arms of F. were substituted for those of R. At the same time R. commenced exporting other goods under the old mark. Cross actions were commenced for injunctions, in which R. set up an alleged custom in Manchester, giving the right to the trade-marks to the shipping agent:—Held, upon evidence, that no such custom existed. *Robinson v. Finlay*, *Ward v. Robinson*, 9 Ch. D. 487; 39 L. T. 398; 27 W. R. 294.—C. A.

Held, also, that neither R. nor W. had any exclusive right to the use of the mark, and that both actions must be dismissed. *Id.*

**Compromise of Prosecution for User.]**—A prosecution instituted by the defendants against the plaintiff under the Merchandise Marks Act, 1862 (25 & 26 Vict. c. 88), was by agreement compromised, and the plaintiff gave the defendants a written apology, requesting them not further to continue proceedings against him, and authorizing them to make such use of the apology as they might think necessary. Upon demurrer to a bill to restrain the excessive publication of this apology:—Held, that the court had no jurisdiction to interfere. *Fisher v. Apollinaris Company*, 10 L. R., Ch. 297; 44 L. J., Ch. 500; 32 L. T. 628; 23 W. R. 460.

**Importation and Exportation.]**—A firm of forwarding agents in London received from correspondents abroad several boxes of cigars bearing forged brands, which were to be delivered to several persons in England. On application by the makers whose brand had been forged, the agents gave information as to the consignors, and offered either to send back the cigars or to erase the brands:—Held, on a bill for injunction by the makers whose brands were forged, that the fact of the agents being merely carriers was no defence to the suit; but that as they had given sufficient information, and offered to erase the brands, they were not to pay costs. *Upmann v. Elkan*, 7 L. R., Ch. 130; 41 L. J., Ch. 246; 25 L. T. 813; 20 W. R. 131.

An action will lie against shipowners who have shipped goods bearing counterfeits of the plaintiff's trade-marks for discovery of the names of the consignor from whom the goods were received. *Orr v. Diaper*, 4 Ch. D. 92; 46 L. J., Ch. 41; 35 L. T. 468; 25 W. R. 23.

**—Restraining Exportation of Goods calculated to deceive.]**—Where a trader has a right to a trade-mark on goods sold in a foreign market, an injunction will be granted to restrain the export of goods under another trade-mark which may deceive the ultimate purchasers, although it would not deceive Englishmen or the dealers in the foreign market. *Johnston v. Orr-Ewing*, 7 App. Cas. 219; 51 L. J., Ch. 797; 46 L. T. 216; 30 W. R. 417—H. L. (E.). Varying *S. C.*, 13 Ch. 434; 41 L. T. 67; 28 W. R. 330, sub nom. *Orr-Ewing v. Johnston*—C. A.

Injunction against the use of trade-mark by

defendant was made general, although the plaintiff had never used his trade-mark except in the Indian market. *Ib.*

**Evidence—Of Fraud.]**—Where a trader has innocently adopted a trade-mark which is calculated to deceive by its similarity to another person's trade-mark, his continuing to use it after complaint has been made is strong evidence of fraud. *Orr-Ewing v. Johnston, supra.*

**— Of Deception.]**—In a trade-mark case, the fact that one person has been deceived is not conclusive as to the misrepresentation. *Civil Service Supply Association v. Dean*, 13 Ch. D. 512.

In suits to restrain the fraudulent use of a trader's name, or of a trade-mark, it is not necessary to give proof of actual deception; it is enough if the acts of the defendant are calculated to deceive. *Hookham v. Pottage*, 26 L. T. 755; 20 W. R. 720. Affirmed on appeal, 8 L. R., Ch. 91; 27 L. T. 595; 21 W. R. 47.

The court does not interfere to prevent the infringement of a trade mark, unless, in the first place, it has evidence that the public has been actually deceived, or is from inspection satisfied that there is either an intention to deceive or a probability of deception. *Cope v. Evans*, 18 L. R., Eq. 138; 30 L. T. 292; 22 W. R. 450.

**— Of Skilled Witnesses.]**—Evidence of skilled witnesses, that in their opinion the public is likely to be deceived by the similarity of two trade marks, is not of itself sufficient evidence of infringement. *Ib.*

**— As to Discovery.]**—In a suit to restrain the infringement of trade-marks, the defendants refused to disclose the names of their customers, the places to which they had consigned their goods, and the prices which had been paid for them. They also, while producing their books, which confessedly shewed orders for goods bearing some of the trade-marks claimed by the plaintiffs, sealed up such portions of entries therein as they swore contained orders for the impression of devices other than those claimed by the plaintiffs:—Held, that the defendants need not disclose the names of their customers or the prices of the goods, as such disclosure could not be material to the plaintiffs, and might injure the defendants in their business, but that they must make the rest of the disclosure which they objected to, and that where one of a line of trade-marks had been disclosed in the order-book, the whole line must be disclosed. *Carver v. Pinto Leite*, 7 L. R., Ch. 90; 41 L. J., Ch. 92; 25 L. T. 722; 20 W. R. 134.

**Registration not a Condition precedent.]**—A Dutch company moved to restrain a commission agent from infringing its trade-mark, and from shipping goods abroad with its trade-mark stamped on them. The writ in the action was issued after the time for registration of trade-marks limited by the Trade Marks Registration Amendment Act, 1876, had expired, and before the Trade Marks Registration Extension Act, 1877, had come into force. The company had not before the motion for injunction registered its trade-mark:—Held, that registration was not

a condition precedent to the company's right to an injunction. *Twentsche Stoom Bleekery Gooij and John Harper v. Ellinger*, 26 W. R. 70.

**Costs in Actions for Infringement.]**—A wine merchant brought an action against another wine merchant to restrain him from pirating his trade-mark by branding it on the corks of his bottles. Some of the wine in bottles with the pirated trade-mark was in the warehouse of certain wharfingers who were made defendants to the action. In their defence they disclaimed all interest in the matter in dispute, and submitted to act as the court might direct upon having their charges and costs paid. At the trial they contended at the bar that the plaintiff, if his right was established, ought not to touch the bottles for the purpose of removing the branded corks without first paying their charges:—Held, that the wharfingers had done nothing to disentitle them to their costs of the action; and that if the plaintiff had any lien on the wine for his costs it must be postponed to the wharfingers' lien for their charges. *Moet v. Pickering*, 8 Ch. D. 372; 47 L. J., Ch. 527; 38 L. T. 799; 26 W. R. 637—C. A. Reversing 6 Ch. D. 770. See *Upmann v. Elkan*, *ante*, col. 84.

**— Innocent Consignee — User.]**—The defendant, who was a china manufacturer, purchased abroad for his own private use a large number of cigars which were consigned to him at the docks here in cases bearing a spurious brand, purporting to be that of the plaintiffs, who were cigar manufacturers. The defendant was not aware that the brand was spurious, nor, except from seeing it on the invoice, that any such brand was in use. Immediately upon the plaintiffs issuing their writ and serving the defendant with notice of motion for an injunction to restrain him from selling the cigars, the defendant stated that he had no intention of selling the cigars, and offered all the relief asked for by the writ, and afterwards at the motion agreed to an undertaking in the terms of the writ, the question of costs being reserved:—Held, that the defendant must pay all the costs of the action. *Upmann v. Forester*, 24 Ch. D. 231; 52 L. J., Ch. 946; 49 L. T. 122; 32 W. R. 28; 47 J. P. 807.

**— Where both Parties deceive Public.]**—The court will give no costs on either side in a case where both parties are engaged in the manufacture of an article intended to be used to deceive and mislead the public. *Estcourt v. Estcourt Hop Essence Company*, 10 L. R., Ch. 276; 44 L. J., Ch. 223; 32 L. T. 80; 23 W. R. 313.

### 3. ASSIGNMENT AND USER BY FIRMS AND REPRESENTATIVES.

**Assignability.]**—A corporate trade-mark granted by the Cutlers' Company at Sheffield to a person not free of the company, is, so far as the special acts governing the company are concerned, assignable. *Bury v. Bedford*, 4 De G., J. & S. 352; 4 N. R. 180; 33 L. J., Ch. 465; 10 Jur., N. S. 503; 10 L. T. 470; 12 W. R. 726.

The question, how far by the general law a trade-mark is assignable, depends greatly upon the nature of the mark and the mode in which it has been used. *Id.*

**Right of Assignee to use Trade Mark.]—**

Where a trade-mark contains an emblem with such a collocation of words as amounts to an advertisement of the character and quality of the goods, and contains statements which, though true as regards the original adopter of the trade-mark, are calculated to deceive the public when used by his assignee, the assignee is not to be entitled to protection in the use of such trade-mark. *Leather Cloth Company v. American Leather Cloth Company*, 11 H. L. Cas. 523; 35 L. J., Ch. 53; 11 Jur., N. S. 513; 12 L. T. 742; 13 W. R. 873.

**Discovery of Trade Secret.]—**When a man has learnt a trade secret from his employer, and practised it after the employer's death, selling the article under the old name, he will not acquire such a right to the exclusive use of the name as a trade-mark as will be protected in a court of equity. *Hovenden v. Lloyd*, 18 W. R. 1132.

Any person who by fair means has gained the knowledge of a trade secret, may, after the death of the original inventor, make and sell the article under the name of the original inventor, provided such person does nothing to induce the public to believe that the article sold by him is made by the successor of the original inventor. *James v. James*, 13 L. R., Eq. 421; 41 L. J., Ch. 353; 26 L. T. 568; 20 W. R. 434.

A member of the family of R. J., the original inventor of a secret preparation, having by fair means become possessed of the original receipt, made and sold the article by the name given to it by the original inventor, under the signature of R. J., his own name being R. R. J.:—Held, that he was not entitled, as against the successor of the original inventor, to sell the article under the signature of R. J. singly, or to represent that his was the only genuine preparation. *Id.* Practically overruled in *Massam v. Thorley's Cattle Food Company*, 14 Ch. D. 748; 42 L. T. 851; 28 W. R. 966.

**Person of same Name.]—**Any person who has become acquainted with the process of manufacturing an article which is in general secret is entitled to manufacture it, and if the name of the first manufacturer has become attached to the article, any person afterwards manufacturing is entitled to describe it by the name of such original manufacturer, and if he happens to be of the same name as the original manufacturer, he may use his name in describing his business, or allow it to be used by a company formed by him for the purpose of carrying on the business, notwithstanding that the representatives of the original manufacturer continue to carry on the old manufacture under the old name. *Massam v. Thorley's Cattle Food Company*, 6 Ch. D. 574; 46 L. J., Ch. 707; 36 L. T. 848. But see *S. C.* in *C. A.*, 14 Ch. D. 748; 42 L. T. 851; 28 W. R. 966.

**Son Carrying on Business after his Father's Death.]—**Where a person is selling an article in his own name, fraud must be shewn to constitute

a case for restraining him from so doing, on the ground that the name is one on which another has long been selling a similar article. *Burgess v. Burgess*, 3 De G., M. & G. 896; 22 L. J., Ch. 675; 17 Jur. 292.

Therefore, where a father had for many years exclusively sold a sauce under the title of "Burgess's" sauce, a court of equity would not restrain his son from selling a similar article under that name, no fraud being proved. *Id.*

The plaintiff's father prepared and sold a medicine called "Dr. J.'s Yellow Ointment," for which no patent had been obtained. The plaintiff, after his father's death, continued to sell the same. The defendant sold a medicine under the same name and mark:—Held, that no action could be maintained against him by the plaintiff. *Singleton v. Bolton*, 3 Dougl. 293.

**Mortgagee—User of Name.]—**The mortgagee of stock-in-trade and goodwill, and of the right to use a name, never having used the name and not intending to use the name, cannot obtain an injunction to restrain persons claiming under the mortgagor from using the name. *Beazley v. Soares*, 22 Ch. D. 660; 52 L. J., Ch. 201; 31 W. R. 887.

**On Sale of Business.]—**In substance there is no distinction between the sale of a business and goodwill by a trader himself, and a sale by his assignees in bankruptcy. *Hudson v. Osborne*, 39 L. J., Ch. 79; 21 L. T. 386.

Therefore, on sale of a business by a trader's assignees in bankruptcy, the trader has no right, upon setting up a fresh business after his discharge, to use the trade-marks of his old business, or in any other way to represent himself as carrying on the identical business which was sold, although he has a right to set up again in business of the same kind next door to his old place of business. *Id.*

In such a case it is no objection to the purchaser's coming for the assistance of the court, that he has continued to use the name of the old business which he found there. *Id.*

Although the fact that a man has sold the goodwill of a business does not prevent him from setting up again immediately in the same trade, the court will nevertheless restrain him from sending special solicitations to the customers of the old house asking them to deal with him at his new place of business, and it will not justify his conduct that he is not in any way holding himself out as continuing to carry on the old business. *Labouchere v. Dawson*, 13 L. R., Eq. 322; 41 L. J., Ch. 427; 25 L. T. 894; 20 W. R. 309.

**On Dissolution of Partnership.]—**On a dissolution of partnership the whole of the stock-in-trade was purchased at a valuation by one of the partners, but no assignment was made of the goodwill of the business:—Held, that the outgoing partner was entitled to an injunction to restrain the use of his name in the style of the firm. *Scott v. Howland*, 25 L. T. 391; 20 W. R. 508.

When in the judgment of the court certain initial letters, surmounted by a crown, had, although originally representing the names of certain partners, become and were a trade-mark; that is, a brand which had reputation and currency

in the market as a well-known sign of quality :—Held, that as such the trade-mark was a valuable property of a partnership constituted by successors to the original partners, but not having the same initials, as an addition to their works, and might be properly sold with the works, and therefore properly included as a distinct subject of value in the valuation to the surviving partner. *Hall v. Barrows*, 4 De G., J. & S. 150; 8 N. R. 259; 33 L. J., Ch. 204; 10 Jur., N. S. 55; 9 L. T. 561; 12 W. R. 322.

A trader, who has been a manager or a partner in a firm of established reputation, has a right, on setting up an independent business, to make known to the public that he has been with that firm, but he must take care not to do so in a way calculated to lead the public to believe that he is carrying on the business of the old firm, or is in any way connected with it. *Hookham v. Pottage*, 8 L. R., Ch. 91; 27 L. T. 595; 21 W. R. 47. Affirming 26 L. T. 755; 20 W. R. 720.

An old established tailor took his foreman into partnership, and the business was carried on under the name of H. & P. The partnership was afterwards dissolved by a decree of the court, in which it was provided that the business of the partnership should belong to the master. The master accordingly kept up the shop under the name of H. & Co. Subsequently the foreman set up a shop only a few doors from the master's shop, and painted over the door the words "P., from H. & P. :"—Held, that, having regard to the manner in which the names were painted up, the foreman had done that which was calculated to lead the public to suppose that he was still connected with the old firm, and that the master was entitled to an injunction. *Id.*

H. Bollmann Condry and Mitchell carried on business together under the style of "Bollmann Condry & Co.," manufacturing and selling a disinfectant, known as Condry's Fluid. After the dissolution of the partnership H. Bollmann Condry set up a business for the same purpose, under the name "H. Bollmann Condry," and Mitchell afterwards set up a similar business under the name of "The Condry's Fluid Company." H. Bollmann Condry sought to restrain Mitchell from using the name of Condry in connexion with the article he sold as Condry's Fluid :—Held, that both the partners had an equal right to the use of the trade name of "Condry's Fluid ;" and that Condry's contention failed because he had not shewn fraud on the part of Mitchell such as to mislead the public into the belief that the article he sold was in reality manufactured by Condry. *Condry v. Mitchell*, 37 L. T. 766; 26 W. R. 269—C. A. Affirming 37 L. T. 268.

A partnership was carried on for fourteen years between B. and G. under the style of B. & Co. On the dissolution, the assets were divided, but no arrangement was come to as to the style :—Held, that the name or style of B. & Co. formed an undivided asset of the partnership which belonged to the partners in common after the dissolution, and that B. was not entitled to prevent G. using the style of B. & Co. in his business. *Banks v. Gibson*, 34 Beav. 566; 34 L. J., Ch. 591.

Two ladies, V. C. and M. W., carried on business in London in partnership under the firm of C. & W. V. C. married L. After this a decree for dissolution was made, and it was ordered that "the said partnership business, and the leasehold premises, trade fixtures; stock-in-

trade, goodwill, and business," should be sold as a going concern to M. W. or to L. and wife, whichever should be the highest bidder. M. W. became the purchaser of all the property directed to be sold. L. and wife, who carried on business in Paris under the firm of C. et Cie., commenced an action to restrain M. W. from carrying on the business under the style or firm of C. & W. :—Held, reversing *Hall, V.-C.*, that L. and wife had no right to restrain M. W. from using the name of the old firm. *Levy v. Walker*, 10 Ch. D. 436; 48 L. J., Ch. 273; 39 L. T. 654; 27 W. R. 370—C. A.

B., an outgoing partner, claimed that by the terms of the deed of dissolution between himself and L., he was entitled to manufacture a particular article from an original recipe, the property of the late partnership, and to sell it as "L.'s soap" prepared by B. :—Held, that he was entitled to use the old trade name of the article as his trade-mark, and to have it registered, although identical with that of the successors of the old firm. *Benbow v. Low*, *Low v. Benbow*, 44 L. T. 875; 29 W. R. 837.

#### 4. REGISTRATION.

**Regulation of Commissioners of Patents forbidding Words in Foreign Characters.**—A regulation issued by the commissioners of patents forbidding the registration as a trade-mark of any word in foreign characters :—Held to be ultra vires and void. *Rotherham's Trade Mark, In re*, 11 Ch. D. 250; 40 L. T. 387; 27 W. R. 503. Affirmed, 14 Ch. D. 585; 43 L. T. 1.

**Committee of Experts under the Trade Marks Registration Act.**—The committee of experts at Manchester, appointed under the Trade Marks Registration Acts, is not a judicial tribunal. It is appointed to consider and give an opinion on technical matters peculiarly within the knowledge of its members. But a person dissatisfied with the opinion of the committee may move the Chancery Division to consider it; and that court is not bound to adopt the opinion as conclusive, even though the court may have no reason to think that the committee has proceeded on a wrong principle, or has acted in an improper manner. Great weight is properly to be attributed to the opinion of the committee, but it proceeds ex parte, and the court may direct a full consideration of the matter before the registrar himself. Observations on the manner in which the court is to exercise this supervising authority. *Orr-Ewing v. Registrar of Trade-Marks*, 4 App. Cas. 479; 48 L. J., Ch. 707; 41 L. T. 239; 28 W. R. 17.

**Functions of.**—The decisions of the Manchester Committee of Experts, although entitled to weight on consideration, are not final, and must, if necessary, be reviewed by the court. *Dugdale's Trade Marks, In re*, 49 L. J., Ch. 303; 28 W. R. 436.

It is not the function of the committee of experts to decide questions of title between rival applicants for registration of identical or substantially identical marks, but to consider whether a mark offered for registration contains the particulars necessary to constitute a registrable trade-mark. *Ede, Ex parte*, 28 W. R. 435.

**House of Lords varying Original Order of Court.]**—Where, under the provisions of the Trade Marks Registration Acts, the registrar cannot proceed with the registration of certain marks without the leave of the court, and the original order of the court is varied by the House of Lords, it is necessary that the order of the House of Lords should be made an order of the Chancery Division of the High Court. *Orr-Ewing's Trade-Marks, In re*, 28 W. R. 412.

**Not a Condition precedent to Action.]**—A Dutch company moved to restrain a commission agent from infringing its trade-mark, and from shipping goods abroad with its trade-mark stamped on them. The writ in the action was issued after the time for registration of trade-marks limited by the Trade Marks Registration Amendment Act, 1876, had expired, and before the Trade Marks Registration Extension Act, 1877, had come into force. The company had not before the motion for injunction registered its trade-mark:—Held, that registration was not a condition precedent to the company's right to an injunction. *Twentsche Stoom Bleekery Goor and John Harper v. Ellinger*, 26 W. R. 70.

**What may be Registered.]**—A word or distinctive combination of letters is not "a distinctive device, mark, or heading" within the meaning of the Trade Marks Registration Act, 1875 (38 & 39 Vict. c. 91), s. 10, and cannot be registered as a trade-mark under the act. *Stephens, Ex parte*, 3 Ch. D. 659; 46 L. J., Ch. 46; 24 W. R. 963.

The applicants, who were iron manufacturers, had for a long period before the passing of the Trade Marks Registration Act, 1875, been in the habit of using as trade-marks the letters B B H, which were the initials of the firm, and also the same marks coupled with symbols or words common to the trade, denoting the quality of the iron:—Held, that every mark, or combination of marks or words used as a trade-mark before the passing of the Trade Marks Registration Act, 1875, which would have entitled the proprietor to maintain a suit for infringement against any person imitating it, may be registered as a trade-mark under the act, and a trader is entitled to register a series of such marks which only differ from each other by combining in different modes a mark common to all of them and peculiar to the trader, with words merely indicative of the quality of the goods marked or symbols common to the trade, a note being in such a case entered in the register specifying the portions of the combination as to which no exclusive right is claimed. *Barrows, In re*, 5 Ch. D. 353; 46 L. J., Ch. 450; 36 L. T. 291; 25 W. R. 407.

Held, on appeal, that the proper mode of registration was to register the trade-mark B B H to be used either alone or with any device or words signifying the quality of the iron. *S. C.*, 5 Ch. D. 353; 46 L. J., Ch. 725; 36 L. T. 780; 25 W. R. 564—C. A.

A single letter which has been used by a firm as a trade-mark before the passing of the Trade Marks Registration Act, 1875, is not a trade-mark within the definition contained in s. 10, and cannot be registered thereunder. *Mitchell, In re*, 7 Ch. D. 36; 46 L. J., Ch. 876; 26 W. R. 326.

Messrs. B., being manufacturers of cotton sewing thread, applied for the registration of a considerable number of labels and devices used by them for various periods in their trade, and many of which were registered in foreign countries. The Manchester Committee of Experts divided the marks into two classes. The registrar refused registration to all the marks in the second class, while, of the marks in the first class, he admitted six to complete separate registration, but refused to register more than one of the remainder as representative of the marks in the first class not separately registered. He further offered a certificate of such representative registration. Upon motion for rectification of the register by registration of all the marks:—Held, that as to the marks placed in the second class, the case was governed by *Orr-Ewing, In re* (in C. A., but see now in H. L., *supra*), and that the court would not review the decision of the committee; and that, as to the marks in respect of which representative registration was offered, the case was governed by *Barrows, In re* (*supra*), and separate registration of each mark could not be granted. *Brook, In re*, 26 W. R. 791.

In the registration of cotton marks, colouring and surrounding lines, edges, and borders, will be disregarded. *Id.*

Seemle, user before the act of a word as part of a trade-mark, is not sufficient to render the word registerable as a mark. *Rose v. Evans*, 48 L. J., Ch. 618.

Whether the scientific name of a particular tree, limetta, is a distinctive word capable of registration as an old mark in respect of lime-juice, a product of the tree, or preparation of lime juice—*quære. Id.*

A coat-of-arms in a medallion formed an important part of the trade-mark of A. This medallion, with the same coat-of-arms, being proposed for registration by B, as his trade-mark, A, sought to restrain the registration. The court refused relief, on the ground that the simple medallion could not be mistaken for A's compound trade-mark. *Farina, In re*, 26 W. R. 261.

**Series of Combinations of Letters.]**—Where a manufacturer places on his goods a series of combinations of letters as trade-marks, each of which serves to indicate to purchasers (1) that the goods are made by the persons using the mark, and (2) the quality of the goods as compared with the goods respectively bearing the other marks in the series, the marks, being exclusively used by the manufacturer, are valid trade-marks and may be registered, notwithstanding that they are indicative of the quality of the goods to which they are applied. *Ransome v. Graham*, 51 L. J., Ch. 897; 47 L. T. 218.

**Old Marks.]**—Old marks, whether cutlers' marks or not, may be registered up to the number of three by different persons in respect of the same goods, even if identical; but this does not apply to new marks, and if the same old mark has been used in respect of the same goods by more than three different persons, it is a common mark. *Jelley, Son and Jones's Application, In re*, 51 L. J., Ch. 639, n.; 46 L. T. 381, n.

The question whether registration should be

allowed or not ought to depend upon this: whether or not the party opposing registration would, independently of the registration acts, have been entitled to restrain the use by the applicant of the mark which he proposes to register. *Farina, In re*, 26 W. R. 261.

— **Old Mark registered for Part of a Class—Registration of New Mark for other Goods in same Class—Limited Registration.**—A new mark may be registered for some of the goods in a class, even though an old mark of a similar kind has been already registered for other goods in the same class, provided that the goods and the trades of the proprietors are sufficiently distinct for no confusion to take place. *Braby's Application, In re, Shropshire Iron Company's Trade-marks, In re*, 21 Ch. D. 223; 51 L. J., Ch. 637; 46 L. T. 380; 30 W. R. 675.

A new mark may be registered in respect of some of the goods in a class though a similar old mark is already registered for other goods in the same class, if the goods are distinct. *Jelley, Son & Jones's Application, In re, supra*.

— **Similarity—Mode of Determining.**—The proper mode of determining questions as to the similarity of trade marks is to compare them as actually used, e.g., impressed on metal goods. *Id.*

— **Marks Registered Abroad—Decision of Foreign Tribunal.**—F. had long used and was the registered proprietor of three trade-marks for eau-de-cologne, consisting of (1) a label with his signature and a seal in the corner, and used for pasting on the side of the bottle; (2) a circular stamp on a strip of paper, used for pasting on the cork and down the neck of the bottle; (3) a label containing a picture of F.'s business premises, "Gegenüber dem Julichs Platz," Cologne, with medals and letterpress, and used for pasting on boxes in which bottles were packed. B., also a manufacturer of eau-de-cologne, applied for registration in his name of three marks similarly composed, and to be respectively used in the same manner. On motion by F. under s. 6 of the above act, for an injunction to restrain B. from proceeding with his application:—Held (1), that the marks were so nearly resembling F.'s marks as to be calculated to deceive, and that the fact that the picture of the house on B.'s label described as "Gegenüber dem Elogius Platz," Cologne, was said to be a correct view of the house in a street leading out of the Elogius Platz, did not prevent B.'s label being a colourable imitation of F.'s registered label, having regard to the similarity in the letterpress and the position of the medals; (2) that the allegation by B. that he had used his marks for several years without interference, did not *prima facie* entitle him to registration, since it was not proved that the original proprietor was aware of such user; and (3) that the injunction must go as to all three marks, notwithstanding that the German Court of Appeal, reversing the judgment of the Court of First Instance, had permitted registration of the label with the picture of B.'s business premises, the question being purely one of fact, as to which the foreign decisions were to be regarded merely as opposite verdicts by special juries. *Farina, In re*, 27 W. R. 456.

— **Registration of new Trade Marks resembling old, by Leave of the Court.**—There being registered under the Trade Marks Registration Act, 1875, four trade-marks including an anchor in respect of goods in class 42 of the first schedule to the rules made under the act, the court refused to give leave to register a new trade-mark including an anchor in respect of goods in the same class, but different in character from those goods for which the four trade-marks had been registered. *Hargreaves' Trade-Mark, In re*, 11 Ch. D. 669; 27 W. R. 450.

— **Allowed if Dissimilar to other Marks on Register.**—The court will under r. 19 direct a trade-mark to be registered, if satisfied of its dissimilarity to marks actually registered, without inquiring whether it be distinguishable from other marks the subject of pending applications to register. *Dugdale's Trade-Mark, In re*, 49 L. J., Ch. 303; 28 W. R. 436.

— **"Distinctiveness," how Estimated.**—Semble, when a trade-mark is claimed consisting of a device associated with certain words, those words may be regarded in estimating the distinctiveness of the mark. *Id.*

— **Prima facie Right to Name—Onus probandi—"Family Salve."**—The plaintiffs had, for fifteen years and upwards, manufactured and sold a medicine under the name of "Reinhardt's Celebrated Family Salve," and in the year 1876 they registered the words "Family Salve" as their trade-mark in connexion with such medicine, under the Trade Marks Registration Acts. The defendant, in 1868, registered at Stationers' Hall a similar preparation under the title of "Spalding's Universal Family Salve," and he had since manufactured and sold the salve under that name. Both salves were sold in packets encased in wrappers bearing the above titles in full, but the wrappers were so folded that until the packets were opened the words "Family Salve" alone were visible. In an action by the plaintiffs for an injunction:—Held, that the words "Family Salve" were both a "distinctive heading" and also "special and distinctive words used before the passing of the act," within s. 10 of the Trade Marks Registration Act, 1875; that the plaintiffs having by the registration acquired a *prima facie* right to the exclusive use of the two words "Family Salve," the onus lay on the defendant to displace that right; and that the defendant having failed to discharge that onus, an injunction must be granted. *Reinhardt v. Spalding*, 49 L. J., Ch. 57; 28 W. R. 300.

— **Signature with descriptive Words.**—Where M. applied to register as a trade-mark his signature in combination with the descriptive words "Filtre Rapide," he was allowed to register his signature with the above words added, under s. 10 of the Trade-Marks Act, 1875, but was compelled to pay the costs of the registrar, who was the only other person appearing on the motion. *Maignen's Application, In re*, 28 W. R. 759.

— **Similar Trade-Mark—Colour not considered.**—W. & Co. proposed to register as a trade-mark for ale a triangle with a double outline, inscribing within the double outline the words "Beccles Brewery, Established 1830," the inner

triangle having within it a conspicuous figure of a church. B. & Co., whose trade-mark for pale ale was a plain triangle, which in use was coloured red, applied to prevent the registration of the proposed trade-mark as being so similar to theirs as to be calculated to deceive:—Held, by James and Brett, L.J.J. (dissentiente Cotton, L. J.), that as W. & Co. would be at liberty to print their trade-mark in whatever colour they pleased, and if printed on a red ground it would be so similar to that of B. & Co. that a purchaser might be misled, the registration ought not to be allowed. *Worthington's Trade-Mark, In re*, 14 Ch. D. 8; 49 L. J., Ch. 646; 42 L. T. 563; 28 W. R. 747—C. A.

— **Rule not applying to Cotton Goods.**—R. applied for registration of a cotton trade-mark, which was coloured, being a gold mohur. It had been placed in the first class by the committee of experts, and had been duly deposited for exhibition, and advertised in the official paper under the Trade-Marks Registration Act and rules, and the additional rules with respect to cotton goods. D. was the proprietor of a cotton trade-mark, which was a silver rupee, and he opposed the registration of R.'s mark:—Held, that R.'s mark was not calculated to deceive, for in such cases the mark which is protected is the registered mark, which has been deposited, and of which the representation can be seen at the places mentioned in the advertisement. *Robinson's Trade-Mark, In re*, 29 W. R. 31.

**Restricted Mode of User—Undertaking—Note upon Register.**—W. applied for the registration of an old trade mark for goods comprised in classes 11, 12 and 13, having used the mark in connexion with the goods comprised in those classes in a particular manner. His application was opposed by a firm who had for many years used, and had obtained registration of, a similar mark, which they used in a different manner from that in which W. used his mark, but upon the same classes of goods:—Held, that registration should be granted to W. on his undertaking (to be noted on the register) not to use his mark in the manner in which the opposing firm used their mark, nor otherwise than in the manner in which he had previously used it. *Whiteley's Trade-Mark, In re*, 43 L. T. 627, n.; 29 W. R. 235, n.

Sykes & Company, of Edgeley, a firm of calico-bleachers, having applied for registration as cotton marks of two marks long used by them, the committee of experts placed the marks in the second class, as not being trade-marks within the meaning of the act. The marks consisted of (1) a shield in outline, containing the figure of a swan and the letters "S. & Co., E.;" it also contained three other letters, subject to variation, being indicative of the date of packing, and the hand employed to pack each particular parcel of calico; (2) a shield in outline, with the letters "R. S. E.," indicative of the former title of the firm, and varying letters as in the other mark. Bleachers' marks are used in a particular mode, being stamped within the fold of the calico before the parcel is stitched up. The committee considered the marks were not trade marks within the act, on the ground that the letters were not quality marks; swans are common marks in the trade, and borders must be disregarded. On application to the court:—

Held, that registration of both marks ought to be proceeded with, and that with the registration there should be entered upon the register a note of an undertaking by the applicants not to use the marks otherwise than in the limited mode in which they had formerly applied them. *Whiteley, In re (supra)*, followed. *Sykes' Trade-Marks, In re*, 43 L. T. 626; 29 W. R. 235.

**Practice—Opposed Application for Registration of Trade-Mark—Directions as to Manner of Hearing.**—The defendants in an action for infringement of trade-mark having applied for the registration of the trade-mark, which they had been restrained by injunction from using, an order was made that the manner in which the matter should be brought before the court should be by motion by the applicants to proceed with the registration, with liberty to either party to use the evidence in the action for infringement, and with further provisions as to evidence. *Johnston's Trade-Mark, In re*, 43 L. T. 672.

**Opposition to Registration—Practice as to determining Mode of Trial.**—Where an application is made for registration of a trade-mark, and such application is opposed by the proprietors of a registered trade-mark, and the case stands for the determination of the court, under the Trade-Marks Rules, 1876. r. 16, the proper course is for the applicant to apply in chambers for directions as to the mode of trial, and not for the opponent to move to restrain the applicant from registering his mark. *Simpson's Trade-Mark, In re*, 15 Ch. D. 525; 42 L. T. 675; 28 W. R. 760.

— **Costs of Applicant.**—Where an application to register a trade-mark is unsuccessful, the applicant may be ordered to pay the costs of persons opposing the application from the time when, under the Trade Marks Registration Rules, r. 16, the matter is deemed to stand for the determination of the court, but cannot be ordered to pay any costs incurred before that time. *Brandreth, In re*, 9 Ch. D. 618; 47 L. J., Ch. 816; 27 W. R. 281.

**Cancelling of Registration—Lapse of Five Years—Registration of Mark not authorised to be Registered.**—P. registered "braided fixed stars" as a trade-mark for matches. After the expiration of five years another manufacturer applied to cancel the registration, on the ground that the words could not be registered as a trade-mark, for that "fixed stars" was a name well known in the trade for a particular description of matches before P. used the alleged trade-mark, and that the words "braided fixed stars" were only a proper description of a kind of matches made by P. under a patent which had recently expired, and which matches were at the time of the registration well known in the trade by that name, and differed from the "fixed stars" formerly known by having a braided stem, which was the subject of the patent:—Held, by Chitty, J., that even if the 3rd section of the Trade Marks Registration Act, 1875, did not make the lapse of five years conclusive evidence that the alleged trade-mark was a proper trade-mark, which, semble, it did, it at all events excluded evidence to shew that words which *prima facie* appeared to be fancy words and proper to constitute a trade-mark

were not capable of constituting one. His lordship therefore declined to hear evidence on the subject, and refused the application. But held, on appeal, that a mark which is not authorized to be registered as a trade-mark does not acquire the character of a trade-mark by being on the register for five years, and may be removed from the register though that period has elapsed, and that evidence ought therefore to have been admitted which went to shew that at the time of the registration the words "braided fixed stars" were merely descriptive of a kind of matches well known in the trade. *Palmer's Application, In re*, 21 Ch. D. 47; 51 L. J., Ch. 673; 46 L. T. 787; 46 J. P. 772—C. A.

Whether a person sued for using a name which has been five years on the register as a trade-mark can defend himself on the ground that it is not a trade-mark, *quære*. *Id.*

**Special and Distinctive Words used as a Trade-Mark before the Trade Marks Act.]—**P. in 1876 registered "braided fixed stars" as a trade-mark for matches, alleging that he had used it as a trade-mark before the passing of the act. He also at the same time registered a label enveloping the boxes in which his matches were sold, which contained the words "braided fixed stars" in two places so as to be conspicuous on each side of the boxes, but also contained a number of other words. It was shewn that at the time when P. introduced the term "braided fixed stars" the term "fixed stars" was known in the trade as denoting a particular class of fuses, and that he had just bought a patent for enveloping the stems of fuses with wire by means of a braiding machine. This patent expired in August, 1881. It appeared from the evidence that P. had not before the act used "braided fixed stars" separately as a trade-mark or otherwise than as a part of the above-mentioned label. In October, 1881, an application was made by a rival trader, to expunge the registration:—Held, that the registration must be expunged, for that to entitle P. to register these words as a trade-mark he must before the act have used them as such alone, and not merely in conjunction with other words:—Held, further, that if they had been so used alone they ought not to have been registered, for that they were only words properly descriptive of the patented article, and that P. had no exclusive right to their use after the patent had expired. *Palmer's, J. B., Trade-Mark, In re*, 24 Ch. D. 504; 32 W. R. 306—C. A.

**Rectification of Register—Costs.]—**If a person registers a trade-mark to which he was not entitled, although he does so with a bona fide belief that he is entitled to it, and after due advertisement in the Trade Marks Journal, and although no opposition is made to the registration, he may have to pay the costs of a motion to rectify the register by removing the mark. *Hyde, In re*, 7 Ch. D. 724; 38 L. T. 777; 26 W. R. 625.

On an application under s. 5 of the Trade Marks Registration Act, 1875 (38 & 39 Vict. c. 91), to remove from the register a trade-mark of H. & Co., who had registered it as an old mark after advertisement in the Trade Marks Journal, claiming forty-one years' user, it appeared that for the greater part of that time the mark had been a common mark, and for about

six years had been so to the knowledge of H. & Co., and that the applicants, who had long used the same trade-mark, were not aware of the advertisement, and had not opposed the registration:—Held, that the trade-mark must be ordered to be removed from the register; that there had been no laches on the part of the applicants, and that the respondents must pay the costs. *Id.*

**Who is a Person aggrieved by Registration.]—**When a mere word not used as a trade-mark before the Trade Marks Registration Act, is put on the register, any dealer who has used the word in his trade in connexion with or as descriptive of an article in which he deals, is a person aggrieved by the registration within the meaning of s. 5 of the Registration Act, 1875. *Rose v. Evans*, 48 L. J., Ch. 618.

A person engaged only in trade abroad, and not alleging any intention to carry on trade in this country in connexion with the class of goods for which a trade-mark has been registered, is not a "person aggrieved" within the meaning of s. 5 of the Trade Marks Act, 1875, so as to be entitled to apply under that section for rectification of the register upon the ground that the registered proprietor has obtained registration in fraud of the true owner of the trade-mark. *Riviere's Trade Mark, In re*, 49 L. T. 506; 32 W. R. 390—C. A.

The patentee of a washing-machine having registered the words "The Home Washer" as a trade-mark under the Trade Marks Registration Act, 1875, in respect of goods in class 6, which includes washing-machines, afterwards granted an exclusive licence of his patent at a royalty. The patent expired in February, 1882, and the patentee not having for a period of over eighteen months been in any way engaged in business connected with the machine, brought an action for an injunction against the former licensees to restrain them from using the trade-mark:—Held, that the former owners of the exclusive licence were persons aggrieved within r. 33, and that upon their application the mark must be removed from the register of trade-marks. *Italph's Trade-Mark, In re*, 25 Ch. D. 194; 53 L. J., Ch. 138; 49 L. T. 504; 32 W. R. 168.

**Proceedings on Refusal to Register.]—**An application to the court by a person aggrieved by the refusal of the registrar to enter his name upon the register as the proprietor of a trade-mark under 38 & 39 Vict. c. 91, s. 5, r. 43, may be by way of motion that the register may be rectified by entering his name as such proprietor, two clear days' notice of motion being given to the registrar. *Stephens, Ex parte*, 24 W. R. 819.

By the Trade Marks Registration Act, 1875, the registrar acts under the direction of the commissioners of patents. By their direction the registrar refused to allow an advertisement in which the word "registered" was part of the proposed trade-mark to appear in the official journal. The trade-mark had in fact been registered under 25 & 26 Vict. c. 68. On a summons by the applicant:—Held, that the court could not order his name to be inserted on the register, there not having been the necessary advertisement; and that it could not interfere with the direction of the commissioners to the registrar. *Meikle, In re*, 46 L. J., Ch. 17; 24 W. R. 1067.

— **Trade-Mark belonging to Firm registered in Name of one Partner.**—Certain trade-marks belonging to a foreign firm trading with England had, owing to a mistake on the part of the managing members of the firm, been registered in the name of the senior member as sole proprietors. The senior member having died, and the whole goodwill of the business being the property of the firm :—Held, that the proper course to adopt was for the firm to take an assignment of the trade-mark from the legal personal representative in England of the deceased. *Furina's Trade-Marks, In re*, 44 L. T. 99, n. ; 29 W. R. 391.

— **Application in Name of Firm as well as in that of Partner.**—A trade-mark which was the property of a partnership firm was by mistake registered as the property of one of the partners trading under the style of the firm. Upon application to the court by the firm, it was ordered that the register be rectified by cancelling the name of the registered proprietor and registering the names of all the partners trading under the style of the firm. *Rust's Trade-Mark, In re*, 44 L. T. 98, n. ; 29 W. R. 393, n.

— **Only in Case of Error, not on Devolution of Interest.**—The provisions of the Trade-Marks Registration Act, 1875, for the rectification of the register by the court, apply only to cases of mistake or error in the original registration, and do not extend to cases where devolution of interest makes it desirable to alter the registration of the name of the proprietor of a trade-mark. *Ward, Sturt & Sharp's Trade-Mark, In re*, 50 L. J., Ch. 347 ; 44 L. T. 97 ; 29 W. R. 395.

— **Registration without Proprietor's Consent.**—M. obtained the registration in his own name of a trade-mark belonging to L. without the knowledge or consent of L. Upon application for relief by L. :—Held, that the register could not be rectified by transferring the registration into the name of L. *Marler's Trade-Mark, In re, Lawrence, Ex parte*, 44 L. T. 98, n. ; 29 W. R. 392, n.

## TRAMWAYS.

See WAY.

## TRANSFER.

1. *Of Negotiable Instruments.*—See **BILLS OF EXCHANGE.**
2. *Of Personal Property.*—See **BILLS OF SALE.**

## TREASON.

See **CRIMINAL LAW.**

## TREASURE TROVE.

See **CRIMINAL LAW.**

## TREASURER (COUNTY.)

See **RATES.**

## TREASURY.

**Lords of, Mandamus to.**—In the half-year ending the 31st December, 1870, certain prosecutions took place at the assizes and quarter sessions of a county, and the costs were taxed by the proper officers under the orders of the respective courts, and the treasurer of the county paid the bills, and returned the bills, with the usual vouchers, to the Treasury. The lords of the treasury had appointed officers, called the examiners of criminal law accounts, and these officers disallowed or reduced in amount fifty-one of the items in the bills returned ; and a rule nisi was then obtained for a mandamus to the lords of the Treasury, commanding them to issue a Treasury minute authorizing the paymaster of civil contingencies to pay to the treasurer of the county the sums disallowed :—Held, that a mandamus would not lie, inasmuch as the lords of the Treasury received the money, which was granted to her Majesty, as servants of the crown, and no duty was imposed upon them as between them and the persons to whom the money was payable. *Reg. v. Lords Commissioners of the Treasury*, 7 L. R., Q. B. 387 ; 41 L. J., Q. B. 178 ; 26 L. T. 64 ; 20 W. R. 336.

Held, also, that the course which the lords of the Treasury had pursued was erroneous, as they had no authority whatever to have the bills re-taxed, and ought to have paid over to the treasurer of the county the full sum which he had expended as costs of prosecutions. *Id.*

The Exchequer and Audit Department Act, 1866 (29 & 30 Vict. c. 39), and the acts which it amends or alters, give no right to a receiver of public moneys to compel the commissioners of the Treasury to direct the comptroller and auditor

general to examine and audit the accounts. *Edmunds, Ex parte*, 25 L. T. 705; 20 W. R. 205.

A mandamus will not lie to the lords commissioners of the Treasury to compel them to pay a debt incurred by a county court, even although parliament has, upon an estimate made by the commissioners of the Treasury, voted a sum for the salaries and expenses of the county courts for the year. *Walmsley, Ex parte*, 1 B. & S. 81; 7 Jur., N. S. 1010; 4 L. T. 242; 9 W. R. 599.

**Letter of Instruction from.]**—A letter of instruction from the lords of the Treasury, signed by three lords of the Treasury, is admissible upon proof of the handwriting of the three whose names are subscribed to it, without producing the commission. *Rex v. Jones*, 2 Camp. 131.

## TREES.

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## TRESPASS.

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### I. TO THE PERSON.

#### 1. GENERAL PRINCIPLES.

**What is Actionable.]**—Trespass lies for originally throwing a squib, which, after having been thrown about in self-defence by other persons, at last put out the plaintiff's eye. *Scott v. Shepherd*, 2 W. Bl. 892; 3 Wils. 403.

If one of two persons, fighting, unintentionally strikes a third, he is answerable for an assault, and the absence of intention can only be urged in mitigation of damages. *James v. Campbell*, 5 C. & P. 372.

Throwing water on a person is a battery. *Purcell v. Horne*, 3 N. & P. 564.

Where A. threw a stick, which struck the plaintiff, but it did not appear for what purpose the stick was thrown:—Held, that it was fair to conclude that the stick was thrown for a proper purpose, and that the striking of the plaintiff was an accident. *Alderson v. Wainwright*, 1 C. & K. 358.

A policeman prevented a member of a society from entering the society's room:—Held, that if the policeman was wholly passive, and merely obstructed the entrance as any inanimate object would, this was not an assault by the policeman. *Jones v. Wylie*, 1 C. & K. 257.

A person cannot justify giving another into custody for merely laying hands on him to attract his attention, provided it is not done hostilely. *Coward v. Baddeley*, 4 H. & N. 478; 28 L. J., Ex. 260; 5 Jur., N. S. 414.

**Threats.]**—Riding after a person, and obliging him to run away into a garden to avoid being beaten, is an assault. *Martin v. Shoppee*, 3 C. & P. 373.

A. was advancing in a threatening attitude with an intention to strike B., so that his blow would have almost immediately reached B. if he had not been stopped:—Held, that it was an assault in point of law, though, at the particular moment when A. was stopped, he was not near enough for his blow to take effect. *Stephens v. Myers*, 4 C. & P. 349.

A declaration stated that the defendant assaulted the plaintiff, "and also then presented a pistol, loaded with gunpowder, ball and shot, at the plaintiff, and threatened and offered therewith to shoot the plaintiff, and blow out his brains." It was proved, that the parties being on board a ship, the defendant (who was the captain) went into his cabin, and brought out a pistol and cocked it, and presented it at the plaintiff's head, saying, that, if the plaintiff was not quiet, he would blow his brains out:—Held, that if the defendant, at the time he presented

the pistol, used words shewing that it was not his intention to shoot the plaintiff, this would be no assault. *Blake v. Barnard*, 9 C. & P. 626.

But a threat to shoot a person, coupled with the act of presenting a loaded fire-arm at him, although it is half-cocked, is, in law, an assault. *Osborne v. Veitch*, 1 F. & P. 317.

The plaintiff being in the defendant's workshop, and refusing to quit when desired, the defendant and his servant surrounded him, and tucking up their sleeves and aprons threatened to break his neck if he did not go out, whereupon the plaintiff, apprehensive of violence, departed:—Held, an assault. *Read v. Coker*, 13 C. B. 850; 9 C. L. R. 746; 22 L. J., C. P. 201; 17 Jur. 190.

**Parish Officers Cutting Pauper's Hair.**—If parish officers cut off the hair of a pauper in the poor-house by force, and against the will of such pauper, this is an assault; and if done as matter of degradation, and not with a view to cleanliness, that will be an aggravation, and go to increase the damages. *Forde v. Skinner*, 4 C. & P. 239.

**Medical Examination—Evidence of Non-Consent or Coercion.**—The plaintiff was a domestic servant in the service of Captain and Mrs. Braddell. In consequence of a suspicion entertained by Mrs. Braddell, she sent for the doctor and requested him to examine the plaintiff to see if she was in the family way. The doctor did so without using any force or doing anything more than was necessary for the purpose of the examination. The plaintiff strongly expressed her dislike to take her clothes off, and cried most of the time, but offered no further resistance, and did what the doctor told her. She afterwards brought an action of assault against the master and mistress and the doctor. At the trial she swore that what was done was not done with her consent. The learned judge withdrew the case from the jury as against the master and mistress, and the jury found a verdict for the other defendant:—Held, that to maintain the action the plaintiff must have been overpowered by force or must have had reasonable cause for apprehending violence; that the facts shewed that she reluctantly submitted to her mistress's orders; that the case was rightly withdrawn from the jury as against the master and mistress, and that the verdict of the jury was right. *Latter v. Braddell*, 50 L. J., Q. B. 448; 44 L. T. 369; 29 W. R. 366; 45 J. P. 520—C. A. Affirming 50 L. J., Q. B. 166; 43 L. T. 605; 29 W. R. 239; 45 J. P. 112.

An examination by medical men, in pursuance of an order of a magistrate, of the person of a female, in custody upon the charge of concealing the birth of her illegitimate child, constitutes an assault. *Agnew v. Johnson*, 14 Cox, C. C. 625.

**Communication of Disease by Sexual Intercourse.**—The communication of venereal disease during illicit sexual intercourse is not an actionable wrong if the act of intercourse has been voluntary; and consent to the intercourse is not vitiated by the fact that it has been induced through wilful concealment of the disease. On the principle *ex turpi causa non oritur actio*, such an action is unsustainable. *Reg. v. Bennett* (4 F. & F. 1105) and *Reg. v. Sinclair* (13 Cox, C. C. 28, distinguished, and held not to apply to a civil action. *Heagarty v.*

*Shine*, 4 L. R., Ir. 288; 14 Cox, C. C. 145. Affirming 2 Ir. L. R. 273; 14 Cox, C. C. 124.

**Stamping Certificate of Character.**—A., before he entered the police force, sent a certificate of his good character, signed by the colonel of the 8th Hussars, to the commissioners of police. On his dismissal from that force, the certificate was returned to A., inclosed in a letter signed by the defendant, the certificate being stamped with the words "dismissed the police service:—Held, that for stamping these words trespass was not the proper form of action. *Taylor v. Rowan*, 7 C. & P. 70; 1 M. & Rob. 490.

**Injury to be Actionable must be Wilful or Negligent.**—To maintain an action for injury to the person the injurious act must be wilful or the result of negligence. *Holmes v. Mather*, 10 L. R., Ex. 261; 44 L. J., Ex. 176; 32 L. T. 361; 23 W. R. 864.

The defendant's horses, while being driven by his servant in the public highway, ran away, and became so unmanageable that the servant could not stop them, but could, to some extent, guide them. The defendant, who sat beside his servant, was requested by him not to interfere with the driving, and complied. While unsuccessfully trying to turn a corner safely, the servant guided them so that, without his intending it, they knocked down and injured the plaintiff, who was in the highway. The plaintiff having sued the defendant for negligence and in trespass, the jury found that there was no negligence in any one:—Held, that, even assuming the defendant to be as much responsible as his servant, no action was maintainable; for since the servant had done his best under the circumstances, the act of alleged trespass in giving the horses the direction towards the plaintiff was not a wrongful act. *Id.*

In an action for driving the defendant's cart against the plaintiff, throwing him down, and wounding him, the defendant cannot shew, under not guilty, that there was no negligence on his part, but that the plaintiff accidentally slipped from the pavement, and the defendant unintentionally drove over him. *Hall v. Fearnley*, 3 Q. B. 919; 3 G. & D. 10; 12 L. J., Q. B. 22; 7 Jur. 61.

**Irregular Execution of Warrant.**—The defendant obtained a search warrant against the plaintiff which was executed by a county constable instead of the parish officer to whom it was addressed:—Held, that trespass was the proper form of action. *Treagood v. Barnes*, 7 Ex. 827; 21 L. J., Ex. 320.

**Committed Abroad.**—It is no bar to an action in this country for an assault and false imprisonment committed by one Englishman upon another at Naples, that by the law of Naples, no proceeding to recover damages for the trespass could be maintained by the plaintiff until after the defendant had been found guilty, and condemned by the criminal tribunal at Naples, before which he had been arraigned in respect thereof; nor is it any bar to such action for the assault that, by the law of Naples, damages in respect of it could only be recovered in one particular form of proceeding, which had been commenced and was still pending. *Scott v. Seymour (Lord)*, 1 H. & C. 219; 32 L. J., Ex. 61; 8 L. T. 511; 11 W. R. 169—Ex. Ch.

**Joint Trespass.]**—A sailor, who had lodged for some weeks at a public-house, and also received advances of cash from the person who kept it, having been paid his wages in the presence of the father of the publican, went to the house of the latter, and drinking some spirits, became intoxicated and fell asleep. The father of the publican, in his son's presence, desired a young woman, an acquaintance of the sailor, to take the money out of his pocket, which she did, and laid it on the table. It was 13*l.* 17*s.* 6*d.* The publican took it up, and said he would keep it till the man got sober. When he awoke and asked for his money, the father said it was all right till the morning. After this, by desire of the sailor, a pound in silver was given to the young woman out of the money, and the next morning, on his applying for the remainder, he was offered 2*s.* and some copper as the balance, after deducting what he owed the publican :—Held, that a joint action of trespass was maintainable against both the publican and his father, and that the sailor was entitled to recover the whole amount taken from him, without any other deduction than that of the pound afterwards given to the woman. *Peddell v. Rutter*, 8 C. & P. 337.

**Evidence of Authority to Commit.]**—On the trial, in an action for assault, the plaintiff proved that he was present in the gallery of a large hall where there was a meeting convened by members of an association, and that the defendant acted as chairman. There was an interruption in the gallery near to the place where the plaintiff was standing, upon which the defendant said, "I shall be obliged to bring those men to the front who are making the disturbance. Bring those men to the front." The plaintiff was making no disturbance, but, according to his statement, he was seized by a man with a white ribbon in his coat and two policemen, and dragged over some benches to the front part of the gallery, and thereby injured. There was nothing to shew the position or duty of those who seized him, or whether any instructions as to keeping order had been given them by the defendant, before the act complained of :—Held, that there was no evidence of any liability on the part of the defendant, as there was not the ordinary relation of master and servant between him and those who assaulted the plaintiff; but only a particular direction as to a particular matter, and that the words used by the defendant did not authorize the officers to act upon their judgment as to who were the persons making the disturbance. *Lucas v. Mason*, 10 L. R., Ex. 251; 44 L. J., Ex. 145; 33 L. T. 13; 23 W. R. 924.

**Liability of Candidate at Election—Acts of Mob.]**—A candidate for election as member of parliament was accompanied through a borough by a crowd of persons forming a procession in his honour. The windows of certain houses, belonging to members of the opposite political party, were broken by the mob in their course; and he, standing up in a carriage, waved his hat in the air, but with no intention of encouraging the mob in their acts of violence, and made no attempt to leave the carriage or stop the procession, though he remonstrated with those who could hear him on the disgraceful character of their proceedings :—Held, that, under the circumstances, he was not liable for the damage

caused by the breaking of the windows. *Peacock v. Young*, 21 L. T. 527; 18 W. R. 134.

## 2. WHEN INDICTABLE.

The judge is bound to try the issues on the record, and ought not to nonsuit if it appears on the evidence that there has been a felony in relation to the subject matter of the dispute and the offender has not been prosecuted to conviction. *Wells v. Abrahams*, 7 L. R., Q. B. 554; 41 L. J., Q. B. 306; 26 L. T. 326; 20 W. R. 659.

In an action by a woman for assault, on her stating that the assault for which she sued was immediately followed by a rape, the judge nonsuited her :—Held, rightly. *Wellock v. Constantine*, 2 H. & C. 146; 32 L. J., Ex. 285; 9 Jur., N. S. 232; 7 L. T. 751. At nisi prius, 2 F. & F. 791. And see further, CRIMINAL LAW (Felony).

Where there has been criminal intercourse in a case of seduction of a servant, accompanied, in the first instance, with some degree of violence, an action is maintainable for an assault. *Deaborough v. Homes*, 1 F. & F. 6.

The objection that there has been no prosecution cannot be taken by plea. *Osborne v. Gillett*, 8 L. R., Ex. 88.

In order to constitute an assault and battery punishable by the criminal law, the act complained of must be done with a hostile intention. *Coward v. Baddeley*, 4 H. & N. 478; 28 L. J., Ex. 260; 5 Jur., N. S. 414.

## 3. IN SELF-DEFENCE.

**Posture of Defence.]**—If A. comes up to attack B., and B. puts himself into a fighting attitude to defend himself, this is not an assault by B., and will not, in action by B. against A. for assault, support a plea by A. of son assault demesne. *Moriarty v. Brooks*, 6 C. & P. 684.

**Excess.]**—Upon issue taken on a plea of son assault demesne, it is necessary to prove an assault commensurate with the trespass sought to be justified. *Reece v. Taylor*, 4 N. & M. 470; 1 H. & W. 15.

A. seized the bridle of the horse on which B. was riding :—Held, that B., after a request to desist, was justified in striking A. with his riding whip, using no more force than was necessary to obtain his release. *Rowe v. Hawkins*, 1 F. & F. 91.

A declaration stated, that the defendant assaulted the plaintiff, and wrenched a stick from his hand, and with the stick and with his fists gave the plaintiff many violent blows. Plea, as to the assaulting the plaintiff with the stick and his fists, son assault demesne :—Held, after verdict, that the plea sufficiently justified the battery with the stick as well as the assault with it. *Blunt v. Beaumont*, 2 C., M. & R. 412; 4 D. P. C. 219; 5 Tyr. 1100.

**Pleading.]**—See *post*, col. 113.

## 4. DEFENCE OF POSSESSION OF HOUSE OR LAND.

**Extent of Justification.]**—Molliter manus impositus is an answer to the battery. *Titley v. Foxall*, 2 Ld. Ken. 308.

An assault by a man in defence of his property is justifiable. *Alderson v. Waistell*, 1 C. & K. 358.

To an action for an assault and battery, the defendant may plead that the plaintiff, with force and arms, and with a strong hand endeavoured forcibly to break and enter the defendant's close; whereupon the defendant resisted and opposed such entrance, and if any damage happened to plaintiff it was in the defence of the possession of the close. *Weaver v. Bush*, 8 T. R. 78.

A plea of molliter manus imposuit, in order to turn the plaintiff out of the defendant's house, where she continued against his will, is no answer to a charge against the defendant for striking the plaintiff repeated blows, and with great force and violence several times knocking her down. *Gregory v. Hill*, 8 T. R. 299. And see *Johnson v. Northwood*, 1 Moore, 420; 7 Taunt. 689.

Action for assaulting, beating, and ill-treating the plaintiff, and beating and striking her down with a truncheon, whereby her thigh was broken. Plea, as to assaulting, beating, and ill-treating the plaintiff, that the defendant was possessed of a house, and the plaintiff was making a disturbance therein, and molliter manus to turn her out:—Held, that the plea was no justification of the striking and wounding with the truncheon. *Oakes v. Wood*, 2 M. & W. 791; M. & H. 237.

**Ejecting—Request to Leave.**—Before a person can be assaulted and turned out of church he should be requested to retire. *Ballard v. Bond*, 1 Jur. 7.

If a person enters a house with force and violence, the person whose house is entered may justify turning him out (using no more force than is necessary), without making a previous request to him to depart; but if the person enters quietly such a request is necessary before he can be turned out. *Tullay v. Reed*, 1 C. & P. 6.

**Request to Desist.**—A declaration alleged that the defendant assaulted the plaintiff, and seized and shook the plaintiff, and dragged him about, and struck him many blows, by means of which he was hurt and wounded, and so continued for a long time, to wit, one week. Plea, that the defendant was lawfully possessed of a close, and a gate belonging to it, and the plaintiff, with force and arms, and with a strong hand, and against the will of the defendant, attempted to break open, and did thereby unlawfully break open the gate, and in breach of the peace did thereby attempt forcibly to enter and unlawfully trespass upon the close, and would unlawfully and forcibly have effected such attempt, if the defendant had not defended his possession; whereupon he, being in his close during the attempt, defended his possession, and resisted such attempt; and, because he could not successfully resist without, in a slight degree, committing the trespasses, he did a little unavoidably commit the trespasses, using no unnecessary force:—Held, that the trespass on the part of the plaintiff being alleged by the plea to be forcibly made, the justification was sufficient, though it was not alleged that the plaintiff had been requested to desist. *Polkirkhorn v. Wright*, 8 Q. B. 197; 15 L. J., Q. B. 70; 10 Jur. 11.

**After Trespass to Land.**—A person on whose land another has committed a trespass, merely by coming upon it, and is going away, has no right to seize and detain him in order to compel him to give his address. *Ball v. Axten*, 4 F. & F. 1019.

**Calling in Police.**—If a person comes into a house, or is in it, and makes a noise and disturbs the peace of the family, although no assault has been committed, the master of the house may turn him out, or call a policeman to do so. *Shaw v. Chairitic*, 3 C. & K. 21.

A. went to the house of B. to demand a debt, which B. said he could not pay; angry words passed, and B. told A. to leave his house; this A. refused to do unless he was paid. Upon this B. sent for a police officer, and had A. locked up in the watch-house:—Held, that if A. was making a disturbance, B. would have been justified in turning him out of his house, but that he was not justified in imprisoning him. *Green v. Bartram*, 4 C. & P. 308.

To a declaration for assaulting and seizing the plaintiff, and forcing him to go as a prisoner from and out of a public-house to a police-station, it is a good justification, that the defendant was possessed of a tavern, that the plaintiff came into the tavern and made a disturbance, and assaulted the defendant and others there, and afterwards stood and remained in the highway, near and opposite to the door of the tavern, and made a disturbance there, and used menacing language to the defendant and his family, and within hearing, and that by reason of such, the plaintiff's conduct, many persons congregated in the highway, near to and opposite the house, and made a disturbance and riot in the highway, in breach of the peace, and to the obstruction of the defendant's business, and of the highway; and that at the time of the removal after mentioned, the plaintiff persisted in standing and making the disturbance; and by reason thereof was causing people to congregate in the highway, opposite and near to the house, in breach of the peace, and to the obstruction of the highway, although before such removal he was requested by the defendant to depart, and to cease from making the disturbance; wherefore the defendant, in order to restore and preserve the peace, and to get rid of the nuisance so occasioned by the plaintiff, gave the plaintiff in charge to a constable, and required him to remove the plaintiff, and deal with him according to law; and the constable thereupon removed the plaintiff, and took him to the police-station, and detained him there, to be dealt with according to law, and examined by a justice of the peace. *Webster v. Watts*, 11 Q. B. 311; 17 L. J., Q. B. 73; 12 Jur. 243.

And see MALICIOUS PROSECUTION AND FALSE IMPRISONMENT.

**In Defence of Easement.**—To an action for throwing water over the plaintiff's apartment and herself, it is no plea that the plaintiff was engaged in obstructing an ancient window of the defendant's house, and that the defendant threw water over her to prevent it. *Simpson v. Morris*, 4 Taunt. 821.

**Taking to nearest Highway.**—A defendant justified an assault in defence of the possession

of a house of W. de W., and by his command. New assignment, that the trespass was committed out of the house, "to wit, in and upon a bridge in a farm, called Bengrove Farm, and in two gardens, two fields, and two folds of and in the same farm, and for another and different purpose." Plea to the new assignment, that W. de W. was possessed of the house, and also of the yards, fields, and folds which belonged to the house, and were adjacent thereto; and that the trespass newly assigned was committed in defence of the possession, by removing the plaintiff; and that the defendant "did take the plaintiff by the nearest and most direct way to a public highway near to the house, as he lawfully might for the cause aforesaid." It was objected that the plea did not justify taking the plaintiff to the highway, as it did not shew that it was necessary to do so, or that the highway adjoined the dwelling-house.—Held, that the plea was good, as it intended to confess a trespass committed on the bridge, yards, fields, and folds, and to justify it as committed in defence of the possession; that with these the removal to the highway had no necessary connexion, and might be treated as surplage. *Hayling v. Okey (in error)*, 8 Ex. 531; 22 L. J., Ex. 139; 17 Jur. 325—Ex. Ch.

**Evidence—Possession.**—Assault by a master on his servant. Justification of molliter manus to remove him from a house of which the master was possessed:—Held, that evidence of another servant of the defendant's having the key to let himself in to work, nobody living in the house, is sufficient evidence of the defendant's possession, as against the plaintiff, to support the plea. *Hall v. Davis*, 2 C. & P. 33.

In an action for assault and battery, the defendant justified on the ground that he was possessed of a dwelling-house, into which the plaintiff unlawfully entered, and was making a noise and disturbance therein:—Held, that this plea was not supported by proof that the defendant held two rooms in the house in question, and that the plaintiff, who was landlord of the house, and kept the key of the outer door, had unlawfully come into them, and made the disturbance complained of. *Monks v. Dykes*, 4 M. & W. 567; 1 H. & H. 418.

—**Shire Hall.**—By a private act a shire hall was vested in the justices of the peace for the county, in trust to allow courts of justice to sit there, and to permit and suffer it to be used for such other public purposes as a major part of the justices in sessions should direct. The hall had always been used for the holding of the county musical festivals; but there was no evidence that the justices had under the act so directed it to be used:—Held, that the stewards of one of those musical festivals had such a possession of the hall that they might justify the turning out an intruder. *Thomas v. Marsh*, 5 C. & P. 596.

—**Cricket Ground.**—To an action for an assault, the defendant pleaded that the defendant and twenty-one other persons were possessed of a close, and were there playing a lawful game of cricket; that the plaintiff was unlawfully on the close, and unlawfully interrupted the twenty-two, whereupon the defendant, for himself and by authority of the

twenty-one others, requested him to depart from the close, and desist from interrupting their game, and, upon his refusal so to do, removed him. The facts were, that the defendant and ten others of the club, who had possession of the field under an agreement, and eleven of a strange club, were playing on the field, and the plaintiff interrupted them by remaining on the ground when requested to leave:—Held, that the plea was not proved, as it was founded on the right of possession of the twenty-two in the close. *Holmes v. Bagge*, 1 El. & Bl. 782; 22 L. J., Q. B. 301; 17 Jur. 1095.

By an agreement between A., the owner of a field, and a committee of a cricket club, A. agreed to let, and the committee to hire, a close, to be used as a cricket ground by the club, and for that purpose only; the tenancy to be determinable by notice in writing at the end of any season. Declaration for an assault. Plea, justification in right of the possession. Replication, that the plaintiff and the defendant were jointly possessed:—Held, that proof on the part of the plaintiff of the agreement, and that the plaintiff and the defendant were both members of the committee, proved the issue. *Ib.*

—**Attempt to Eject.**—If the defendant pleads that he was possessed of a public-house, in which the plaintiff was making a disturbance, and that, the plaintiff refusing to depart, the defendant laid hands on him, and turned him out, this plea is proved, if it is shewn, that, in consequence of the plaintiff refusing to go, the defendant assaulted him, with a view of turning him out of the house, though in fact the defendant could not succeed in actually turning the plaintiff out. *Moriarty v. Brooks*, 6 C. & P. 684.

##### 5. DEFENCE OF POSSESSION OF GOODS.

**What Justifiable.**—An owner of goods (or his servants acting by his command) which are wrongfully in possession of another, may justify an assault, in order to repossess himself of them, no unnecessary violence being used. *Blades v. Higgs*, 10 C. B., N. S. 713; 30 L. J., C. P. 347; 7 Jur., N. S. 1289; 4 L. T. 551.

To an action for an assault and battery, the defendant pleaded that he was possessed of a horse and gig, which were upon a highway, and that the plaintiff seized the horse and gig, and was driving them away, and dispossessing the defendant of them, and would, in breach of the peace, have dispossessed him of them; wherefore the defendant defended his possession, and resisted the plaintiff's endeavour, and in so doing committed the assault:—Held, that evidence which shewed that the plaintiff seized the defendant's horse for the purpose merely of obtaining his name and address, did not support the plea. *Gaylard v. Morris*, 3 Ex. 695; 18 L. J., Ex. 297.

##### 6. OTHER JUSTIFICATIONS.

**Order of Parliament.**—To a claim for damages for an assault committed on plaintiff, a member of parliament, whilst attempting to enter the House of Commons for the purpose of taking his seat, the defendant pleaded in justification thereof that the House had previously resolved and ordered that the defendant (one of its officers) should "remove the plaintiff from the House until he should engage not further to

disturb the proceedings of the House," and that, acting in pursuance of such order, the defendant resisted and removed the plaintiff:—Held, on demurrer, that the plea was good. *Bradlaugh v. Erskine*, 47 L. T. 618; 31 W. R. 365.

**Correcting Pupil.]**—A music-master of a cathedral is not justified in even moderately beating a chorister for singing at a catch club; though such singing might be injurious to his performing in the cathedral. *Newman v. Bennett*, 2 Chit. 195. See *Winterburn v. Brooks*, 2 C. & K. 16.

**As Master of Ship.]**—To a count for assaulting the plaintiff on board a ship on the high seas, and forcing and compelling him, he being sick, to stand, and remain standing, on the deck, for the space of one hour, a plea justifying the forcing and compelling the plaintiff to stand, and remain standing, upon the deck, is bad, as being pleaded to that which is mere matter of aggravation. *Griffiths v. Dunnett*, 7 M. & G. 1002; 8 Scott, N. R. 336.

Action for assaulting the plaintiff and putting him in irons, and imprisoning him. Plea, that the defendant was commander of a ship of war on the high seas, and that the plaintiff was steward of the ship, and, as such steward, the servant of the defendant, and had access to the defendant's cabin, and the charge of the defendant's goods there; that moneys of the defendant had been feloniously stolen out of a desk in the cabin upon two occasions; that upon each occasion the desk had been clandestinely opened by means of a key, and that the plaintiff had access to and could have obtained the key of the desk, and could have opened the same, and taken the moneys; that the defendant believed that no other person had or could have obtained access to the key of the desk without the knowledge of the plaintiff; wherefore the defendant, having good and probable cause of suspicion, and suspecting the plaintiff, for the causes aforesaid, to be guilty of or concerned in the stealing of the moneys, did, as commander, put him in irons, and so detain him (the same being a reasonable mode of detainer) until he could examine into and investigate the circumstances of suspicion against the plaintiff according to law:—Held, that the plea shewed a sufficient justification. *Broughton v. Jackson*, 18 Q. B. 378; 21 L. J., Q. B. 265; 16 Jur. 886.

Held, also, that the putting in irons must be taken to be a reasonable mode of detainer; and that if there was excess in the mode of detainer the plaintiff should have new assigned. *Ib.*

A count alleged that the defendant assaulted the plaintiff, and beat, bruised, pushed, dragged, and pulled about, kicked, wounded and ill-treated him, and knocked down and prostrated him on the deck of a vessel, and hit and struck him numerous blows. Plea, as to the assaulting, beating and ill-treating the plaintiff, a justification as captain of a vessel wherein the plaintiff and other persons were passengers, and that the plaintiff made a great noise, disturbance and affray on board, and was then fighting with a certain other person, "then being a passenger in and on board of the vessel, and whose name was to the defendant unknown," and was striving to beat and wound the said person; wherefore the defendant, for the preservation of the peace, and to preserve due order and discipline in the vessel,

as such captain, molliter manus imposuit:—Held, that the allegation, that the defendant knocked down and prostrated the plaintiff on the deck, was alleged in the declaration as a distinct assault from the others, and that it was not covered by the justification, and that consequently, upon proof of such assault, the plaintiff was entitled to damages. *Noden v. Johnson*, 16 Q. B. 218; 20 L. J., Q. B. 95; 15 Jur. 424.

**As Marshal Keeping Order.]**—One of the marshals of the city of London, whose duty it was, on the day of a public meeting in the Guildhall, to see that a passage was kept for the transit to the carriages of the members of the corporation and others, directed a person in the front of the crowd at the entrance to stand back, and, on being told by him that he could not for those behind him, struck him immediately on the face, saying that he would make him:—Held, that in so doing the marshal exceeded his authority, and that he should have confined himself to the use of pressure, and should have waited a short time to afford an opportunity for removing the party in a more peaceable way. *Imason v. Cope*, 5 C. & P. 193.

#### 7. EVIDENCE AND PLEADING.

**Evidence in Mitigation of Damages.]**—In an action for an assault, though the defendant has not pleaded a justification, he may extract evidence in mitigation of damages in the cross-examination of the plaintiff's witnesses. *Moore v. Adam*, 2 Chit. 198.

A. having written a novel, B. published a libel on A. in the form of a critique on the novel, for which A. beat him; B. brought an action for the assault, and A. a cross action for the libel:—Held, that, in the action for the assault, the libel might be given in evidence in mitigation of damages, although it was the subject of another action; but that being so, the defendant ought not to derive much advantage from it in diminishing the damages. *Fraser v. Berkeley*, 7 C. & P. 621; 2 M. & Rob. 3.

**Of Facts in Dispute.]**—In an action by husband and wife, in which they declared that the defendant drove a chaise against another chaise, in which the wife was riding, whereby she was thrown out and sustained an injury:—Held, that it was unnecessary to state to whom the plaintiff's chaise belonged at the time the accident happened. *Hopper v. Reece*, 1 Moore, 407; 7 Taunt. 698. And see *Howard v. Peete*, 2 Chit. 315.

A party, consisting of the defendant and others, hired for a day's excursion a carriage and post horses driven by postillions, who were the servants of the owner of the horses. The defendant rode upon the box. The postillions, in endeavouring to force their way into a line of carriages, overturned a gig and seriously injured the plaintiff, who was in the gig. The defendant, at the time and afterwards, held himself out as responsible for the accident, and used expressions shewing that he had a control over the postillions at the time it happened:—Held, that he was liable in trespass. *McLaughlin v. Pryor*, 4 M. & G. 48; 4 Scott, N. R. 655.

It is competent for the jury to consider the words which the defendant used subsequently to the trespass, in coming to the conclusion whether

he was a joint trespasser with those actually committing the mischief. *M'Laughlin v. Pryor*, 4 Scott, N. R. 655; Car. & M. 354; 4 M. & G. 48.

**Pleading.]**—A plaintiff declared for an assault in seizing and laying hold of him, pulling and dragging him about, striking him, forcing him out of a field into and through a pond, and then imprisoning him; a plea justifying the assaulting, seizing, and laying hold of the plaintiff, and pulling and dragging him about, is no sufficient answer to the entire charge in the declaration. *Bush v. Barker*, 1 M. & Scott, 588; 1 Bing. N. C. 72.

An assault *ex vi termini* excludes consent; therefore, a plea of leave and licence to a declaration charging an assault amounts to not guilty. *Christopherson v. Bare*, 11 Q. B. 473; 17 L. J., Q. B. 109; 12 Jur. 374.

A plea of son assault admits the assault. *Hay v. Kitchen*, 1 Wils. 171.

In an action of assault and battery, to which the defendant pleads this plea, the plaintiff may, under a replication joining issue on the plea, and without replying excess, shew that although he struck the first blow the defendant was guilty of excess. *Dean v. Taylor*, 11 Ex. 68. But see contra, *Rimmer v. Rimmer*, 16 L. T. 238.

A. and B. were charged jointly and in one count with assault, battery, and imprisonment of the plaintiff. A. pleaded a justification as a justice of the peace. Trespasses, including an assault, battery, and imprisonment, were proved to have been done by A. and B. jointly, and afterwards on the same day another imprisonment, but without an actual battery, done by A. alone, to which last the justification alone applied—Held, that no new assignment was necessary and that the judge was right in telling the jury to confine their attention to the joint trespass only. *Kearney v. Tottenham*, 15 W. R. 1020.

In an action for an assault it is competent to the defendant to give evidence of an assault by the plaintiff, without a plea of son assault domeane. *Syers v. Chapman*, 2 C. B., N. S. 438.

## II. TO LANDS.

### 1. WHAT AMOUNTS TO.

**In General.]**—Quære, whether it is a trespass to pass over land in a balloon. *Kenyon v. Hart*, 6 B. & S. 249; 34 L. J., M. C. 87; 11 Jur., N. S. 602; 11 L. T. 733; 13 W. R. 406.

The owner of two contiguous houses in the city of London conveyed one of them to B. by a deed which correctly marked out on a plan the ground site of the house conveyed. Over this site there projected on the first floor a room of the owner's house, which was supported by the other house.—Held, that the right to the vertical column of air over the projection was determined by the ground site, and hence belonged not to the owner, but to B. *Corbett v. Hill*, 9 L. R., Eq. 671; 39 L. J., Ch. 547; 22 L. T. 263.

**Cutting Trees or Taking Minerals in Copyholds.]**—In an ordinary estate of copyhold the property in the trees and minerals is in the lord, the possession in the copyholder. If a stranger or the lord cuts trees or takes minerals,

the copyholder can maintain trespass. *Eardley v. Granville*, 3 Ch. D. 826; 45 L. J., Ch. 669; 34 L. T. 609; 24 W. R. 528.

**Percolation of Water from Soil placed against Wall.]**—A statement of claim alleged that the defendants deposited on their land and against a wall of the defendants, adjoining the house of the plaintiff, a large quantity of soil, clay, &c., thereby raising the surface of the defendants' land above that of the land on which the plaintiff's house was built; and that the plaintiff's house was consequently injured by the percolation of water through the defendants' wall.—Held, that the statement shewed a good cause of action. *Hurdman v. North Eastern Railway Company*, 3 C. P. D. 168; 47 L. J., C. P. 368; 38 L. T. 339; 26 W. R. 489.

**Entry to Repair Defences of Port.]**—To an action for entering the plaintiff's close, called the manor of S., the defendant pleaded, that from time immemorial, there has been, and still is, a public port, partly within the manor, and also in a river, which has been a public and common navigable river from time immemorial; and that there is in that part of the port which is within the manor, an ancient work or erection, belonging to the port, necessary for the preservation of the same, and for the safety and convenience of the ships resorting thereto; that the work being damaged and in decay, it became necessary that the work should be repaired, but that the plaintiff did not nor would repair the same, but wholly neglected so to do; wherefore the defendant entered and repaired it; and a verdict having been found for the defendant.—Held, that the plaintiff was entitled to judgment, notwithstanding the finding, inasmuch as it did not state that immediate repairs were necessary, or that any persons bound to do so had neglected to repair after notice had been given them for that purpose, or that a reasonable time for repairing the same had elapsed, or that the defendant had occasion to use that port; and it was doubtful whether the plea would have been good, even had it contained those allegations. *Lonsdale (Earl) v. Nelson*, 3 D. & R. 556; 2 B. & C. 302.

**Landlord Entering on Premises to Repair.]**—A lessor who, in the absence of express power in the lease, enters upon the demised premises to repair them on breach of the lessee's covenant to repair, even though under a superior lease the lessor is liable to forfeiture for non-repair, and, though he enters by leave of weekly sub-tenants, commits a trespass which will be restrained by injunction. *Stocker v. Planet Building Society*, 27 W. R. 877—C. A.

**Foxhunting.]**—A person is not justified in entering the land of another against his will for the purpose of foxhunting. *Gundry v. Feltham* (1 T. R. 334) discussed. *Paul v. Summerhayes*, 4 Q. B. D. 9; 48 L. J., M. C. 33; 39 L. T. 574; 27 W. R. 215.

**By Animal.]**—The defendants' horse having injured the plaintiff's mare by biting and kicking her through the fence separating the plaintiff's land from the defendants':—Held, that there was a trespass by the act of the defendants' horse, for which the defendants were

liable, apart from any question of negligence on their part:—Held, secondly, that the damage to the plaintiff's mare was not too remote. *Ellis v. Loftus Iron Company*, 10 L. R., C. P. 10; 44 L. J., C. P. 24; 31 L. T. 483; 23 W. R. 246.

An ox belonging to the defendant, and while being driven by his servants through the streets of a country town, entered the plaintiff's shop, which adjoined the street, through the open doorway and damaged his goods. No negligence on the part of the persons in charge of the ox was proved:—Held, that the defendant was not liable. *Tillett v. Ward*, 10 Q. B. D. 17; 52 L. J., Q. B. 61; 47 L. T. 546; 31 W. R. 197; 47 J. P. 438.

**Justification under Process.**—In an action for breaking and entering the plaintiff's close and taking his goods, the defendant may justify under a sufficient legal process if he had it in fact at the time, although he declared then that he entered for another cause. *Crowther v. Ramsbottom*, 7 T. R. 654.

**Forcible Entry.**—An attempt to eject by force a person having a legal title to land brings the person who makes it within the provisions of the statute against forcible entry, though the possession of the person having such legal title has only just commenced, though he may himself have obtained it by forcing open a lock, though his ejection has not been made by a "multitude" of men, nor attended with any great use of violence, and though the person who attempts to eject him may even set up a claim to the possession of the land. *Lowe v. Telford*, 13 Cox, C. C. 226; 1 App. Cas. 414; 45 L. J., Ex. 613; 35 L. T. 69. Reversing Ex. Ch. 31 L. T. 90.

But damages cannot be recovered for such forcible entry, which is an indictable offence. *Beddall v. Maitland*, 17 Ch. D. 174; 50 L. J., Ch. 401; 44 L. T. 248; 29 W. R. 484.

And see *Edwick v. Hawkes*, post, col. 123 and CRIMINAL LAW.

**Mortgage—Default in Payment—Seizure by Agent.**—The respondent mortgaged a sheep run to the appellant. The deed fixed no time for the repayment of the money, but only stipulated that if the mortgagor should make default in payment of the amount on demand, the mortgagee should be at liberty to enter. It appeared from the covenants in the deed that it was the intention of the parties that the mortgagor should remain in possession until default was made; but there was no express stipulation to that effect. During the absence of the respondent the appellant sent an agent to the station with a demand in writing for repayment, which was served on the respondent's wife, and in default of payment the appellant's agent immediately took possession of the run and the sheep on it:—Held, that as the respondent had no opportunity of inquiring into the truth of the agent's statement, there was no default which justified the appellant in entering into possession and seizing the property, and that the respondent was entitled to substantial damages. *Moore v. Shelley*, 8 App. Cas. 285; 52 L. J., P. C. 35; 48 L. T. 918—P. C.

**Erecting Hoarding.**—The plaintiff was the owner in fee of a cottage, the defendant owned some land immediately adjoining. The plaintiff

alleged that the defendant had erected on the plaintiff's land a hoarding on poles in order to block out the access of light to a window in the cottage, and had in so doing committed a trespass. The plaintiff also alleged that the poles and hoarding produced a rattling and creaking noise which was an intolerable nuisance to the plaintiff and his tenants. The plaintiff claimed an injunction to restrain the trespass and the nuisance. At the trial it was proved that the cottage was in the occupation of a weekly tenant of the plaintiff, who was not a party to the action. There was no evidence that the acts of the defendant had caused any diminution of value of, or other injury to, the reversion:—Held, that the poles and hoarding not being of such a character as to injure the reversion, the plaintiff could not maintain an action for trespass nor obtain an injunction. *Cooper v. Crabtree*, 20 Ch. D. 589; 51 L. J., Ch. 585; 46 L. T. 573; 30 W. R. 579—C. A.

**Other Obstacles.**—Trespass is the proper remedy for nailing a board so as to overhang the plaintiff's close. *Pickering v. Rudd*, 4 Camp. 219; 1 Stark. 56.

So, for the continuance of an act (as driving hold-fasts) for which trespass lies, and in which form of action the plaintiff has before recovered. *Lawrence v. Obee*, 1 Stark. 22.

**Pulling down Inhabited House.**—Where a house has been unlawfully erected on a common, a commoner whose enjoyment of the common is interrupted by it may pull it down. *Perry v. Fitzhoyce*, 8 Q. B. 767; 15 L. J., Q. B. 239; 10 Jur. 799.

But he is not justified in pulling it down if there are persons in it at the time. *Id.*

If a mere stranger erects a building upon land belonging to another, the owner of the land is justified in pulling down the building for the purpose of ejecting the intruder, and the fact of the latter being at the time in the building will not be any ground for maintaining an action of trespass against the real owner. *Burling v. Reed*, 11 Q. B. 904; 19 L. J., Q. B. 291; 14 Jur. 395.

A commoner may pull down a building wrongfully erected upon the common, and which prevents his exercising his right as fully as he otherwise might, provided he does no unnecessary damage. *Davies v. Williams*, 16 Q. B. 546; 20 L. J., Q. B. 330; 15 Jur. 752.

A declaration alleged that the defendant entered a dwelling-house and land, which dwelling-house was actually inhabited by the plaintiff and his family, and in which he was; and whilst the plaintiff was therein, pulled down and destroyed the dwelling-house and the fixtures therein, and assaulted the plaintiff therein, and ejected and expelled him and his family therefrom; and seized, converted, and destroyed the materials of the house. The defendant pleaded, as to the entering, pulling down, and destroying the house and fixtures therein, and seizing the materials, that he was entitled to common of pasture over the land; and because the house was wrongfully erected on the land, so that without pulling it down he could not use or enjoy the common of pasture in so ample and beneficial manner as he otherwise would and ought to have done, he necessarily and unavoidably committed the trespasses, doing no unnecessary damage:—Held, that the plea was bad, since the defendant was not justified in pulling down the house when

the plaintiff and his family were in it. *Jones v. Jones*, 1 H. & C. 1; 31 L. J., Ex. 506.

**Regaining Possession of Property.]**—Trespass for entering the plaintiff's close: a plea that certain goods of the defendant were there, and he entered to take them, doing no unnecessary damage, is ill. *Anthony v. Hancy*, 8 Bing. 186; 1 M. & Scott, 300.

But if a party takes the goods of another, and places them upon his own land, the owner may enter that land for the purpose of retaking them, without making himself liable in trespass. *Partrick v. Colerick*, 3 M. & W. 483.

If A. wrongfully places goods in B.'s building, B. may lawfully go upon A.'s close adjoining the building, for the purpose of removing and depositing the goods there for A.'s use, and trespass *quare clausum fregit* will not lie. *Rea v. Sheward*, 2 M. & W. 424.

To an action for breaking and entering a yard, the court allowed the defendant to plead that he went there for the purpose of viewing a mare belonging to him, which had been recently stolen, and was then in a stable within the yard. *Webb v. Beavan*, 7 Scott, N. R. 936; 6 M. & G. 1055.

**To prevent Murder.]**—A private person may justify breaking and entering the plaintiff's house, and imprisoning his person, so that he may prevent him from committing murder on his wife. *Hancock v. Baker*, 2 B. & P. 260.

**Police Officer—Open House.]**—A police officer, hearing a noise in a public-house at one o'clock in the night, entered the house, the door being open:—Held, that this was not a trespass. *Rea v. Smith*, 6 C. & P. 136.

**Authority of Agent to Commit.]**—A local board employed B. to manage its sewage farm. He had general powers of management, and was not interfered with by the board. Thinking to do good to the farm under his management, and to the neighbourhood, by widening and straightening a stream, he cut away the plaintiff's land on the bank:—Held, that the board was not liable for the trespass so committed, inasmuch as the authority given to B. was confined to the farm, and he was acting entirely beyond the scope of such authority when he went off the farm and damaged the land. *Bolingbroke (Lord) v. Swindon New Town Local Board*, 9 L. R., C. P. 575; 43 L. J., C. P. 575; 30 L. T. 723; 23 W. R. 47. *And see* MASTER AND SERVANT—PRINCIPAL AND AGENT.

**Committed Abroad.]**—Trespass will not lie in this country for entering a house in Canada. *Doulson v. Matthews*, 4 T. R. 503.

**In pursuit of Game.]**—*See* GAME.

**To Minerals.]**—*See* MINES AND MINERALS.

**To Fishery.]**—*See* FISH.

**Where Way Foundrous.]**—*See* WAY.

## 2. WHO MAY MAINTAIN.

### a. In General.

**Occupancy.]**—Mere prior occupancy of land,

however recent, gives a good title to the occupier, whereupon he may recover against all the world, except such as can prove an older and a better title in themselves. *Catteris v. Cooper*, 4 Taunt. 547.

Seemle, that the daughter, or even a female servant of the occupier of a house, has such a possession of her bed-room as will enable her to maintain trespass against a person who wrongfully forces himself into it while she is in bed. *Lewis v. Ponsford*, 8 C. & P. 687.

Proof that the plaintiff was in separate possession of two rooms of a house, is sufficient to satisfy an allegation that he was in possession of the messuage. *Fenn v. Grafton*, 2 Bing., N. C. 617; 3 Scott, 56; 2 Hodges, 58. *See* *Monks v. Dykes*, 4 M. & W. 567.

The actual possession of crown lands, under a parol licence from the crown, entitles the party in possession to maintain trespass against a wrongdoer. *Harper v. Charleworth*, 6 D. & R. 572; 4 B. & C. 574.

**For Limited Purpose.]**—Where contractors for making a navigable canal erected a dam composed of piles and earth, with the consent of the owner of the soil, for the purpose of completing their work:—Held, that they might maintain trespass against the defendants as wrongdoers, for breaking and destroying the same. *Dyson v. Collick*, 1 D. & R. 225; 5 B. & A. 600.

The proprietor of land agreed to grant leases to the defendant of certain houses which he had undertaken to build on the land; the defendant to hold the land and premises for eighty years, yielding therefor 400*l.* a year rent, and to build a wall all along the west side of the land; the landlord to have a right of way over the streets between the houses. The defendant entered, paid rent, built houses, and obtained leases of the houses as fast as they were built:—Held, that he was, under these circumstances, in possession of the soil between the houses, and that the landlord could not maintain an action against him for erecting a wall on the west side of the land, across the end of one of the streets. *Alexander v. Bonnin*, 4 Bing. N. C. 799; 6 Scott, 611; 1 Arn. 337.

Where A. was seised in fee of a close upon which the burgesses of a borough had a right, during a portion of the year, to depasture their cattle, and had, during that period, exclusive possession of the close:—Held, that A. might maintain an action against a party who, during that period, committed a trespass in the subsoil by digging holes, but not against any one who, during that period, merely rode over the close. *Cox v. Glue*, 5 C. B. 533; 17 L. J., C. P. 162; 12 Jur. 185.

**Nature of Title.]**—D. and H. agreed between themselves, in writing, to purchase lands then in the market. By this agreement D. was to have the surface at three-fourths, and H. the minerals at one-fourth of the whole purchase-money. H. afterwards entered into a contract with the owner of the lands to purchase them from him. The lands were duly conveyed to D. by the owner, H. being a party to the purchase deed, and executing a release of all his interest in the lands to D. Afterwards, by an indenture of the 12th July, 1834, D. granted, bargained and sold to H., his executors, administrators, and

assigns, all the minerals lying under the lands, upon terms substantially the same as those contained in the previous agreement between D. and H. The indenture of the 12th July, 1834, was not inrolled as a bargain and sale, and there was no livery of seisin to make it operate as a feoffment. There were seven seams of coal and minerals lying under the lands, and soon after the execution of the deed, H. began to work and get the coal under the lands, and continued so to do between 1835 and 1844. He did not, however, go below the two first seams of coal, and on his ceasing to work in 1844, H. left tramways, implements, &c., in the tunnels and levels he had made. In 1855, H., by deed, conveyed the minerals (except the two first or upper seams), with power to dig for and get the coal, to the plaintiffs, who shortly afterwards entered, and bored down below the two first seams, in order to try for, but they did not work, the coal. D. died in 1848, and in 1857 his devisee and heir-at-law, by deed, granted the lands (except the coal thereunder theretofore sold and conveyed to H.) to S., subject as to the beds of coal under the same to the indenture of the 12th July, 1834. In 1872 S. granted a lease of the coal under the lands to the defendants, and they entered and worked, and got coal under the lease in 1872. On the first of January, 1873, the surviving trustee for sale of D. granted and confirmed unto S. and his heirs, all the seams and beds of coal lying under the lands, subject to such right or interest as legally passed to H., his executors, administrators or assigns, under the indenture of the 12th July, 1834. H. died in 1861.—Held, that the plaintiffs, through H., had sufficient possession of all the seams of coal to entitle them to maintain trespass against the defendants, who were mere wrongdoers, for intruding upon the plaintiff's mines. *Low Moor Company v. Stanley Coal Company*, 34 L. T. 186—C. A. Affirming 33 L. T. 436.

**Mortgagee out of Possession.**—Trespass will not lie against the occupier of land at the suit of a mortgagee, who has never been in actual possession, or been seised of the land, and has not obtained a judgment in ejectment either by default or by verdict, and therefore he cannot in such case waive the tort and maintain an action for use and occupation. *Turner v. Cameron's Coalbrook Steam Coal Company*, 5 Ex. 932; 20 L. J., Ex. 71.

**Lessees.**—The tenant of a mortgagor, whose tenancy was created after the mortgage, and has never been recognized by the mortgagee, cannot maintain trespass against the mortgagee for entering and distraining on the land under the powers of the mortgage. *Gibbs v. Cruikshank*, 8 L. R., C. P. 454; 42 L. J., C. P. 273; 28 L. T. 735; 21 W. R. 734.

An entry is not necessary to the vesting of a term of years in the lessee, but for the purpose of maintaining an action of trespass the lessee must enter, since that action is founded on the actual possession. *Harrison v. Blackburn*, 17 C. B., N. S. 678.

**Lessors.**—A person legally entitled to land, having entered without making any formal declaration of his entry, may maintain trespass against a person wrongfully in possession at the time of entry, and continuing in such possession

afterwards. *Butcher v. Butcher*, 7 B. & C. 399; 1 M. & R. 220.

A lessor having entered at the expiration of the term, may sue in trespass persons claiming under the late tenant as well as the late tenant himself. *Iley v. Moorhouse*, 8 Scott, 156; 6 Bing. N. C. 52.

**Executor.**—An executor can maintain trespass for injury to a chattel real of his testator done in the testator's lifetime. *Hone v. Hamilton*, 9 Ir. R., C. L. 15.

**Heir.**—After entry by an heir-at-law, his right of possession relates back to the time his legal right to enter accrued, so as to enable him to support an action against a wrongdoer for a trespass committed at a time antecedent to the entry. *Barnett v. Guildford (Earl)*, 11 Ex. 19; 24 L. J., Ex. 281; 1 Jur., N. S. 1142.

It makes no difference in this respect that the wrongdoer is an abator, and the cases in which a contrary doctrine is laid down are not law. *Id.*

**Tenant for Life.**—Where the interest of A., a tenant, ceases before the expiration of the term of letting, by the death of his landlord, the tenant for life, A. will not be presumed to have continued in possession after such death, and, in the absence of any subsequent entry, or other act done by him, he has not a sufficient possession of the land, either actual or constructive, to entitle him to maintain trespass. *Brown v. Notley*, 3 Ex. 219; 18 L. J., Ex. 39.

Where it is necessary to a plea of justification under a lease from a tenant for life, that he should be still living, the defendant must aver the continuance of the life, otherwise the plea is bad on general demurrer. *Dayrell v. Hoare*, 4 P. & D. 114; 12 A. & E. 356.

**Servant after Notice.**—The plaintiff was employed by the Highgate Archway Company to collect toll for them, and lived in the toll-house, one shilling per week being deducted from his wages by way of rent. The company having ceased to collect toll at the particular spot, he was dismissed from their employ, and received a notice to leave the house, which he promised to do.—Held, that these circumstances did not constitute him a tenant of the company; and, therefore, that he could not maintain trespass against their agent for pulling down the toll-house. *Hunt v. Colson*, 3 M. & Scott, 790.

The committee of a society having dismissed their manager, entered on and expelled him from a house they had put him into possession of and allowed him to occupy as such manager, and in which he had also been allowed to carry on his own business as a bookseller, and took possession of, but offered to return his stock, which, however, he never had applied for.—Held, that he could not sue them, either in trespass or trover. *White v. Bailey*, 2 F. & F. 385. A rule for a new trial was afterwards refused. 10 C. B., N. S. 227; 30 L. J., C. P. 253; 7 Jur., N. S. 948.

The plaintiff was master of a school which was under the control of trustees, and, as such, was allowed to occupy a school-house. The trustees had drawn up certain rules, one of which provided for the master's dismissal, in case of misconduct. In pursuance of this rule, the trustees,

on the 28th June, dismissed the plaintiff, who acquiesced in the dismissal, and the school was then peaceably taken possession of by the trustees, and locked up. On the following day the plaintiff re-entered by force. On the 11th July, he was ejected by the trustees. To an action against them for such eviction, the trustees pleaded that the plaintiff was not possessed:—Held, that he had not, by his re-entry, a *prima facie* right of possession against the trustees as wrongdoers. *Browne v. Dawson*, 12 A. & E. 624; 4 P. & D. 355.

**Date of Entry.**—Trespass is not maintainable by a person who comes into possession after the commission of the trespass. *Pilgrim v. Southampton and Dorchester Railway Company*, 8 C. B. 25; 18 L. J., C. P. 330.

#### b. Tenants in Common against each other.

**When actual Ouster.**—One tenant in common cannot maintain trespass or trover against his co-tenant for cutting and carrying away the grass off their land unless there has been an ouster, or unless it is shewn that the grass has been destroyed. *Jacobs v. Seward*, 5 L. R., H. L. 464; 41 L. J., C. P. 221; 27 L. T. 185. Affirming 22 L. T. 690; 18 W. R. 953—Ex. Ch.

A. and B. being tenants in common of land, B. entered the land, cut the grass, put a lock upon the gate, and carried away the grass. There was no evidence that he kept the gate locked, but there was evidence that he opened the gate for A.'s son to take away the hay of a former year:—Held, that these facts did not amount to an ouster, so as to enable A. to maintain an action of trespass against B., nor to a destruction of the common property, so as to entitle him to maintain an action of trover. *Ib.*

Held, also, that the court was right in refusing to allow an amendment of the declaration by converting the action into an action for an account under 4 Anne, c. 16, s. 27. *Ib.*

Trespass *quare clausum fregit* lies by one of several tenants in common against his co-tenant where there has been an actual expulsion. *Murray v. Hall*, 7 C. B. 413; 18 L. J., C. P. 161; 13 Jur. 262.

So it lies by one tenant in common against his co-tenant (or the licensee of the latter), for digging up and carrying away the soil of the close of which they are tenants in common, for such an act is an ouster. *Wilkinson v. Haygarth*, 12 Q. B. 837; 16 L. J., Q. B. 103; 11 Jur. 104.

To such an action, a plea that the close is not the close of the plaintiff is not supported by proof that he is tenant in common of it with others who authorized the trespass. *Ib.*

The plaintiff and defendant being tenants in common of a wall, the defendant removed the coping-stones and increased the height of it, so as to form the back of a building which he erected against it, and carried up a chimney upon it:—Held, evidence of an ouster, for which an action was maintainable. *Stedman v. Smith*, 8 El. & Bl. 1; 26 L. J., Q. B. 314; 3 Jur., N. S. 1248.

**Paying into Court.**—Where one tenant in common brings an action against his co-tenant, and the declaration takes no notice of his limited

interest, but alleges an expulsion or a total destruction, the defendant may pay money into court in respect of the damage to the plaintiff's share, and as to the residue plead *liberum tenementum*, or traverse the plaintiff's property. *Cresswell v. Hedges*, 31 L. J., Ex. 497; 8 Jur., N. S. 767; 7 L. T. 70; 10 W. R. 777.

#### 3. LEAVE AND LICENCE.

**Presence at Creditor's Meeting.**—Action for assault; plea, that the defendant was possessed of an office and premises wherein the plaintiff was trespassing, whereupon the defendant requested him to leave the office and premises, which the plaintiff refused to do, and thereupon the defendant gently removed him. Replication, that M. had instituted liquidation proceedings under the Bankruptcy Act, 1869, in the county court, and had convened a general meeting of his creditors, to be holden at the office and premises in the plea mentioned, on the 3rd February, 1874, and the defendant was the solicitor of M. in such proceedings, and in and about summoning the meeting, which was duly held at the said time and place; and the plaintiff, then being the solicitor and duly appointed proxy of T., a creditor of M., attended the meeting as such, and the defendant was present at the meeting as solicitor and on behalf of M., and officiated thereat as the duly elected chairman; and a proof made under the proceedings by T., and a writing under his hand duly appointing the plaintiff his proxy in the matter of the proceedings, were produced to the defendant, then being such chairman, and afterwards and during the continuance of the meeting, and before its termination or adjournment, and whilst the plaintiff was lawfully attending the same as such proxy at the office and premises, the plaintiff refused to leave the same when so requested by the defendant, as he lawfully might for the cause aforesaid:—Held, that the plaintiff was not a trespasser on the occasion. The defendant having given the plaintiff leave to be present at the meeting as proxy for a creditor, the latter had a right, coupled with an interest, entitling him to be on the creditor's premises. *Vaughan v. Hampson*, 33 L. T. 15.

**At Race-course.**—To an action for assault and false imprisonment, the defendant pleaded, that, at the time of the trespass, the plaintiff was in a close of E.; and that the defendant, as the servant of E., and by his command, *molliter manus imposit* on the plaintiff, to remove him from the close, which was the trespass complained of. The plaintiff replied, that he was in the close by the leave and licence of E., which was traversed by the rejoinder. The evidence was that E. was steward of the Doncaster races; that tickets of admission to the grand stand were issued, with his sanction, and sold for a guinea each, entitling the holders to come into the stand, and the inclosure round it, during the races; that the plaintiff bought one of the tickets, and was in the inclosure during the races; that the defendant, by the order of E., desired him to leave it, and, on his refusing to do so, the defendant, after a reasonable time had elapsed for his quitting it, put him out, using no unnecessary violence, but not returning the guinea:—Held, that, on this evidence, the jury was properly directed to find the issue

for the defendant. *Wood v. Leadbitter*, 23 M. & W. 838; 14 L. J., Ex. 161.

**Licence to Eject.**—A licence by a tenant to his landlord to eject him on a specified day without any process of law is void, as authorizing the commission of an act which is made illegal by the act 5 Ric. 2, st. 1, c. 8. *Edwick v. Hawkes* or *Edridge v. Hawkes*, 18 Ch. D. 199; 50 L. J., Ch. 577; 45 L. T. 168; 29 W. R. 913.

If a person, who has a legal right of entry upon land which is in the possession of a wrongdoer, is allowed to enter peaceably through the outer door, it is still illegal for him to turn out the wrongdoer with violence. *Ib.*

The plaintiff being distrained on for rent, gave the defendant, her landlord, the following undertaking: "In consideration of Mr. C. giving me the furniture distrained for rent, I undertake to give him possession of the premises on or before one week from the date hereof." The plaintiff acted on this instrument, by selling some of the furniture for her own use, and, at the end of a week, the defendant took possession. The plaintiff having sued him in trespass, and the defendant having pleaded leave and licence:—Held, that the above instrument established the plea. *Frltham v. Cartwright*, 5 Bing. N. C. 569; 7 Scott, 693.

A. let premises to B., by an agreement, which contained clauses for payment of rent and for repairing the premises; and a clause, that, in case of non-payment of the rent, or non-performance of the conditions, it should be lawful for A., without demand, to enter upon and take possession of the premises, and expel B. therefrom, without legal process; and that, in case of such entry, and of an action being brought for the same, the defendant might plead the leave and licence of B. to A. for the entry or trespasses complained of. In an action by B. against C., for breaking and entering the premises, and assaulting the plaintiff, C. pleaded leave and licence. Rent being in arrear from B. to A., C., under a written order from A., entered and forcibly expelled B. The agreement was given in evidence:—Held, that the plea was sustained by the evidence. *Kavanagh v. Gudge*, 7 M. & G. 316; 7 Scott, N. R. 1025; 1 D. & L. 928; 13 L. J., C. P. 99; 8 Jur. 362.

**To seize and sell Goods—Demand.**—A licence by deed to enter a dwelling-house at any time or times, and seize certain chattels and sell the same, will not justify a breaking and entering unless a demand of the goods has been first made, together with an intimation of the authority under which such demand is made. *Aikins v. Brunton*, 14 W. R. 636.

**To fetch Goods Sold.**—A licence is not implied by law to the purchaser of goods (though sold under an execution or a distress) to enter upon the premises of the former owner and take them away, although they have remained there with his assent. *Williams v. Morris*, 8 M. & W. 488.

To support a plea of leave and licence to an action for taking away goods under such circumstances, there must be proof of an express agreement that the purchaser should enter on the premises and take the goods. *Ib.*

**To Build.**—A plea of leave and licence to

erect and maintain a wall upon a given spot is not supported by proof of a licence to erect only. *Alexander v. Bonnin*, 6 Scott, 611; 4 Bing. N. C. 709.

**Pending definite Agreement.**—To an action for entering the plaintiff's land and breaking open his gate, the defendant pleaded as an equitable plea, that a dispute had arisen between the plaintiff and defendant and other persons, whether there was a highway over the land; and thereupon, in order that the defendant and R., the plaintiff's solicitor, might arrange to come to a definite understanding as to the course to be pursued in deciding or trying the question; and in consideration that the defendant and the other persons, at the plaintiff's request, then signed the same, it was, by a memorandum in writing, signed by the plaintiff, R., the defendant, and the other persons, agreed that, without prejudice to the question of right, the way should remain open and unobstructed for the passage of the defendant and the other persons, until R. and the defendant should come to a definite understanding as to the course to be pursued in trying the question then in dispute. The plea alleged that the trespasses were committed before any agreement had been come to, and justified them in the use of the way:—Held, that the plea was no answer to the action either at law or in equity. *Hyde v. Graham*, 1 H. & C. 593; 32 L. J., Ex. 27; 8 Jur., N. S. 1229; 7 L. T. 563; 11 W. R. 119.

**Revocation.**—In trespass quare clausum fregit on several days; plea, leave and licence to the whole. If some of the trespasses were committed after the licence was revoked, the plaintiff need not new assign, as the defendant, by his plea, undertakes to prove a licence sufficient to cover all the acts of trespass. *Haward v. Grant*, 1 C. & P. 448.

**Where no Authority.**—If A. gives B. leave to go on a field, in which A. has no right, and B. goes there, this will not make A. liable as a co-trespasser with B.; but if A. orders and authorizes B. to go on the field, and he does so, A. is a joint trespasser with B.; the latter being an authority, the former a leave and licence only. *Robinson v. Taughton*, 8 C. & P. 252.

**Pleading.**—*See post*, col. 126.

#### 4. NOTICE NOT TO TRESPASS.

**Costs after Notice not to Trespass.**—The notice required to entitle a plaintiff to his costs under 3 & 4 Vict. c. 24, s. 3, in an action of trespass or trespass on the case, when he recovers less damages than 40s., and the judge does not certify that the action was to try a right, or that the trespass was wilful and malicious, must be in writing and must be served personally on the defendant, or left at his last reputed or known place of abode, or, at least, must be clearly shewn to have reached him. *Turner v. Cameron*, 24 L. T. 500; 19 W. R. 888.

A service of a notice on a bailiff in possession of premises is insufficient. *Ib.*

In an action for placing stumps and stakes on the plaintiff's land, the defendant paid into court 40s., which the plaintiff took out in satisfaction. The plaintiff afterwards gave the defendant

notice, that, unless he removed the stumps and stakes, another action would be brought against him :—Held, that the leaving the stumps and stakes on the land was a new trespass ; that the plaintiff was entitled to full costs in an action for their continuance after the notice, though he recovered less than 40s., and the judge refused to certify that the trespass was wilful and malicious, under 3 & 4 Vict. c. 24, s. 2 ; and that the proper mode of obtaining such costs was by entering a suggestion on the record, that the trespass was committed after notice. *Bowyer v. Cook*, 4 C. B. 236 ; 4 D. & L. 816 ; 16 L. J., C. P. 322 ; 11 Jur. 333.

**Waiver.**—Trustees for sale of premises gave notice, dated May 18, 1824, to A., the rightful occupier of a cottage thereon, not to trespass on any part thereof, and afterwards brought an action against him for trespassing on an orchard. The same parties gave another notice to A. on the 18th March, 1825, and before the trial, to quit the possession of all the ground which he rented, or held under them :—Held, that the second notice acknowledged A. as a tenant, and operated as a waiver of the first, which had treated him as a trespasser, and consequently that the action did not lie. *Barton v. Cordy*, M'Clel. & Y. 278 ; 1 C. & P. 664.

## 5. PRACTICE.

### a. Parties.

**Joinder of Several Defendants.**—Where several join in one justification, it is either good or bad for all. *Anon.*, Lofft, 364.

Declaration against three ; plea by all, not guilty ; separate pleas of justification by two ; replication to these pleas that those two were guilty of excess ; rejoinder by all three, that they were not all three guilty of excess ; the rejoinders held ill, and judgment for the plaintiff. *Morrow v. Belcher*, 7 D. & R. 187 ; 4 B. & C. 704.

In a joint action the plaintiff should go for one trespass done at the same time, in which all were implicated ; and if he goes for a trespass done at a time when they were not present, he will not afterwards be allowed to go for one at a time when they were. *Sedley v. Sutherland*, 3 Esp. 202.

But where plaintiff proved a trespass on a given day by three of four, but failing to implicate the fourth in that act of trespass, abandoned it, and proceeded to prove a joint trespass by the four on a subsequent day :—Held, that he was at liberty so to do. *Roper v. Harper*, 5 Scott, 250 ; 4 Bing. N. C. 20.

In trespass against several, if any one suffers judgment by default, the plaintiff need only give evidence to affect the rest ; and it is matter for the jury, whether the trespass proved is the same as that confessed ; but the plaintiff cannot be non-suited. *Harris v. Butterly*, Cowp. 483.

The application to a judge, in the course of a cause, to direct a verdict for one or more of several defendants in trespass, is strictly to his discretion ; and that discretion is to be regulated not merely by the fact, that, at the close of the plaintiff's case, no evidence appears to affect them, but by the probabilities, whether any such will arise before the whole evidence in the cause closes. *Sowell v. Champion*, 2 N. & P. 627 ; 6 A. & E. 407.

In trespass against several, there cannot be a verdict for any of them until the case for the

plaintiff is finally closed by the complete examination of all his witnesses, nor so long as the cross-examination of any of them is reserved. *Souch v. Champion*, 1 F. & F. 495.

Where a verdict was found against one only of several defendants, the evidence applying to all, but no leave was given at the trial for leave to enter a verdict against the others :—Held, that a verdict could not be entered against them. *Stirling v. Cozens*, 3 D. P. C. 790.

In trespass against several, a judgment of non pros. ought to be joint, and not distinct against each. *Pryce v. Foulkes*, 4 Burr. 2418.

If two defendants suffer judgment by default, and the plaintiff executes writs of inquiry against them separately, and takes several damages against them, it is irregular ; and if the plaintiff enters up final judgment with those several damages against the defendants, it is erroneous ; but the court will permit the plaintiff to set aside his own proceedings before final judgment on payment of costs. *Mitchell v. Milbank*, 6 T. R. 199.

**Who may sue.**—See ante, col. 117.

### b. Pleadings.

**Claims.**—One trespass well alleged is sufficient on demurrer to a declaration. *Chamberlain v. Greenfield*, 2 W. Bl. 810 ; 3 Wils. 292.

The allegation of *alia enormia* is no part of the declaration. *Lowden v. Goodrich*, Peake, 46.

A declaration alleged that the defendant, on the 6th of March, broke and entered the plaintiff's house, and continued therein for eight days. Plea, payment into court, as to the first three days, and not guilty as to the residue. It was proved that the defendant, having quitted the house on the third day, returned on the fifth and continued therein for three more days :—Held, that evidence of the latter trespass was rightly received under the declaration, though it only alleged one trespass with a continuando. *Percival v. Stamp*, 9 Ex. 167 ; 2 C. L. R. 282.

A count for entering rooms and taking goods is not allowed to be joined with a count for taking the same goods, as and for a distress for rent falsely pretended to be due. *Hoare v. Lee*, 5 C. B. 754 ; 5 D. & L. 765 ; 17 L. J., C. P. 196 ; 12 Jur. 356.

In an action for breaking and entering a house, the allegation *vi et armis* does not imply a forcible entry. *Harvey v. Bridges*, 3 D. & L. 55 ; 14 M. & W. 437 ; 14 L. J., Ex. 272 ; *S. P.*, *Wright v. Burroughes*, 3 C. B. 685 ; 4 D. & L. 438 ; 16 L. J., C. P. 6.

**Description of Premises.**—The word "close" includes as well the subsoil as the soil. *Cox v. Gluc*, 5 C. B. 533 ; 17 L. J., C. P. 162 ; 12 Jur. 185.

A declaration stated that the defendant broke and entered "lands of the plaintiff, covered with water, being the bed and channel of the river T., and under the same, in the several parishes of L. and L., in the county of G."—Held, before the Reg. Gen. T. T. 1853, that the declaration sufficiently described the locus in quo by name. *Beaufort (Duke) v. Vivian*, 7 Ex. 580 ; 21 L. J., Ex. 204.

The locus in quo should be designated by abutments or other description, as it was at the time of the trespass, and not at the time of the declara-

tion. *Humphrey v. London and North-Western Railway Company*, 7 Ex. 325; 22 L. J., Ex. 149.

A plea justifying a trespass, as committed in exercise of a right of way, is sufficiently certain as to the premises in respect of which the way is claimed, if it describes them as "a close in the parish," &c., "and county," &c., "called B., with lands thereunto adjoining; and another close called M., and divers, to wit, two other closes next adjoining thereunto;" claiming a way from B. to M. and back, for the better use, occupation, &c. of B. and the lands adjoining thereto, and of M. and the adjoining closes respectively. *Holt v. Daw*, 16 Q. B. 990; 20 L. J., Q. B. 365.

A description of a close by two abutments only is a sufficient description of the premises. *North v. Ingamells*, 9 M. & W. 249; 1 D., N. S. 151.

The plaintiff's close was described by abutments; plea, seisin in fee in the defendant, and issue thereon. The plaintiff is entitled to recover for a trespass done in a close in his lawful possession, answering to the description in the declaration, although the defendant also has a close answering to the same description. *Lempriere v. Humphrey*, 4 N. & M. 638; 3 A. & E. 181; 1 H. & W. 170.

The owner of a close called Hall Close, removed an old fence, and added to his close a small slip of land adjoining a public road. In an action for an alleged trespass committed upon this slip of land a year after the inclosure, the plaintiff, in his declaration, described the locus in quo as Hall Close:—Held, that it was well described. *Brownlow v. Tomlinson or Walker*, 1 Scott, N. R. 426; 1 M. & G. 484; 8 D. P. C. 827.

**Defences.**—Under not guilty, that only can be given in evidence, which shews that the defendant did not do the act complained of. *Pearcy v. Walter*, 6 C. & P. 232.

A recovery of damages against a co-trespasser not sued is not admissible in mitigation of damages under the plea of not guilty. *Day v. Porter*, 2 M. & Rob. 151.

In an action for breaking the outer door, and entering the plaintiff's house, the defendant may give in evidence under not guilty, that he entered by virtue of a warrant of distress for rent, and was turned out of possession, whereupon he committed the trespasses complained of. *Eagleton v. Gutteridge*, 11 M. & W. 465; 2 D., N. S. 1053; 12 L. J., Ex. 359.

To an action for breaking and entering the plaintiff's close, a plea, that the close was not the close of the plaintiff, puts in issue the possession merely, not the right of possession of the plaintiff. If the plaintiff means to set up superior title in himself or some person under whom he claims, he should plead in confession and avoidance. *Whittington v. Bozall*, 5 Q. B. 139; 12 L. J., Q. B. 318; 7 Jur. 722.

But under a plea to a similar declaration that the close was not the close of the plaintiff, the defendant may shew a lawful right to the possession of the close either in himself or in some other person under whose authority he claims to have acted. *Jones v. Chapman*, 2 Ex. 803; 18 L. J., Ex. 456—Ex. Ch.

A declaration stated a breaking, entering, damaging the doors, hinges and locks, spoiling the grass and fruit-trees, and exposing the plaintiff's goods to sale on his premises, by means of

which he was not only disturbed in the possession of his house, but prevented from carrying on his business, and deprived of the enjoyment of his goods. The defendant pleaded, that, before action brought, the plaintiff became a bankrupt:—Held, on general demurrer, that, as there were some causes of action included in the declaration which would not pass to the assignees, the plea, which embraced the whole, and was not addressed to any particular part of the declaration, was substantially bad. *Rogers v. Spence*, 12 C. & F. 700.

In trespass quare clausum fregit, where there are several issues, and amongst them one on the plaintiff's possession of the close, the plaintiff has a right to a trial of all the other issues, though it appears on the opening of the evidence that he was not in possession of the close. *Fry v. Monckton*, 2 M. & Rob. 303.

A declaration alleged that the defendants broke and entered the plaintiff's house, and made a noise therein, and broke open the doors of the house; and broke to pieces the locks of the doors with which they were fastened, and seized the plaintiff's goods. Justification under a *fi. fa.* by one defendant alleged that he sued out the writ, and that by authority thereof the other defendant, being sheriff, peaceably entered, the outer door being open, in order to seize, and did seize the goods being in the house; and in so doing, the defendants unavoidably made some noise, which are the trespasses complained of:—Held, that the plea was bad, the breaking of the doors and locks being not aggravation merely, but a substantive trespass, distinct from the breaking and entering, and requiring to be justified, which was not done. *Curlewis v. Laurie*, 12 Q. B. 640.

To a declaration for breaking and entering the plaintiff's house, and taking and carrying away his goods, and converting them to the defendant's use, the defendant pleaded a justification of the entry, that the house was the freehold of A., and that he entered as his servant, and, because the goods were incumbering the close, he removed them off to a convenient distance:—Held, that the allegation of the conversion of the goods was mere matter of aggravation, and that the plea therefore was not bad for omitting to justify it. *Pratt v. Pratt*, 6 D. & L. 20; 2 Ex. 413; 17 L. J., Ex. 299.

In an action for breaking and entering the plaintiff's house, and expelling him therefrom, the breaking and entering are the gist of the action, and the expulsion is merely aggravation; therefore, a justification as to the breaking and entering will cover the whole declaration. *Taylor v. Cole*, 3 T. R. 292; 1 H. Bl. 555.

The plaintiff declared for breaking his close, and set out the close by abutments. The defendant justified, alleging that the close was part of an allotment of six acres made by commissioners duly authorized for certain purposes in execution of which he entered. The plaintiff denied that the close was part of the six acres in the plea supposed to have been allotted; and thereupon issue was joined. The close, set out by abutments, was not all within the allotment, but that part in which the actual trespass occurred was within it:—Held, that the justification was made out. *Bassett v. Mitchell*, 2 B. & Ad. 99.

— **Leave and Licence.**—A licence to enter

the plaintiff's house, if pleaded, is a bar to an action for breaking and entering his house, and debauching his daughter, but it cannot be given in evidence under the general issue. *Bennett v. Alcott*, 2 T. R. 166.

A tenant from year to year being desirous of letting his house for a quarter, quitted and left it locked, with authority to his landlord to let it during his absence, if an opportunity offered, and for that purpose left the key with a neighbour; an opportunity occurred of letting the house, but the person who had the key having absconded, the landlord entered by placing a ladder against the house and raising the first-floor window, and after shewing the inside of the house, left it in the same state as before; the house was afterwards entered by persons unknown, and some of the tenant's furniture and wearing apparel were stolen; and the tenant having brought an action against the landlord for breaking and entering the house, and leaving it insecure, in consequence of which his furniture and wearing apparel were stolen:—Held, that a plea of leave and licence was no answer to the action. *Ancaster v. Milling*, 2 D. & R. 714.

A plea of leave and licence means leave and licence in fact, and a licence in law must be specially pleaded. *Moxon v. Savage*, 2 F. & F. 182.

—**Liberum tenementum.**—In trespass quare clausum fregit, the defendant is entitled to plead liberum tenementum, with a plea denying the close to be the plaintiff's. *Slocombe v. Lyall*, 6 Ex. 119; 2 L. M. & P. 33; 20 L. J., Ex. 96.

It is pleadable to an action for breaking and entering the plaintiff's house, where the name of the premises is particularly set forth in the declaration. *Harvey v. Brydges*, 3 D. & L. 55; 14 M. & W. 437; 14 L. J., Ex. 272; 9 Jur. 759. Affirmed, 1 Ex. 261—Ex. Ch.

A declaration alleged, that the defendant, with force and arms, broke and entered a house and land of the plaintiff, then in his actual possession and occupation, and with force and arms ejected the plaintiff and his family from the occupation of the same; to which the defendant pleaded liberum tenementum:—Held, good. *Id.*

But liberum tenementum, to a declaration charging an assault upon the plaintiff, is a bad plea. *Roberts v. Taylor*, 1 C. B. 117; 3 D. & L. 1; 14 L. J., C. P. 87; 9 Jur. 330.

Upon a plea of liberum tenementum the defendant has the choice to what parcels he will apply his plea; and if the plaintiff insists on a trespass in other parcels, he must newly assign. *Hawke v. Bacon*, 2 Taunt. 156.

The plea of liberum tenementum gives implied colour, for it admits a possession sufficient as against a wrongdoer; but it denies his rightful possession, and asserts a right to immediate possession in the defendant. *Doe v. Wright*, 2 P. & D. 672; 10 A. & E. 763.

It renders it incumbent on the defendant to prove title, either by deed or by shewing twenty years' actual possession. *Brest or Grice v. Lever*, 7 M. & W. 593; 9 D. P. C. 246.

On a plea of liberum tenementum to an action for a trespass to a close named in the declaration, the defendant is entitled to a verdict, if he establishes a title to that part of the close on which the trespass was committed, and is not bound to prove a title to the whole close. *Smith v. Royston*, 8 M. & W. 381; 1 D. N. S. 124.

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A declaration stated, that the defendant, with force and arms, and with a strong hand, and against the form of the statute, broke and entered a house, being in the actual occupation and possession of the plaintiff, and in a forcible manner broke open the doors and windows, and also with force and arms assaulted the plaintiff, and with a strong hand put out and expelled the plaintiff therefrom. Plea, as to the breaking and entering, and breaking the doors, liberum tenementum:—Held, that the plea was good, inasmuch as it justified the breaking and entering, which was the gist of the action, the breaking and entering with a strong hand and against the form of the statute being aggravation. *Davison v. Wilson*, 11 Q. B. 890; 17 L. J., Q. B. 196; 12 Jur. 647.

The plea admits such a possession in the plaintiff as would maintain the action against a wrongdoer, but asserts in answer that the defendant is the freeholder, with a right to the immediate possession. *Ryan v. Clarke*, 7 D. & L. 8; 18 L. J., Q. B. 267; 13 Jur. 1000.

To an action for breaking and entering the plaintiff's dwelling-house, ejecting and expelling the plaintiff and his family therefrom, and seizing his goods, the defendant pleaded, as to the trespasses in and to the dwelling-house, and seizing and taking the goods, liberum tenementum. The plaintiff traversed the liberum tenementum, and new-assigned the expulsion:—Held, that the new assignment was bad, the plea justifying the expulsion, as well as the breaking and entering of the dwelling-house, and the seizure of the goods. *Meriton v. Coombe*, 1 L. M. & P. 510; 9 C. B. 787; 19 L. J., C. P. 336.

—**Replications.**—A replication of an outstanding term in a stranger confesses the freehold, and presumptive right of immediate possession, but avoids the presumption, which is a consequence of the right of freehold, and by so doing makes the defendant a wrongdoer, notwithstanding he is the freeholder, and falls back upon the possession of the plaintiff, which was asserted in the declaration, and admitted in the plea, and is sufficient against a wrongdoer. *Ryan v. Clarke*, 7 D. & L. 8; 18 L. J., Q. B. 267; 13 Jur. 1000.

Where a defendant justifies a trespass for preventing a tortious act of the plaintiff, who relies on a licence which rendered his act lawful, he ought to reply the licence. *Taylor v. Smith*, 7 Taunt. 156.

A freehold of customary tenements within a manor, though such tenements are not held at the will of the lord, and are transferable by lease and release and admittance, is in the lord; and, therefore, where, in an action by the customary tenant against the lord, the latter pleads liberum tenementum, the derivative and subordinate interest of the tenant ought to be replied. *Thompson v. Hardinge*, 1 C. B. 940; 14 L. J., C. P. 268; 9 Jur. 927.

A replication, by way of estoppel, may be replied to a plea of liberum tenementum, and if the plaintiff does not avail himself of that liberty, but merely joins issue on the plea, the matter, which might have been so replied, is not conclusive evidence in his favour, but is merely evidence to go to the jury. *Faversham (Lord) v. Emerson*, 11 Ex. 385; 24 L. J., Ex. 254.

In an action for breaking and entering the

plaintiff's land, and building thereon a wall and a cornice, a verdict was found for the defendant on the plea of liberum tenementum. In a subsequent action by the devisees of the former defendant against the former plaintiff and his wife, for injury to the reversion by the wife breaking and entering the land and pulling down the cornice, the defendants were held to be estopped, by the record in the former action, from giving evidence to shew that the land under the cornice had not been in dispute. *Whittaker v. Jackson*, 2 H. & C. 926; 32 L. J., Ex. 181; 11 L. T. 155.

— **Continuing Trespass.**—A declaration alleged that the defendants wrongfully raised an embankment near the plaintiff's house, and wrongfully continued the same, by reason whereof large quantities of water flowed against and into the house. Plea, that the embankment was raised and continued by the defendants under certain acts of parliament. Replication, that although the embankment was raised and continued under the acts of parliament, the flowing of the water against and into the house was occasioned by the wrongful construction and negligent and improper raising of the embankment, and the want of proper and sufficient drains to the same, and the continuing the embankment so wrongfully constructed and insufficiently drained:—Held, that the replication was not a departure from the declaration. *Brine v. Great Western Railway Company*, 2 B. & S. 402.

**Traverse of Command.**—If the defendant pleads soil and freehold in another, by whose command he justifies the trespass, such command may be traversed by the plaintiff. *Chambers v. Donaldson*, 11 East, 65. And see *Cury v. Holt*, 11 East, 70, n.

The only ground upon which the authority of a servant is traversable in an action of trespass is, the protection of the person or property of a party from the officious and wanton interference of a stranger, where the principal might have been willing to waive the right. *Dobree v. Napier*, 3 Scott, 201; 2 Bing. N. C. 781.

A defendant pleaded that the locus in quo was the soil and freehold of T., and justified under him as his servant and by his command. The replication traversed the command. T. was a minor, and a ward in Chancery, and the defendant the receiver and agent for the estate:—Held, that from this the jury might infer a general authority to do the act, and if they so inferred, ought, to find for the defendant; and that upon this issue the plaintiff was not entitled to shew that he held under a lease, and to insist that the act was therefore such as an infant could not authorize. *Ever v. Jones*, 9 Q. B. 623; 16 L. J., Q. B. 42; 10 Jur. 965.

**New Assignment.**—There cannot be a new assignment except where there is a special plea. *Smith v. Miles*, 1 T. R. 475.

Where the plaintiff in his declaration avers a single act of trespass, which the defendant justifies, there can be no new assignment. *Taylor v. Smith*, 7 Taunt. 156.

Where a justification is pleaded, to which the plaintiff new assigns that the action is brought for another and different trespass than that men-

tioned in the plea, and not guilty is pleaded to the new assignment; if the plaintiff gives in evidence only one trespass, it is incumbent on him to shew that the trespass is clearly a different one from that mentioned in the plea; if the circumstances are alike, the jury ought to consider it to be the same. *Darby v. Smith*, 2 M. & Rob. 184.

To an action for breaking the plaintiff's close and laying a railroad thereon, the defendant justified under the reservation contained in certain deeds. The plaintiff new assigned to the plea that the trespasses were committed on other and different occasions, and to a greater extent than was necessary, and for other and different purposes, and on other parts of the close; to which there was judgment by default:—Held, that the plaintiff could not dispute that some species of railroad was within the reservation, but that the question was, whether the railroad was constructed in a direction or in a manner unauthorized by the reservation. *Dand v. Kingscote*, 6 M. & W. 174; 2 Railw. Cas. 27.

The locus in quo was described as "abutting on the south and east on a close in the occupation and possession of the defendants." The defendants (a railway company) pleaded that they took possession of a part of the close abutting on the south on the fence of their railway, under 8 & 9 Vict. c. 20, ss. 32, 33, which was the trespass complained of. It appeared at the trial, that at the time the trespass was committed, the close abutted on the fence of the railway, but afterwards the company took possession of and purchased a small part of it adjoining the railway, so that the plaintiff's description was correct at the time of the declaration, but not at the time of the trespass:—Held, that the plaintiff, not having new assigned, was not entitled to recover. *Hunfrey v. London and North-Western Railway Company*, 7 Ex. 325; 22 L. J., Ex. 149.

Where the defendant pleaded liberum tenementum, as occupier for thirty years, having a right to dig sand and marl; and that the defendant having occasion to exercise the right, and for the purpose of the right, and in the exercise of the right, as occupier of the land, and in order to the cultivation thereof, committed the trespass complained of; to which the plaintiff replied by traversing the plea in the form given by 15 & 16 Vict. c. 76, s. 77; the plaintiff having proved a trespass, and no evidence being adduced in support of the right claimed:—Held, that the defendant was entitled to a verdict, as the plaintiff ought to have new assigned. *Glover v. Dixon*, 9 Ex. 158; 2 C. L. R. 309; 17 Jur. 1012.

Where the general issue is on record, and the defendant means to suffer judgment by default on a new assignment, so much of the general issue as applies to the trespasses newly assigned should be withdrawn. *Cross v. Johnson*, 4 M. & R. 290; 9 B. & C. 613. See *Price v. Seaward*, Car. & M. 23.

#### c. Evidence.

**Onus.**—A party who insists upon remaining on the land of another against his will, and therefore *prima facie* against right, ought to shew all the circumstances which make such possession lawful, and abridge the general rights of property. *Hayling v. Okey (in error)*, 8 Ex. 531; 22 L. J., Ex. 139; 17 Jur. 325—Ex. Ch.

**Admissions and Conduct of Defendant.]**—In an action for breaking and entering the plaintiff's mine and taking coals, evidence of working by the plaintiff in another part of the same mine, within eighty yards of the place of the trespass, coupled with a statement by the defendant, that he had got the coal, and was willing to pay such amount as should be settled by arbitration, is evidence of the plaintiff's being in possession of the place where the trespass was committed. *Wild v. Holt*, 9 M. & W. 672; 1 D., N. S. 876.

In an action against five persons for breaking into the plaintiff's house, in which they have paid money into court, the plaintiff cannot go into proof (as evidence of malice), that, nine months after the trespass, one of them indicted him for perjury. *Newton v. Wilson*, 1 C. & K. 537.

Evidence of the conduct of the parties before the trespass complained of, if it has reference to it, may be receivable; but not evidence of the act of one defendant done by him long after the trespass. *Id.*

**Refusing Entrance to Plaintiff.]**—In an action for breaking and entering the plaintiff's apartment, it appeared that the plaintiff had taken furnished lodgings in the defendant's house for a term, and that the only entrance to them was through the defendant's street door and lobby; and the evidence to shew the breaking and entering by the defendant was, that, before the term had expired, the defendant prevented the plaintiff from entering the house, telling him he should no longer have the apartments:—Held, sufficient evidence for the jury to infer a breaking and entering of the apartments by the defendant. *Lane v. Dixon*, 3 C. B. 776; 16 L. J., C. P. 129; 11 Jur. 89.

**Nature of Right.]**—Issue being taken on pleas justifying a trespass, in exercise of a right, evidence is admissible to shew that the entry was not at a proper time, and that the plaintiff resisted the entry on that ground. *Lynn v. Comer*, 2 F. & F. 244.

**Recalling Witnesses.]**—The plaintiff's counsel, after he has closed his case, may recall a witness to prove that the locus in quo was in the possession of the plaintiff, which he had omitted to do on his previous examination. *Brown v. Giles*, 1 C. & P. 118.

#### d. Injunction.

**When Granted.]**—The guardians of the poor, wrongfully claiming a right of way to their relieving office over the plaintiffs' lands, invited paupers to come that way for relief; the trespass by the paupers causing serious injury to the plaintiffs, an injunction was granted to restrain the guardians, their servants, workmen and agents, from trespassing. *Ardley v. St. Pancras (Guardians)*, 39 L. J., Ch. 871.

A meane landlord entering on demised premises in the absence of express power in the lease, though himself liable to forfeiture for non-repair, will be restrained by injunction. *Stocker v. Planet Building Society*, 27 W. R. 877—C. A.

When the plaintiff's title is not disputed the court will grant an injunction to restrain acts of trespass without requiring him first to bring an action. *Goodson v. Richardson*, 9 L. R., Ch. 221; 43 L. J., Ch. 790; 30 L. T. 142; 22 W. R. 337.

When water pipes had, without the consent of the owner of the soil, been laid in the soil of a highway, an injunction to restrain the continuance of the pipes was granted; the owner of the soil not being left to his remedy at law, and not being required to establish his right at law. *Id.*

The facts that the soil under the highway was of no value to the owner, and that his motive for applying to the court was not connected with the enjoyment of his land, were held not to be reasons against the granting of the injunction. *Id.*

In 1859 H. brought ejectment against S. to recover a piece of woodland. S. set up adverse possession for more than twenty years, and the action was discontinued. H. shortly afterwards took up his residence in a house close to the wood, and frequently walked in the wood, turned cattle into it, and cut the brambles there. In 1873 he cut down a tree in the wood, and threatened to cut more, upon which S. filed his bill for an injunction:—Held, that, after H. had, by bringing ejectment, admitted S. to be in possession of the wood, the acts done by H. must be looked upon only as acts of trespass not putting him into possession, and that S., being in possession, was entitled to an interlocutory injunction to restrain him from cutting timber. *Stanford v. Hurlstone*, 9 L. R., Ch. 116; 30 L. T. 140; 22 W. R. 422.

The court has no jurisdiction to restrain a trespass which does not amount to waste. *Turner v. Ringwood Highway Board*, 18 W. R. 424.

#### e. Damages.

**Against Rightful Owner—Forceful Entry.]**—Damages cannot be recovered against a rightful owner of land for a forcible entry on land; but for any independent wrong connected with such entry damages may be recovered even by a person whose possession was wrongful. *Beddall v. Maitland*, 17 Ch. D. 174; 50 L. J., Ch. 401; 44 L. T. 248; 29 W. R. 484.

**Aggravation.]**—Trespass for breaking and entering the plaintiff's dwelling-house may be well laid to have been done under a false charge and assertion, that the plaintiff had stolen property in her house, per quod she was injured in her credit, for that is laid only as matter of aggravation; and the jury may give damages for the trespass, as it is aggravated by such false charge. *Bracegirdle v. Orford*, 2 M. & S. 77.

Pending a negotiation for an assignment of a lease, A. was let into possession of the premises as tenant of some kind. The negotiation going off, B. (the landlord) demanded the key, and wrote to A., telling him that he never intended to let him into possession, and A. refusing to go out, B. entered, and forcibly expelled him and his family, in the doing of which the plaintiff and his wife were assaulted:—Held, that although the plaintiff was entitled to recover damages for the assaults, he was not entitled to damages for the expulsion; his tenancy being at the most a tenancy at will, and that having been properly determined. *Pollen or Pollon v. Brewer*, 7 C. B., N. S. 371; 6 Jur., N. S. 509.

**Mining beyond Boundary.]**—A. was the owner of a small feu of about an acre and a half in extent. The surface of the ground was occu-

pied by miners' cottages, and underneath was coal. When A. purchased the feu he was under the impression that all the minerals under the feu, as under all the ground surrounding it, had been reserved to the superior; but that was a mistake, for in the deed granting the feu there was no reservation of coal. The superior granted the whole property in the coals in all the surrounding land to R. and C. They, under the impression that they had the whole of the coal, including the coal under the acre and a half, worked out and disposed of the coal under A.'s acre and a half; and in doing so damaged the surface. A. could not have worked the coal to a profit himself; there was no person to whom he could dispose of it but to R. and C.; and the element of wilful trespass, and the element of special and exceptional need of support to the surface, were absent. In a claim by A. for (1) the value of the coal; (2) a sum for "way-leave" and the advantage obtained by working through instead of round the feu; and (3) for damages done to the houses on the surface:—Held, affirming the decision of the court below, that the value of the coal taken must be the value of the coal to the person from whom it is taken, at the time it is taken, and that the best evidence in the peculiar circumstances of this case of that value was the royalty paid by R. and C. for the surrounding coal field; therefore A. was entitled to the lordship on the coal excavated, calculated at that rate; together with the payment of a sum for damage done to the houses on the surface. *Livingstone v. Rawyards Coal Company*, 5 App. Cas. 25; 42 L. T. 334; 28 W. R. 357; 44 J. P. 392—H. L. (Sc.).

In an action for getting and taking coal from a coal-mine, the proper measure of damages is the value of the coal as soon as it is severed from the freehold, which may be ascertained by deducting from the saleable value of the coal at the pit's mouth the expense of carrying it there from the mine. *Morgan v. Powell*, 3 Q. B. 278; 2 G. & D. 721; 6 Jur. 1109.

In an action for taking coals from the plaintiff's mine, where the defendant is a mere wrongdoer, the measure of damages is the value of the coals at the time when they first existed as chattels; and the defendant is not entitled to any deduction for the expense of getting them, or for a rent payable to the mine-owner on coals got from the mine. *Wild v. Holt*, 9 M. & W. 672; 1 D., N. S. 376.

See also MINES AND MINERALS.

**Taking Soil.**—T. demised land to the plaintiff at an annual rent for twenty-one years, with liberty to dig half an acre of brick earth annually: the lessee covenanted that he would not dig more, or, if he did, that he would pay an increased rent of 375*l.* per half acre, being after the same rate that the whole brick earth was sold for. A stranger dug and took away brick earth; the lessee recovered against him the full value of it:—Held, that he was entitled to retain the whole damages. *Attersoll v. Stevens*, 1 Taunt. 183.

In an action for cutting into the plaintiff's close, and carrying away the soil, the proper measure of damages is the value to the plaintiff of the land removed, not the expense of restoring it to its original condition. *Jones v. Goody*, 8 M. & W. 146; 1 D., N. S. 50.

**Interest.**—Where a plaintiff proves by parol that he occupies the premises under a written agreement from W., and the defendant produces a lease from W., made and taking effect about the time of the acts complained of as trespasses; in order to entitle him to more than nominal damages, the plaintiff must shew the duration of his interest, which he can only do by the production of the written instrument. *Tucyman v. Knowles*, 13 C. B. 222; 22 L. J., C. P. 143; 17 Jur. 238.

Action for breaking and entering the dwelling-house of the plaintiff, and taking away goods therein, not alleging them to be his goods:—Held, that the plaintiff was not entitled to damages for the value of the goods, as they were not alleged to be his property. *Pritchard v. Long*, 9 M. & W. 666; 1 D., N. S. 883.

**Costs.**—In an action for breaking and entering a house, and taking and selling goods, the plaintiff is not entitled to recover the costs of setting aside a warrant of attorney and all subsequent proceedings under which the trespass was committed. *Holloway v. Turner*, 6 Q. B. 928; 14 L. J., Q. B. 143; 9 Jur. 160.

### I. Effect of Judgment.

**Where Trespass Continuing.**—Trespass is the proper remedy for wrongfully continuing a building on the plaintiff's land, for the erection of which the plaintiff has already recovered compensation; and a recovery, with satisfaction for erecting it, does not operate as a purchase of the right to continue such erection. *Holmes v. Wilson*, 10 A. & E. 503. See *Thompson v. Gibson*, 7 M. & W. 456.

Therefore, where the trustees of a turnpike-road built buttresses to support it on the land of A., and A. thereupon sued them and their workmen for such erection, and accepted money paid into court in full satisfaction of the trespass for such erection:—Held, that, after notice to the trustees to remove the buttresses, and a refusal to do so, A. might bring another action against them for keeping and continuing the buttresses on the land, to which the former recovery was no bar. *Ib.*

**Recovery in Replevin no Bar.**—A recovery in replevin is a bar to any action for the same taking of the same goods, as all damages may be then recovered, but not to an action for trespass to land committed at the time of such taking. *Gibbs v. Cruickshank*, 8 L. R., C. P. 454; 42 L. J., C. P. 273; 28 L. T. 735; 21 W. R. 734.

A person let into possession of mortgaged property by the mortgagor, he being left in possession only by the sufferance of the mortgagee, has no title against the mortgagor, except after his assent to the assignment or tenancy. *Ib.*

## III. TO GOODS.

### 1. RIGHT OF POSSESSION.

**Mere Possession.**—The plaintiff, at the time of the trespass, must either have the actual possession or a constructive possession in the property which is the subject of the trespass. *Smith v. Miles*, 1 T. R. 480.

A. commissioned her brother to buy a cow for

her, and a fortnight afterwards he bought a cow; but, before the cow had either come to A.'s hands or she had assented to the purchase, the cow was taken by B.:—Held, that A. had such a property in the cow as would enable her to maintain trespass against B. for taking the cow. *Thomas v. Phillips*, 7 C. & P. 573.

If an owner of a chattel gratuitously permits another person to use it, the owner may maintain trespass for an injury done to it while it is so used. *Lotan v. Cross*, 2 Camp. 464.

A shopkeeper, who has the possession of goods sent to him on sale or return, may maintain trespass for their injury in his own name. *Colwill v. Reeves*, 2 Camp. 575.

**As Servant.**—A master of a fly-boat, who is hired by a canal company at weekly wages, may maintain trespass for cutting a rope fastened to the vessel, whereby it was towed along an inland navigation, although the vessel and the rope were the property of the company. *Moore v. Robinson*, 2 B. & Ad. 817.

A. hired a steamboat for an excursion, the owner's captain navigating her:—Held, that the hirer had not such a possession as to justify him in forcibly turning out a stranger whom the captain had allowed to come on board. *Dean v. Hogg*, 10 Bing. 345; 4 M. & Scott, 188; 6 C. & P. 54.

**Auctioneer.**—An auctioneer put into possession of fixtures attached to the freehold for the purpose of selling them, the purchaser being bound to detach and remove them, has not such a possession as will support trespass de bonis asportatis for their wrongful removal. *Davis v. Danks*, 3 Ex. 435; 18 L. J., Ex. 213.

**Qualified Right.**—A., being indebted to B., it was agreed that B. should keep A.'s cow till the debt was paid; that A. might drive her away every morning and night to be milked; and if he did not return her, that B. might retake her whenever and wherever he found her. A. drove her away, and kept her three weeks, whereupon B. retook her. In an action by A. against B. for so doing:—Held, that these facts supported a plea denying A.'s property in the cow. *Richards v. Symons*, 8 Q. B. 90; 15 L. J., Q. B. 35; 10 Jur. 6.

**Incomplete Possession.**—The plaintiff and the defendant were owners of boats employed in a fishery. The plaintiff's boat cast a fishing sean round a shoal of mackerel, with the exception of a comparatively small opening, which the sean did not quite fill up, but through which, in the opinion of the witnesses, the fish could not escape. The defendant's boat then came through the opening, and took the mackerel:—Held, that the plaintiff could not maintain trespass for taking his fish, his possession not having been complete. *Young v. Hichens*, D. & M. 592; 6 Q. B. 606.

**Possession of Trespasser.**—Title to property created merely by the act of reducing a thing into possession necessarily implies a reduction into possession effected by an act which is not in any way of a wrongful nature. Such an act, therefore, effected by one who is at the moment a trespasser, cannot create a title to property. *Blades v. Higgs*, 11 H. L. Cas. 621.

**Setting up Jus tertii as an Answer.**—A., being in possession of a piano, which he had previously mortgaged with other goods by a bill of sale to B., sold it to the plaintiff, who took possession of it, and removed it from premises which A. held as tenant to the defendant. The sale to the plaintiff was a bona fide transaction. The defendant, to whom a year's rent was due by A., and being unaware of B.'s mortgage, or of the sale to the plaintiff, caused the chattel to be taken out of the plaintiff's possession and replaced in the premises held by A. Thereupon, B. claimed it as his property, but the defendant, after B.'s claim had been made, distrained and sold the piano, together with other goods, for the rent due, when it was purchased amongst other property by B., who paid the defendant the rent due, and the costs and expenses of the distress, retaining the balance of the purchase-money. In an action for trespass in taking away the piano, and for its conversion:—Held, that the defendant could not defeat the action by shewing that the title to the chattel was in B. under the bill of sale, and that the plaintiff was entitled to a verdict. *Haggan v. Pasley*, 2 Ir. L. R. 573.

In an action for seizing goods in the possession and apparent ownership of the plaintiff, the defendant cannot set up the title of a third person to defeat the action. *Nelson v. Cherrill*, 1 M. & Scott, 452; 7 Bing. 668.

And see BAILMENT.

## 2. WHAT AMOUNTS TO A TRESPASS.

### a. In General.

**Where Contract Imperfect.**—Where a party purchased, by a verbal contract, a crop of growing grass, with liberty to go on the close where it grew, for the purpose of cutting and carrying it away:—Held, that he could not maintain trespass against the seller for taking away his horse and cart from the close, which he had brought there for the purpose of carrying away the grass; for this was in substance an action charging the defendant on a contract, within the 4th section of the Statute of Frauds. *Currington v. Roots*, 2 M. & W. 248.

**Locking up Goods.**—The wife of G.'s brother was present in his house at G.'s death, and put away jewellery belonging to him in a cupboard, with the bona fide object of protecting it. The jewellery disappeared:—Held, that her act amounted to a trespass, and the executor of G. was entitled to nominal damages. *Kirk v. Gregory*, 1 Ex. D. 55; 45 L. J., Ex. 186; 34 L. T. 488; 24 W. R. 614.

Seemle, that if the articles had reasonably required protection, and the act of the wife had been a reasonable precaution for that purpose, the trespass would have been justified. *Id.*

The defendant claiming rent in arrear from the plaintiff, his lodger, locked the door of the room in which the plaintiff's goods were deposited, and refused to allow the plaintiff to enter and remove them, saying that he should not have them until he had paid his rent:—Held, that the acts of the defendant did not amount to a taking, and that trespass was not maintainable. *Hartley v. Mozham or Moron*, 3 G. & D. 1; Car. & M. 504; 3 Q. B. 701; 12 L. J., Q. B. 41; 6 Jur. 946.

If in an action for taking goods the defendants plead that L. was possessed of a room, and that they, as his servants, removed the goods, which were incumbering the room, to a convenient distance; this plea is disproved, if it is shewn that the defendants locked up the goods in the room, and took away the key. *Jones v. Lewis*, 7 C. & P. 343.

**By Custom-house Officer.**—Where a custom-house officer took by force, from under the arm of a passenger landing from a vessel, a portfolio containing school-drawings, without making any previous demand:—Held, that, as drawings which had not paid duty were liable to forfeiture under 3 & 4 Will. 4, c. 56, the officer was not liable in trespass *de bonis asportatis*. *De Goudin v. Lewis*, 2 P. & D. 283; 10 A. & E. 117.

Where goods, liable to payment of duty, have been landed and warehoused, and examined by custom-house officers in the regular execution of their duty, no action can be maintained against such officers for the detention of the goods, under a belief that they are liable to forfeiture, though it ultimately appears they were not so liable. *Jacobsohn v. Blake*, 7 Scott, N. R. 772; 6 M. & G. 919; 13 L. J., C. P. 89; 8 Jur. 272.

**By Landlord.**—A landlord who has accepted the rent in arrear, and the expenses of the distress, after the impounding, cannot be treated as a trespasser merely because he retains possession of the goods distrained, although his refusal to deliver them up to the tenant may amount to a conversion, so as to render him liable in trover. *West v. Nibbs*, 4 C. B. 172; 17 L. J., C. P. 150.

If a landlord puts in a distress and declares that he distrains and does really intend to distrain certain goods on the premises which are not by law distrainable; for this alone neither trespass nor trover will lie. *Beck v. Denbigh*, 29 L. J., C. P. 273; 6 Jur., N. S. 998; 2 L. T. 154; 8 W. R. 392.

**By Constable under Warrant.**—A constable having a warrant authorizing the seizure of certain specified goods alleged to have been stolen, seized those goods and others not specified in the warrant; the latter goods were not likely to furnish evidence of the identity of the former:—Held, that he was liable to an action of trespass, though a copy of the warrant had not been demanded. *Crozier v. Cundy*, 9 D. & R. 224; 6 B. & C. 232.

**Trespass by Relation.**—The rule, that a party cannot be made a trespasser by relation, is only applicable where the act complained of was lawful at the time. *Tharpe v. Stallwood*, 5 M. & G. 760; 6 Scott, N. R. 715.

Trespass lies against a person who takes a beast as an estray, although lawfully at first, and afterwards abuses it by riding and labouring it. *Ozley v. Watts*, 1 T. R. 12.

Where cattle escape through defect of the defendant's fences, trespass will lie if he drives them into the highway and there leaves them. *Carruthers v. Holmes*, 8 A. & E. 113; 3 N. & P. 246; 1 W., W. & H. 264.

**Mixing Goods.**—If A., for a fraudulent purpose, mixes his goods with B.'s, still, if they can be distinguished, he may maintain trespass

against a person who, having a right, to take B.'s goods, ignorantly takes those of A. *Colwill v. Reeves*, 2 Camp. 575.

**How differing from Conversion.**—In trespass a party is liable if he takes the property only for an instant; but in trover he is not liable unless he also proceeds to a conversion. *Price v. Helyar*, 4 Bing. 597, 604.

#### b. Principal and Agent.

**Liability of Principal.**—Whether a seizure of particular goods under a *fi. fa.* was directed by the execution creditor, so as to make him liable for the act of the sheriff, is a question of fact. It is not within the scope of the implied authority of the solicitor of a judgment creditor issuing a *fi. fa.* to direct the sheriff to seize particular goods. *Jarmain v. Hooper* (*infra*) distinguished. *Smith v. Keal*, 9 Q. B. D. 340; 47 L. T. 142; 31 W. R. 76—C. A. Affirming 51 L. J., Q. B. 487; 46 L. T. 770; 46 J. P. 615.

A direction by the attorney to the sheriff to seize under a writ of execution is an act done by an agent within the scope of his authority, and binds the principal. The client, therefore, is liable in trespass for the act of the attorney, in directing the sheriff to take the goods of the wrong party. *Jarmain v. Hooper*, 1 D. & L. 769; 6 M. & G. 827; 13 L. J., C. P. 63; 8 Jur. 127.

Where goods of a party are seized under a process which has issued in a suit in which such party is a defendant, but the seizure takes place without the knowledge or authority, or in the name of the plaintiff in such suit, the circumstances that the goods afterwards came to his hands, and that he, knowing the circumstances of the seizure, refuses to give them up, do not make him a trespasser. *Wilson v. Tumman*, 6 Scott, N. R. 894; 1 D. & L. 513; 12 L. J., C. P. 306.

A mere ratification of a previous trespass does not make the party ratifying a trespasser. *Ib.*

A principal is not liable for the wrongful acts of his agent, though he receives benefit from them, unless, at the time of the receipt, he has notice of the illegality. *Freeman v. Rosher*, 13 Q. B. 780; 18 L. J., Q. B. 340.

Where a broker, under a warrant from the landlord, authorizing him to distrain the goods and chattels of the tenant, seized a fixture, which was afterwards sold, and the proceeds paid to the landlord:—Held, that the receipt of the proceeds did not make the landlord a trespasser, it not being shewn that he was aware of the illegal seizure. *Ib.*

A. authorized B., a broker, to distrain for rent due to him from C. B. having entered for the purpose of executing the warrant, took away books and papers (which were assumed not to be distrainable), and omitted to insert them in the inventory:—Held, that A. was liable, jointly with B., in trespass. *Gauntlett v. King*, 3 C. B., N. S. 59.

**Solicitor, when Personally Liable.**—Action for wrongful seizure of goods against an execution creditor, and her attorney, jointly. The attorney, who had given the sheriff a *fi. fa.* against C., sent a man with the sheriff, to point out his goods. He pointed out goods which the

sheriff seized, and which, on an interpleader issue, were found to be the goods of D. :—Held, that the attorney, by the direction which he had given the sheriff, had made himself personally liable in trespass. *Power v. Fleming*, 4 Ir. R., C. L. 404.

Held, also, that, the attorney having directed the sheriff to seize the goods which the man sent should point out, the consequence was just the same as if he had himself pointed out the wrong goods, and directed the sheriff to seize them. *Id.*

**Licence by Agent.**—A man, who takes possession of a ship by consent of the plaintiff's agent, is not liable to an action of trespass. *Mills v. Dawson*, Peake's Add. Cas. 59.

#### c. Companies.

**Liability of.**—Trespass will lie against a corporation for seizing and converting goods to their own use. *Maund v. Monmouthshire Canal Company*, 2 D., N. S. 113; Car. & M. 606; 4 M. & G. 452; 5 Scott, N. R. 457; 3 Railw. Cas. 159; 6 Jur. 932.

Trespass will not lie against a railway company for the act of their servant, who, whilst in the performance of his duty in driving a locomotive engine, runs over the plaintiff's sheep upon the railway. If the plaintiff had a right to have his sheep there, or if they were not wrongfully there and the injury was occasioned by the want of skill or care on the part of the company's servant, or in consequence of their order to drive at a certain speed, an action on the case, and not trespass, is the proper remedy. *Sharrod v. London and North-Western Railway Company*, 7 D. & L. 213; 6 Railw. Cas. 239; 4 Ex. 580; 14 Jur. 23.

#### d. Joint Trespass.

**What Constitutes.**—A person who knowingly receives from another a chattel which the latter has wrongfully seized, and afterwards, on demand, refuses to give it back to the owner, does not thereby become a joint trespasser, unless the chattel was seized for his use or benefit. *Wilson v. Barker*, 1 N. & M. 409; 4 B. & Ad. 614.

An attorney who delivers a precept to a sheriff's bailiff, who thereupon acts under it, is not therefore a co-trespasser with the bailiff. *Sowell v. Champion*, 6 A. & E. 407; 2 N. & P. 627; W., W. & D. 667.

### 3. PLEADING AND EVIDENCE.

**Pleadings.**—The plea of not possessed in an action for taking the plaintiff's goods puts in issue his title to, as well as the possession of, the goods. *Harrison v. Dixon*, 1 D. & L. 454; 12 M. & W. 142; 13 L. J., Ex. 247.

A declaration charged the defendant with taking and carrying away the goods of the plaintiff, and also with converting them to his own use :—Held, that such conversion was merely matter of aggravation; and a plea justifying the taking the goods and carrying them away, but omitting to justify their conversion, was sufficient. *Pratt v. Pratt*, 6 D. & L. 20; 2 Ex. 413; 17 L. J., Ex. 299.

In an action for taking the plaintiff's hog, and converting the same to the defendant's use, the conversion is only matter of aggravation, and

need not be justified or answered, for the conversion is not a trespass vi et armis. *Dye v. Leatherdall*, 3 Wils. 20.

In an action for taking goods out of a dwelling-house, it must be alleged that they are the goods of the plaintiff. *Pritchard v. Long*, 9 M. & W. 666; 1 D., N. S. 883.

**Evidence of Property.**—In trespass, on pleas of—first, not guilty, and secondly, that the goods were not the goods of the plaintiff, and issues thereon, the defendant cannot set up property in a stranger, under whom he does not justify, in answer to the plaintiff's possession. *Carter v. Johnson*, 2 M. & Rob. 263.

In an action for taking goods and chattels, the defendant pleaded that the goods were not the goods of the plaintiff. The plaintiff proved that he had purchased them of the sheriff, under an execution issued against B. The defendant proved, that he had subsequently taken them in execution as the goods of B., they being at the time in B.'s possession :—Held, that this evidence was admissible, and that it was competent for the judge to put it to the jury to say whether the previous sale to the plaintiff was bona fide or fraudulent. *Ashley v. Minnett*, 3 N. & P. 231; 8 A. & E. 121; 1 W., W. & H. 155.

A. brought an action against B. for taking two tables and a chair. He pleaded not guilty. It was proved that B. took two chairs and a table in the house of D.; but none of the witnesses knew A., and there was no evidence of any kind to connect A. with the goods taken in D.'s house :—Held, that, to entitle A. to recover, there must be some evidence to connect him with the goods taken. *Forman v. Davies*, Car. & M. 127.

#### 4. DAMAGES.

**Costs and Expenses.**—In an action for taking the plaintiff's goods in execution under a warrant of attorney and judgment, which were afterwards set aside as illegal, the plaintiff cannot claim as part of the damage his costs incurred in vacating the warrant of attorney and judgment. *Holloway v. Turner*, 6 Q. B. 928; 14 L. J., Q. B. 143; 9 Jur. 160.

Where a defendant had wrongfully seized the plaintiff's goods, but had not removed them from the house in which the plaintiff resided, and another wrongdoer, against the will of the defendant, seized the goods while thus in the defendant's possession, the plaintiff was held entitled in trespass to recover as damages from the defendant the amount she had been forced to pay to the second wrongdoer, to redeem the goods from him. *Keene v. Dilke*, 4 Ex. 388; 18 L. J., Ex. 440.

D. obtained, as special damage, in an action against an execution creditor and her attorney, a verdict for the costs of the interpleader proceedings, which he had taxed against the execution creditor, and for the payment of which by her he had an order of the court, but which he was unable to recover :—Held, that, as his action was brought against both the execution creditor and her attorney, the same damages must be recovered against both; that, as D. had an order which was equivalent to a judgment of the court against her, he could not recover the amount of them as damages against her, and, therefore, the verdict should be reduced by the amount. *Power v. Fleming*, 4 Ir. R., C. L. 404.

**For Forcible Entry.]**—Damages cannot be recovered against the rightful owner for a forcible entry on land, for the stat. 5 Ric. 2, st. 1, c. 8, only makes a forcible entry an indictable offence, and does not create any civil remedy for it. But for any independent wrong (such as an assault or an injury to furniture) committed in the course of the forcible entry, damages can be recovered, even by a person whose possession was wrongful, for the statute makes a possession obtained by force unlawful, even when it is so obtained by the rightful owner. *Beddall v. Maitland*, 17 Ch. D. 174; 50 L. J., Ch. 401; 44 L. T. 248; 29 W. R. 484.

**Extent of Injury.]**—A's carriage was driven against the wheel of B's chaise; the collision threw a person, who was in the chaise, upon the dashing-board, the dashing-board fell on the back of the horse and caused him to kick, and thereby the chaise was injured:—Held, that B. was entitled to recover against A. damages commensurate with the whole of the injury sustained. *Gilbertson v. Richardson*, 5 C. B. 502; 17 L. J., C. P. 112; 12 Jur. 292.

In an action of damages for taking goods under irregular legal process where special damage is alleged and claimed but not proved, the plaintiff is nevertheless entitled at least to nominal damages, or to such substantial damages as the jury thinks adequate. *Doss v. Doss*, 14 L. T. 646; 14 W. R. 590—P. C.

A person who has moved the goods of another without a lawful right to do so, even to put them out of the way, is liable only for the natural consequences of the removal. *Walker v. Sheerman*, 3 F. & F. 259.

On a declaration for taking the plaintiff's goods, chattels and effects, he may recover the value of fixtures. *Pitt v. Shew*, 4 B. & A. 206.

**Mitigation of.]**—In an action for taking the plaintiff's goods, the defendant having pleaded not guilty, cannot, in mitigation of damages, give in evidence a repayment by him, after action brought, of money produced by the sale of the goods. *Rundle v. Little*, 6 Q. B. 174; 13 L. J., Q. B. 311; 8 Jur. 668.

#### 5. RESTORATION OF GOODS.

Under certain circumstances the court will stay the proceedings in an action for seizing goods, on the defendant's restoring the goods, or paying the full value of them, with the costs of the action. *Pickering v. Truste*, 7 T. R. 53. And see *Earle v. Holderness*, 4 Bing. 462.

But the court refused to stay proceedings in an action for seizing goods, on the defendant's restoring them or their value, with costs, where it would not have ended the suit, and the value was disputed. *Knot v. Barker*, 3 Anst. 896.

**In Criminal Cases.]**—See CRIMINAL LAW.

## TROVER AND CONVERSION.

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#### 1. PARTIES.

**By whom Maintainable—Joint Owners.]**—Four joint owners of goods delivered them to a pawnee, to be redelivered in a certain event. After the happening of the event the assignee of three of the joint owners demanded the return of the goods, which was wrongfully refused. The fourth joint owner was abroad, and did not assent to the demand:—Held, that the assignee could not maintain trover against the pawnee. *Harper v. Godsell*, 5 L. R., Q. B. 422; 59 L. J., Q. B. 185; 18 W. R. 954.

If an article is deposited by one, with the authority of another, and received by the bailee to keep on the joint account of the two, one alone cannot lawfully demand it without the authority of the other, so as to maintain trover upon the bailee's refusal to deliver it. *May v. Harvey*, 13 East, 197.

Where the question was, whether goods were the property of the plaintiff alone or jointly with S.:—Held, that, as the plaintiff and S. had made joint orders for the disposition of the goods, the plaintiff alone could not recover. *Nathan v. Buckland*, 2 Moore, 153.

A declaration stated that the plaintiff was possessed as of his own property of four horses, which the defendant converted and disposed of to his own use. Pleas, first, that they were not the property of the plaintiff, and secondly, that a judgment was recovered against F., and that the defendant (a sheriff's officer) seized them under an execution against F., the same being the goods and chattels of F., and liable to be seized and taken as aforesaid, and not being the property of the plaintiff. To which the plaintiff replied, that they were his cattle and property. At the trial, it was found by the jury, that they

## TRIAL.

See PRACTICE.

were the property of the plaintiff and F. jointly :—Held, that the issue raised by the defendant was, whether the cattle was the sole property of F., and the jury having found that they were the joint property of the plaintiff and F., that the plaintiff was entitled to recover. *Farrar v. Beswick*, 1 M. & W. 682.

In an action against a bailee of goods delivered to him for reward, containing some counts charging a misuser of the goods, whereby they were lost to the plaintiff, and other counts in trover, the defendant cannot plead generally in abatement that they were the goods of the plaintiff and other persons. *Phillips v. Claggett*, 10 M. & W. 102 ; 6 Jur. 629.

Two persons jointly interested in a chattel having made a joint demand of it, may, notwithstanding, maintain separate actions in respect of it, against a person who unjustly detains it. *Bleaden v. Hancock*, 4 C. & P. 152.

— **Member of Society.**—A member of an amicable society, intrusted with a box containing the fund, and bound by bond to keep it safely, cannot maintain trover against another member and a third person, who took it from him. *Holliday v. Camell*, 1 T. R. 658.

— **Tenants in Common against each other.**—One tenant in common cannot maintain trespass or trover against his co-tenant for cutting and carrying away the grass off their land unless there has been an ouster or unless it is shewn that the grass has been destroyed. *Jacobs v. Seward*, 5 L. R., H. L. 464 ; 41 L. J., C. P. 221 ; 27 L. T. 185.

One tenant in common of a chattel cannot maintain trover for it against his companion, unless the latter has so disposed of it as to render it impossible that the plaintiff should ever take and use it. *Fennings v. Grenville (Lord)*, 1 Taunt. 241.

The conversion of a chattel by a tenant in common from its general and profitable application, though it changes the form of the substance is not such a destruction of the subject-matter as to prevent the plaintiff from taking and using it in its altered state ; therefore it creates no right of action. *Id.*

One of two tenants in common of a chattel is not liable in trover at the suit of his co-tenant for the mere sale of the chattel, though he is for such a disposition as amounts to a destruction of it. *Mayhew v. Herriek*, 7 C. B. 229 ; 18 L. J., C. P. 179 ; 13 Jur. 1078.

There need not be an actual destruction : any disposal of the property in such a manner as to prevent a co-tenant from obtaining his share is a conversion. *Id.*

When one tenant in common forcibly took a ship out of the other's possession, and secreted it from him so that he did not know where it was carried, and changed the name of it, and it afterwards got into a third person's hands, who sent it on a foreign voyage where it was lost :—Held, that it was proper to be left to the jury, whether the destruction was not by the means of that tenant in common. *Barnardiston v. Chapman*, 4 East, 121.

The secret removal of entire chattels by one tenant in common, without the consent or knowledge of the other, and for the purpose of selling them and applying the proceeds to his own use, does not amount to a conversion, nor is it an un-

lawful act, for which the tenant can maintain an action, even although the removal has created a lien on the chattels by a third party. *Jones v. Brown*, 25 L. J., Ex. 345.

Observations on the rule that one tenant in common cannot maintain trover against another. *Wickham v. Wickham*, 2 Kay & J. 496.

— **On Bankruptcy.**—One of two tenants in common of goods committed an act of bankruptcy ; after which the defendant, by direction of the other tenant in common, sold the goods :—Held, that the assignees of the bankrupt could not recover from the defendant the proceeds of the sale in an action for money had and received, nor maintain detinue. *Morgan v. Marquis*, 9 Ex. 145 ; 2 C. L. R. 276 ; 23 L. J., Ex. 21.

Assignees of two bankrupt partners declared in trover for property which had belonged to the bankrupts, alleging a possession in themselves as assignees, and a conversion since the bankruptcy. It appeared that a separate fiat had first issued against one partner, under which the goods were seized by the sheriff, and sold ; subsequently to which a joint fiat was issued against both, and the plaintiffs were appointed assignees :—Held, that they could not recover against the sheriff for an undivided moiety, as the property of the partner against whom the separate fiat had issued. *Edwards v. Hooper*, 11 M. & W. 363 ; 12 L. J., Ex. 304 ; 7 Jur. 378.

— **Assignee under Voidable Bill of Sale.**—The plaintiff having seized the goods of S., a trader, under a fi. fa. issued upon a judgment founded on a warrant of attorney previously given to him by S., took an assignment of the goods from the sheriff by bill of sale. The defendants, who were landlords to S., distrained for rent, and seized the goods under such distress whilst the plaintiff was in possession of them. Three days afterwards, S. filed a petition in bankruptcy, on which he was declared a bankrupt, and assignees were appointed. The assignees did not interfere with or demand the goods of the plaintiff, but they commenced an action against the plaintiff for the conversion of the goods. In an action for an excessive distress, brought by the plaintiff against the defendants, the jury found that the warrant of attorney was given as a fraudulent preference of the plaintiff over the other creditors, in contemplation of bankruptcy :—Held, that the property in the goods vested in the plaintiff by the bill of sale, subject to be divested by the assignees ; and that, as the assignees had not interfered, the plaintiff was the owner of the goods, and the defendants, being wrongdoers, could not set up the title of the assignees to defeat the plaintiff's action. *Newnham v. Stevenson*, 13 C. B. 285 ; 20 L. J., C. P. 111 ; 15 Jur. 360.

— **Several Defendants.**—In trover against several all cannot be found guilty on the same count, without proof of a joint conversion by all. *Nicoll v. Glennie*, 1 M. & S. 588.

A written notice of demand to deliver up deeds was served on three persons at different times and places :—Held, that it was for the jury to say, from the whole of the evidence, whether they had not previously agreed to act in such a manner with reference to the deeds as to render their refusal, although separately given, evidence of a joint conversion. *Atkin v. Slater*, 1 C. & K. 356.

**Corporations.**—Trover, as well as trespass, lies against a corporation aggregate. *Maxnd v. Monmouthshire Canal Navigation Company*, 3 Railw. Cas. 159; 4 M. & G. 452; 2 D., N. S. 113; 5 Scott, N. R. 457; Car. & M. 606; 6 Jur. 932.

A contractor, having engaged with a railway company to construct a portion of their line, employed a sub-contractor to fence the line, who, for that purpose, placed timber near it. This timber having been sold to the plaintiff, was afterwards taken away by the workmen employed on the railway; a claim to the timber having been made on behalf of the plaintiff on a director of the company, the claimant was recommended by him to attend a meeting of the company, which he did, and was informed, by the same director, that there was a prospect of an amicable arrangement, and that, in all probability, his claim would be met:—Held, in trover against the company, that there was not sufficient evidence to make the company liable. *Glover v. North-Western Railway Company*, 5 Ex. 66; 19 L. J., Ex. 172.

**Husband and Wife.**—Where, in trover against husband and wife, the declaration stated a conversion by both:—Held, sufficient, after verdict. *Keyworth v. Hill*, 3 B. & A. 685.

The plaintiff's goods had been taken in execution under process against B.'s goods, and placed upon the premises of the defendant, who was an innkeeper; upon a demand of them by the plaintiff, in the absence of the defendant, the wife of the defendant said that she would consult the attorney who had issued the execution, and after having done so refused, saying she was not to deliver them up, and that he would save her harmless:—Held, sufficient evidence of a conversion. *Catterall v. Kenyon*, 2 G. & D. 545; 3 Q. B. 310; 6 Jur. 507.

**Conversion by Servant.**—A servant may be charged in trover, although the act of conversion is done by him for the benefit of his master. *Stephens v. Elwall*, 4 M. & S. 259.

Whether he has any authority or not from his master for so doing. *Perkins v. Smith*, 1 Wils. 328.

So, a servant, acting under the orders of his master, in detaining another's goods, is guilty of a conversion as well as his master; but a packer, having, in the exercise of his business, shipped goods which had been pledged by a factor to several persons, under the orders of a third person who employed him for that purpose, is not guilty of a conversion. *Greenway v. Fisher*, 1 C. & P. 190.

Where goods, which had been saved from fire, were carried to a warehouse by the servants of an insurance company, of which the defendant, as one of such servants, kept the key, and on his being applied to by the owner to deliver them up to him, refused to do so without an order from the company:—Held, that this was not such a refusal as amounted to a conversion. *Alexander v. Southey*, 5 B. & A. 247.

**By Agent.**—If a principal ratifies the unauthorized purchase by his agent of a chattel which the vendor had no right to sell, he is guilty of a conversion; although he had no knowledge of the circumstances which made the

sale unlawful. *Hilbery v. Hatton*, 2 H. & C. 822; 33 L. J., Ex. 190; 10 L. T. 39. And see *Pottconier v. Gibbs*, Holt, 383.

## 2. WHAT AMOUNTS TO CONVERSION.

### a. In General.

**Nature of Dealing with Property.**—In trover the party is supposed to have obtained possession of the goods lawfully, but to have unlawfully converted them to his own use. *Golightly v. Ryn*, Loft, 88.

It is not every wrongful act depriving a party of the possession of his goods, that amounts to a conversion. *Thorogood v. Robinson*, 6 Q. B. 769; 14 L. J., Q. B. 87; 9 Jur. 274.

Where the plaintiff's goods and servants were on land which the defendant recovered in ejectment, and the defendant, on entering, under the writ of possession, turned the plaintiff's servants off the land, and would not let them remain for the purpose of removing the goods, there having been no subsequent demand or refusal:—Held, that the jury might find that there was no conversion. *Id.*

To constitute a conversion of goods for which trover will lie, there must be some repudiation by the defendant of the owner's right, or some exercise of dominion over them by him inconsistent with such right. *Heald v. Carey*, 11 C. B. 977; 21 L. J., C. P. 97; 16 Jur. 197.

A mere refusal by the defendant to deliver to the plaintiff a chattel of his which is on the defendant's premises is not evidence of a conversion, but a denial by the defendant of the plaintiff's right to it, or a refusal by which the defendant exercises a dominion over the chattel, is. *Wilde v. Waters*, 16 C. B. 637; 24 L. J., C. P. 192.

The forcible taking possession of a house and fixtures by the assignee of a term in the house, is not a conversion of such fixtures. *Longstaff v. Meagor*, 4 N. & M. 211. See *Beddall v. Maitland*, ante, col. 143.

**Intention to appropriate Goods.**—When one by an authorized act deprives another of his goods, though without any intention to appropriate them to his own use, it is a conversion of the goods. *Hiort v. Bott*, 9 L. R., Ex. 86; 43 L. J., Ex. 81; 30 L. T. 25; 22 W. R. 414.

The defendant having through an error of the consignor of goods received what purported to be an invoice of goods sold by the consignor to the defendant through a named broker, and an order which required a railway company to deliver the goods to the order of the consignor or consignee, indorsed the order to the broker, who thereby obtained from the company, and made away with the goods:—Held, that, though the defendant indorsed the order with the intention of correcting what he believed to be an error and of returning the goods to the consignor, yet since the circumstances did not require him to indorse the order or interfere with the goods in any way, he was liable in trover to the consignor. *Id.*

A mere wrongful asportation of a chattel does not amount to a conversion, unless the taking or detention of the chattel is with intent to convert it to the taker's own use, or that of some third person, or unless the act done has the effect either of destroying or changing the quality of

*Fouldes or Foulds v. Willoughby*, 10; 1 D., N. S. 86; 5 Jur. 534.

**Illegal Purpose.**—When goods are taken for an illegal purpose, the person who takes them repudiates the illegal purpose, and it has been carried out. *Taylor v. Taylor*, 1 Q. B. 163; 34

fraud his to the with T's assigned goods back, he was entitled

plaintiff being lawfully exchanged given him, acting on behalf of a trader, who had taken from him bankrupt, came to the plaintiff in bed, and demanded the plaintiff's refusal to give them, that if he did not, the expense of the plaintiff's bill would fall on him, and the consequence would be very severe with him. The plaintiff was much agitated, and delivered up the goods. The plaintiff's agent afterwards, while the goods were in the defendant's possession, informed him of the circumstances under which they had been given to the plaintiff, and told him that he (the defendant) and his employers had no right to them; but the defendant notwithstanding handed them over to his employers:—Held, first, that the original taking was not a conversion, inasmuch as there was no such duress as would have avoided a contract, or have enabled the plaintiff to maintain trespass de bonis asportatis. *Powell v. Hoyland*, 6 Ex. 67; 20 L. J., Ex. 82.

Held, secondly, that the defendant was guilty of a conversion by delivering the bills to his employers after notice of the facts. *Id.*

**Accidental Flood — Goods Unlawfully Deposited.**—Trover for timber. Plea, a justification that the defendant was possessed of a close, and was digging a sawpit therein, and because the timber was put and placed on the close by the plaintiff without the leave or licence of the defendant, and was so buried therein that the defendant could not make the pit without a little cutting and destroying the timber, the defendant necessarily a little cut and destroyed the same. At the trial it appeared that several spars used for bowsprits were placed on the plaintiff's land by the defendant, that the plaintiff covered them over with earth, and directed a pit to be dug, and in order to dig the pit the spars were unavoidably cut asunder. The premises being close to the River Thames some pieces of the spars were accidentally washed away:—Held, first, that there was no conversion of the timber. *Simmons v. Lillystone*, 8 Ex. 431; 22 L. J., Ex. 217.

Held, secondly, that it was a misdirection to leave to the jury the intention of the defendant in making the pit; for assuming that the timber was wrongfully put on his land by the plaintiff, the defendant would be justified in cutting it if he could not make the pit without doing so, whatever his intention might be. *Id.*

Held, thirdly, that the plea was bad for not stating that the timber was buried by the plaintiff. *Id.*

**Agreement to Sell and Account.**—A. intrusted B. with goods to sell in India, agreeing to take back from B. what he should not be able to sell, and allowing him what he should obtain beyond a certain price, with liberty to sell them for what he could get, if he could not obtain that price. B. not being able to sell the goods in India himself, left them with an agent, to be disposed of by him, directing the agent to remit the money to himself in England:—Held, that A. could not maintain trover against B. for the goods. *Bromley v. Cozwell*, 2 B. & P. 438.

**Intention to Benefit.**—Where an injury has been done to a chattel belonging to another, in endeavouring to do a service to such person out of charity, or to prevent mischief from the act of other persons, trover will not lie for it. *Drake v. Shorter*, 4 Esp. 165.

A pipe of wine belonging to A. was deposited in B.'s cellar, and was bottled at a time during which there were conflicting claims to it by A. and the assignees of the party to whom it was sent, and who resided in B.'s house. By whom, or by whose orders the wine was bottled did not appear, though there was some evidence that it was likely to be injured from not being bottled:—Held, that it was a question for the jury whether the act of bottling operated as a conversion. *Phillpott v. Kelley*, 4 N. & M. 611; 3 A. & E. 106; 1 H. & W. 134.

Held, also, that it was a question for the jury whether the drinking of a part of the wine, taken in connexion with the bottling, amounted to a conversion; and they having found that it did not, the court refused to disturb the verdict. *Id.*

**Evidence.**—A person, on being served with the notice of demand, merely said, "that he would consult his attorney:"—Held, that this expression, coupled with his subsequent conduct in not giving up the deeds, amounted to evidence of a conversion. *Atkin v. Slater*, 1 C. & K. 356.

In an action for conversion of a bill of exchange, it being proved that the defendant had said in answer to a demand for it, that he could not give it up because it had been burnt, and he not being called as a witness:—Held, that the case was rightly left to the jury, and, that their verdict for the plaintiff was justified by the evidence. *McKeown v. Cotching*, 27 L. J., Ex. 41.

If a person who has possession of the goods of another, on being desired by the owner to send them to a particular place, not only refuses to send them to that place, but says generally that he will not deliver them up unless payment of a debt due from the owner to him is guaranteed, such general refusal is evidence of a conversion, although he might not be bound to send the goods to any particular place. *Sharp v. Pratt*, 3 C. & P. 34.

#### b. Detention after Demand.

**Nature of.**—Detention against a lawful demand is *prima facie* evidence of a conversion. *Golightly v. Ryn*, Loft, 88.

The defendant had in his possession a boiler belonging to the plaintiff, the plaintiff demanded

it, and the defendant at first refused to restore it, but before the issuing of the writ tendered it:—Held, no conversion. *Hayward v. Seaward*, 1 M. & Scott, 459.

The demand and refusal necessary to afford evidence of a conversion, must be absolute and unqualified. *Philpot v. Kelley*, 4 N. & M. 611; 3 A. & E. 106; 1 H. & W. 134.

A. lent goods to B., who died, and on his death the goods came into the possession of C., who, when the goods were demanded of him, said that he should do nothing but what the law required. C. did not afterwards deliver up the goods:—Held, to be a sufficient conversion by C. *Davies v. Nicholas*, 7 C. & P. 339.

The owner of a gun delivered it to B. to be sold for him, and B. delivered it to C. on trial, who kept it for some time, during which the gun was burst; the owner afterwards demanded the gun in the following terms: "I give you notice that the gun is my property, and I demand the same of you, and require you to deliver it up in the same plight in which it was when delivered to you." C. answered that he would pay ten times the value rather than repair it:—Held, that such demand and refusal were not evidence of a conversion. *Rushworth v. Taylor*, 3 Q. B. 699; 3 G. & D. 3; 12 L. J., Q. B. 80; 6 Jur. 945.

Taking the property of another, by assignment from one who has no authority to dispose of it; as taking an assignment of tobacco in the king's warehouse, by way of pledge from a broker who had purchased it there, in his own name, for his principal; and refusing to deliver it to the principal, after notice, and demand by him; none other than the person in whose name it was warehoused being able to take it out—is a conversion. *McCombie v. Davies*, 6 East, 538; 2 Smith, 557.

A widow who was administratrix of an insolvent, being applied to by his assignees for some papers that had been in his possession at the time of his decease, answered that they were in the hands of her attorney:—Held, not sufficient evidence of a conversion. *Canot v. Hughes*, 2 Bing. N. C. 448; 2 Scott, 663; 1 Hodges, 410.

A., who was paying his addresses to a lady, lost her letters and two memorandum-books, containing remarks of his own; B. found them and kept them, on the ground that the books contained matter injurious to him, and also shewed them to others; A. sent a person to demand them of B., who, at first, refused to give them up at all; but before the person left, said he would not give them to him, but would to C. or D. C. went, and B. offered to give him the letters and one book, which C., after consulting with A., accepted, saying, that he made a sacrifice to obtain the letters:—Held, that there was a conversion of the whole. *Clendon v. Dinneford*, 5 C. & P. 18.

A refusal to deliver goods by a person ignorant of the real owner is not evidence of a conversion. *Green v. Dunn*, 3 Camp. 215, n.

**Setting up Attachment.]**—On a demand of goods by the real owner, the defendant refused to deliver them, stating as his reason for the refusal, that they had been attached in his hands by a foreign attachment in a suit against a third party, from whom he had received them as his own, which was the fact:—Held, no evidence of a conversion. *Verrall v. Robinson*, 2 C., M. &

R. 495; 4 D. P. C. 242; 1 Gale, 244; 5 Tyrw. 1069.

Wine, the property of a plaintiff, being in the warehouse of the defendant, a wharfinger, notice from the Mayor's Court was served on the defendant, attaching in his hands all the goods of H., from whom the plaintiff had purchased the wine, and at the same time the defendant was informed that the attachment had reference to the wine. The plaintiff demanded the wine from the defendant's clerk, producing the delivery warrant which had been issued by the defendant to B., a former owner, and indorsed by him to H., and by H. to the plaintiff. The defendant's clerk said that there was a difficulty in consequence of the attachment, and referred the plaintiff to the defendant, whom he could not find. The plaintiff's attorney thereupon wrote, demanding the wine before eleven o'clock the next morning. The defendant's attorney replied, asking for time for inquiry, but a writ was issued before that answer was received:—Held, that there was some evidence of a conversion; that the conduct and position of the defendant was evidence from which the jury might infer whether or not he had been guilty of a conversion of the wine, and that, before arriving at a conclusion, it was proper for the jury to consider whether the defendant had a bona fide doubt as to the plaintiff's title to the wine, and whether a reasonable time for clearing up that doubt had elapsed before the action was commenced. *Pillot v. Wilkinson*, 3 H. & C. 345; 34 L. J., Ex. 22—Ex. Ch.

**Demanding Receipt.]**—If A. has a box in his possession containing papers belonging to a person deceased, and sends the box with its contents to his solicitors, with directions to deliver the box and papers to the executor on his giving an inventory of them, and a receipt:—Held, that trover lies against the solicitors, if they refuse to deliver the box and papers to the executor, he refusing to give an inventory and a receipt, although the solicitors offered to give them up if the executor would give an inventory and a receipt. *Cobbett v. Clutton*, 2 C. & P. 471.

**Refusal of Agent.]**—In trover against a defendant for not delivering some wine deposited with her by way of security for an advance of money:—Held, that it was not sufficient evidence of a conversion to shew that her son, who acted as her general agent, refused to give it up; and that it was necessary to prove that such agent acted under a special direction in order to make the defendant liable. *Pothonier v. Dawson*, Holt, 383. *And see cases ante*, col. 147.

**Sufficiency of Demand.]**—A demand in writing left at the defendant's house is sufficient. *Logan v. Houlditch*, 1 Esp. 22.

If a verbal demand and a demand in writing are made at the same time for the purpose of bringing an action, and the one has no reference to the other, evidence of the verbal demand is sufficient, without the production of the writing. *Smith v. Young*, 1 Camp. 439.

The plaintiff being entitled to the five best beasts as heriots, marked seven beasts, claiming all as heriots, and left them in the possession of the defendant, who was the owner up to the time of marking. The plaintiff afterwards ap-

plied to the defendant, who still had possession of the seven, for the beasts generally, but the defendant refused to give them up, without qualifying his refusal:—Held, no conversion of any of the beasts, the demand having reference to a seizure of seven, and it not being ascertained that any five were legally chosen. *Abington v. Lipscombe*, 1 Q. B. 776; 1 G. & D. 230; 6 Jur. 257.

**Evidence.**—It is not necessary to give notice to produce a written demand of the article for which the action is brought. *Hammond v. Plank, Peake*, 166, n.

**Authority of Party Demanding.**—A. brought an action against B. for taking away a filly; B. justified the taking as the servant of C.; the jury found a verdict for A. with damages, subject to a reference to D., to ascertain to whom she belonged, which was to depend on whether a scar should appear on a certain part of her body; and in case it should, the verdict for A. was to stand, if not, it was to be entered for B. The filly was delivered to D. by the consent of all parties, and he made his award, and found her to belong to A., and accordingly ordered the verdict found for him to stand; C., ten days after the award, demanded the filly of D., who refused to deliver her, and a fortnight afterwards he brought an action for her recovery:—Held, that the detention of the filly by D. did not, under the circumstances, amount to a conversion, as C. was no party to the original action, and as it did not appear that he was authorized to make the demand by B., to whom alone D. was bound to deliver her, he only being liable for the damages awarded to A. *Gunton v. Nurse*, 5 Moore, 259; 2 B. & B. 447.

Where a demand of the goods is not made by the party himself, a refusal, on the ground that the party applying is unknown, or not properly authorized, is not sufficient to support the action. *Solomons v. Davies*, 1 Esp. 83.

Where A. refused to give up chattels when demanded by the owner, on the ground that he had purchased them from B. who was the owner's servant, and it appeared that B. had no authority to sell:—Held, evidence of a conversion by A., although he had made the purchase bona fide, and in the belief that B. had such authority. *Metcalfe v. Lumsden*, 1 C. & K. 309.

**Necessity of Demand.**—Where property has been wrongfully and fraudulently taken, a demand and refusal are not necessary to enable the plaintiff to maintain trover. *Granger v. Hill*, 5 Scott, 561; 1 Arn. 42.

Where goods are delivered under a contract to do something with them, and to deliver them according to the party's undertaking, an omission of the party doing what he so undertook to do will not sustain trover unless there has been an actual refusal to re-deliver. *Severin v. Keppell*, 4 Esp. 156.

The defendant came to the plaintiff's house, which was left in the care of a servant, and said, that, having authority from the lord chancellor, he was come to take charge of the goods in the house; he put a man in possession, and took an inventory of the goods; and subsequently the servant was by him refused admittance into the house. The judge nonsuited the plaintiff, on the ground that, without a demand, there was no evidence of a conversion:—Held, that there was

some evidence which ought to have been submitted to the jury. *Needham v. Rawbone*, 6 Q. B. 771; n.; 9 Jur. 274.

**Statute of Limitations.**—To support a plea of the Statute of Limitations, by shewing a conversion more than six years before action brought, the defendant must either prove an actual conversion in fact, or give evidence of a positive and an absolute demand and refusal before that period. *Phillpott v. Kelley*, 4 N. & M. 611; 3 A. & E. 106; 1 H. & W. 134.

When a person, intrusted with a chattel for safe custody to be restored to the owner when required, is sued in detinue for detaining it after a demand, the Statute of Limitations is no bar to such action if brought within six years after the demand and refusal, although more than six years have elapsed since the person so intrusted with the article has wrongfully parted with the possession of it. *Wilkinson v. Verity*, 6 L. R., C. P. 206; 40 L. J., C. P. 141; 24 L. T. 32; 19 W. R. 604.

### c. Claim of Right or Interest.

**Nature of, in General.**—To maintain trover there must be some exercise of ownership over the chattel taken inconsistent with the owner's right of dominion over it. *Fauldes v. Willoughby*, 8 M. & W. 540; 1 D., N. S. 86.

If a person detains goods under any claim of interest in himself, so as to deprive the person entitled to the possession of them of his dominion over them, it is a conversion. *Burroughes v. Bayne*, 5 H. & N. 296; 29 L. J., Ex. 188; 2 L. T. 16.

**Claim of Lien.**—If one having a lien upon the goods, when they are demanded of him, claims to retain them upon a different ground, making no mention of the lien, trover may be maintained against him without any tender having been made of the amount of his lien. *Boardman v. Sill*, 1 Camp. 410, n.

A refusal grounded on a claim of right, to deliver up goods on demand, is evidence of a conversion, though the defendant may have a lien on them. *Cunee v. Spanton*, 8 Scott, N. R. 714; 7 M. & G. 903; 14 L. J., C. P. 23; 8 Jur. 1008.

**On Goods Shipped.**—The captain of a ship who had taken goods on freight, and claimed to have a lien upon them, delivered them to a bailee. The real owner demanded them of the latter, and he refused to deliver them without the directions of the bailor:—Held, that the bailor not having any lien upon the goods, the refusal was a sufficient conversion. *Wilson v. Anderton*, 1 B. & Ad. 450.

A vendor shipped, by order of a vendee, goods, which by the bill of lading were consigned to a third person at a foreign port. Before the vessel sailed, the vendee stopped payment, and the vendor thereupon demanded the goods of the captain, without tendering freight or expenses of unshipping. The captain refused to deliver, solely on the ground that he had signed a bill of lading for the consignee:—Held, sufficient evidence of a conversion to maintain trover at the suit of the vendor. *Thompson v. Trail*, 9 D. & R. 31; 6 B. & C. 36; 2 C. & P. 334.

Goods delivered to a person claiming them

wrongfully, who pays freight and other charges, cannot be detained for those expenses against the rightful owner. *Lempriere v. Pasley*, 2 T. R. 485.

A tender of freight and charges is not necessary previously to bringing trover for goods, of which a party has wrongfully obtained the possession. *Id.* And see SHIPPING.

**Attorney's Lien.**—The evidence of the conversion of a deed was, that when the deed was demanded from the defendant, he said he would deliver it up; but that it was then in the hands of his attorney, who had a lien upon it:—This was held insufficient. *Smith v. Young*, 1 Camp. 439.

In an action against A. and B. for a lease, the evidence of conversion was as follows:—A demand having been made upon A., he declined to give up the lease until rent due to B. was paid; but he added, that it was more B.'s business than his own, and as he was not in, he (A.) would either send the lease in the course of the day or would write the plaintiff a letter declining to return it. The plaintiff receiving neither lease nor letter, issued a writ on the following morning:—Held, that this amounted to an absolute refusal, notwithstanding A. and B. had at the time (though it was not mentioned) a lien upon the lease for a small sum due to them for business done by them as attorneys for the plaintiff. *Weeks v. Guode*, 6 C. B., N. S. 367.

**On Taking out of Pledge.**—A., having goods at a pawnbroker's, delivered the duplicate to B. to take them out of pledge; B. took them out accordingly, and paid the amount due on them. On A. sending to B. for the goods, B. said he had not got them, and refused to tell who had them:—Held, that B. had no right to insist on a tender of the money he had advanced to get them out of pledge. *Jones v. Cliff*, 1 C. & M. 541; 3 Tyr. 576.

#### d. Sale.

**In Breach of Bailments.**—Where the hirer of a piano sent it to an auctioneer to be sold:—Held, that he was guilty of a conversion, as well as the auctioneer, who refused to deliver it up unless the expenses incurred were first paid. *Loeschman v. Machin*, 2 Stark. 311.

A bailee of goods for hire, by selling them determines the bailment, and the bailor may maintain trover against the purchaser, though the purchase was bona fide. *Cooper v. Willomatt*, 1 C. B. 672; 14 L. J., C. P. 219; 9 Jur. 598.

A. conveyed goods by bill of sale to B.; B. allowed A. to use the goods at a weekly rent, A. undertaking to deliver them up on demand; A. afterwards sold and delivered the goods to C., a bona fide purchaser:—Held, that B. might maintain trover against C. *Id.*

Under an agreement between the plaintiff and the defendant that C. should be employed by them, for a certain time, and the plaintiff should be employed for a certain time also, and that the parties should be allowed to have the use of certain goods for a certain period, and at the expiration of the agreement the goods should be given up to the plaintiff; the goods having been, during the term, applied by the defendant to a purpose in contravention of the agreement, and not having been delivered by him at the end of the term:—Held, that the bailment had been deter-

mined, and that the plaintiff might maintain trover. *Bryant v. Wardell*, 2 Ex. 479.

**By Assignees.**—A., by deed, dated the 28th of September, 1845, conveyed goods to B. subject to a proviso, that if he should pay B. the sum thereby secured on the 22nd of March, 1850, or at such earlier day or time as B. should appoint by giving A. fourteen days' notice, and should pay interest in the meantime half-yearly, the deed should be void, and it was agreed between the parties that until default should be made in payment of the principal at the time specified, or the interest after fourteen days' notice, it should be lawful for A., his executors or administrators, to hold and enjoy the goods. A. continued in possession of the goods according to the agreement, until the 13th of December, 1849, when he became bankrupt, and his assignees, on the 19th of February, 1850, sold the whole of the goods absolutely, and not merely the bankrupt's interest in them. No demand had been made on A. by B. (or by the assignees of B.) for the principal money or interest in the meantime:—Held, first, that the deed did not give a mere possession and use of the goods to A. as bailee or tenant at will, but the right of possession and use for the term ending the 22nd of March, 1850, defensible by non-payment of the principal or of the interest according to the terms of the deed; but, secondly, that the sale by the assignees of A. the bankrupt, destroyed the bailment; and, thirdly, that the sale by the assignees was equivalent to a sale by the bailee himself, and consequently that trover would lie by the assignees of the mortgagee against the assignees in bankruptcy of the mortgagor for the conversion by the sale of the goods during the term. *Fenn v. Bittleston*, 7 Ex. 152; 21 L. J., Ex. 41.

**Of Property Pledged to be Redeemed.**—A. deposited a dock warrant for brandies with B., as a security for a loan, which was to be repaid on the 29th of January, or, in default, the brandies were to be forfeited. On the 28th, B. agreed for the sale of the brandies to C., and on the 29th delivered to him the dock warrant, and C. took actual possession of the brandies on the 30th:—Held, that the sale on the 28th, and the delivery of the dock warrant to the vendee on the 29th, A. having the whole of that day to redeem it, amounted to a conversion. *Johnson v. Stear*, 15 C. B., N. S. 330; 33 L. J., C. P. 130; 10 Jur., N. S. 99; 9 L. T. 804; 12 W. R. 347.

A. deposited goods with B. as security for the repayment of a loan in one month. At the end of the month B. entered into an agreement for an indefinite extension of the credit, A. agreeing to pay interest monthly. At the end of the second month, neither the principal nor interest being paid, B. wrote to A. demanding the payment of an amount in excess of what was actually due, and informing him that if it was not paid he should sell the goods. The money not being paid, B. sold the goods:—Held, in trover by A. against B., that B. had no right to sell till he had properly determined the extension of the credit, and thus sending a letter demanding an excessive amount had not that effect, and therefore A. was entitled to recover the value of the goods. *Pigot v. Cubley*, 15 C. B., N. S. 701; 33 L. J., C. P. 134; 10 Jur., N. S. 318; 9 L. T. 804; 12 W. R. 467.

Scrip certificates for shares were pledged to

secure an advance, for the repayment of which no particular date was fixed. The pledgor became bankrupt and the pledgee sold a portion of the certificates to satisfy his debt without making demand for payment or giving any notice of his intention of selling. The assignee in bankruptcy of the pledgor's estate, without making any tender of the amount of the debt, brought trover for the certificates against the pledgee:—Held, that the action was not maintainable. *Halliday v. Holgate*, 3 L. R., Ex. 299; 37 L. J., Ex. 174; 17 W. R. 13—Ex. Ch.

**Custom to take Damaged Goods.]**—Where, by the custom of the trade, a calico-printer is bound to take goods damaged in the printing, the mere circumstance of their being damaged confers no such property in them on him as to authorize him to sell them, unless the owner has elected that he should take them. *Lacloch v. Tuole*, 3 Esp. 114.

**Sale by Auctioneer of Goods comprised in Bill of Sale.]**—By a memorandum of agreement the plaintiff let on hire certain cabs to P. Subsequently the plaintiff made an advance of a sum of money to P., taking as security a bill of sale on all his goods. Neither the agreement to hire nor the bill of sale were registered under the Bills of Sale Act. P. took the goods (all of which were included either in the agreement to hire or the bill of sale) to the defendant and instructed him to sell. The defendant, being without notice of the plaintiff's claim, advanced money to P. upon the goods, sold them by auction, and, after deducting expenses and commission, paid over the balance to P. In an action brought to recover the value of the goods, on the ground of their alleged conversion by the defendant:—Held, that the plaintiff was entitled to recover, since the dealing with the property and sale by the defendant amounted to a conversion of the goods. *Cochrane v. Rymill*, 40 L. T. 744; 27 W. R. 776.

Plaintiffs were the holders of a bill of sale, including certain horses and harness. The grantor of the bill of sale without the plaintiffs' knowledge took the horses and harness to defendant's repository in the city of London for sale by auction. They were entered in the catalogue, defendant knowing nothing of the bill of sale. Horses were sold under the same conditions in defendant's yard whether sold privately or by auction. Before the auction the grantor of the bill of sale sold the horses and harness by private contract in defendant's yard. The purchase-money was paid to defendant, who deducted commission and paid the balance to the seller, and the horses and harness were delivered to the purchaser:—Held, in an action for conversion of the horses and harness, that the defendant was not guilty of conversion. *National Mercantile Bank v. Rymill*, 44 L. T. 767—C. A.

**Allowance out of Property to Bankrupt.]**—B., an undischarged bankrupt, to whom his creditors had given, by a resolution duly passed, a certain quantity of his furniture, assigned that furniture by bill of sale to the plaintiff, and afterwards sent it to the defendant, an auctioneer, who sold it and paid the money received to the bankrupt. In an action for conversion:—Held, that the plaintiff was entitled to the furniture, for that the bankrupt

could, under the resolution of his creditors, dispose of it to the plaintiff, and that there was no *ius tertii* which the defendant could set up. *Brown v. Hickinbotham*, 50 L. J., Q. B. 426.

### e. Waiver of Conversion.

**Effect of.]**—The defendant sold the goods of D. under a bill of sale. D. became bankrupt, and his trustee petitioned the Court of Bankruptcy to set aside the sale as fraudulent or void, and order payment of the proceeds (the amount of which he knew) to him. The court so ordered, and the money was paid. The trustee afterwards being dissatisfied with the amount realized, and desiring to obtain the difference between the value of the goods and proceeds of the sale, brought trover against the defendant:—Held, that he could not do so, as by his acts he had waived the tort. *Smith v. Baker*, 8 L. R., C. P. 350; 42 L. J., C. P. 155; 28 L. T. 637.

The assignees of a bankrupt are not entitled to waive a sale of the goods as a conversion, and rely on a subsequent demand and refusal. *Edwards v. Hooper*, 11 M. & W. 363; 12 L. J., Ex. 304; 7 Jur. 378.

A servant of a bankrupt, without authority, sold the bankrupt's goods to the defendant, who had notice of the act of bankruptcy. His assignees delivered to the defendant a bill of parcels as for goods sold and delivered by the bankrupt, and made two several demands for payment, which the defendant refused, and he also refused to deliver up the goods when they were subsequently demanded:—Held, that the demand for payment amounted only to a qualified offer by the assignees to adopt the sale, and that they were not thereby precluded from suing in trover. *Valpy v. Sanders*, 5 C. B. 887; 17 L. J., C. P. 249; 12 Jur. 483.

A person having once affirmed the acts of another, who wrongfully sold his property, cannot afterwards treat him as a wrong-doer, and maintain trover. *Brewer v. Sparrow*, 7 B. & C. 310; 1 M. & R. 2.

If an owner of goods, after a tortious sale of them, waives the conversion and claims the proceeds of the sale, part of which is paid to him, he cannot afterwards treat the seller as a wrong-doer and maintain trover against him. *Lythgoe v. Vernon*, 2 H. & N. 180; 29 L. J., Ex. 164.

**Owner Standing by.]**—The owner of goods, who stands by and voluntarily allows another to treat them as his own, whereby a third person is induced to buy them bona fide, cannot recover them from the vendee. *Gregg v. Wells*, 10 A. & E. 90; 2 P. & D. 296.

## 3. RIGHT OF ACTION.

### a. Property and Possession.

**Nature of Right.]**—Trover must be founded on the right of property in the plaintiff. *Pyne v. Dor*, 1 T. R. 55.

And the plaintiff must have the right of possession as well as the right of property at the time. *Gordon v. Harper*, 7 T. R. 9; 2 Esp. 465; *S. P.*, *Owen v. Knight*, 4 Bing. N. C. 54; 6 D. P. C. 245; 5 Scott, 307.

While the right of property in a chattel is admitted to be in one person, the right of possession of that chattel cannot be absolutely and adversely in another. *Clerk v. Adam*, 1 C. & F. 242.

**Property of Servant.]**—A servant, being engaged for a year, at thirty guineas and a suit of clothes, was provided with a livery suit on his entering the service. He was wrongfully turned away within the year:—Held, that he could not maintain trover for the clothes, for he had no property in the clothes till he had served the year. *Crocker v. Molynaux*, 3 C. & P. 470.

A calico-printer is entitled, after having discharged his head colourman, to the book in which that servant has entered the process for mixing colour during his service, although many of the processes were the invention of the head colourman himself. *Makepeace v. Jackson*, 4 Taunt. 770.

**Present Possession.]**—In order to maintain trover the plaintiff must have a right to the present possession of the goods. *Bradley v. Copley*, 1 C. B. 685; 14 L. J., C. P. 222; 9 Jur. 599.

Trover may be maintained by a gratuitous bailor of cattle against a wrongdoer who takes them out of the possession of the bailee. *Nicolls v. Bastard*, 1 Tyr. & G. 156; 2 C., M. & R. 659; 1 Gale, 295.

A person who is entitled to the temporary possession of a chattel, and delivers it back to the owner for an especial purpose, may, after that purpose is satisfied, and during his temporary right, maintain trover for it against the owner. *Roberts v. Wyatt*, 2 Taunt. 268.

Mere possession of goods is sufficient to maintain trover against a wrongdoer. *Jeffries v. Great Western Railway Company*, 5 El. & Bl. 802; 25 L. J., Q. B. 107; 2 Jur., N. S. 250.

A. has sufficient property in goods shipped by B. for the specific purpose of placing funds in the hands of A. to meet a bill drawn by B. upon A., to entitle A. to maintain trover, although no bill of lading is executed, and A. holds merely a receipt signed by the mate of the vessel, acknowledging the shipment of the goods to be delivered to A. *Frans v. Nicholl*, 3 M. & G. 614; 4 Scott, N. R. 43.

**Profit à prendre.]**—The plaintiff, under a licence of the owner of the soil to search for tin ore, had, in searching for that mineral, made excavations in the soil. The defendant carted away some of the soil which the plaintiff had so thrown out, the plaintiff not having abandoned his right to search the soil thrown out for ore. In trover for the removal of the soil:—Held, that the plaintiff had, as against the defendant, a mere wrongdoer, a sufficient possessory title to the mass thrown out to enable him to maintain the action. *Northam v. Bowden*, 11 Ex. 70; 24 L. J., Ex. 237.

A plaintiff who claims a right to cut rushes on a common, and cuts five or six loads, which the defendant carries away, may maintain trover for them. *Rackham v. Jerryp*, 3 Wils. 332, 338.

**On Loss of Lien.]**—If a person having a lien on goods wrongfully parts with them, the owner's right to the possession revives, and he may maintain trover for them. *Scott v. Newington*, 1 M. & Rob. 252.

**Setting up Jus tertii.]**—A., being in possession of a piano, which he had previously mortgaged with other goods by a bill of sale to B., sold it to the plaintiff, who took possession of it, and

removed it from premises which A. held as tenant to the defendant. The sale to the plaintiff was a bona fide transaction. The defendant, to whom a year's rent was due by A., and being unaware of B.'s mortgage, or of the sale to the plaintiff, caused the chattel to be taken out of the plaintiff's possession, and replaced in the premises held by A. Thereupon B. claimed it as his property; but the defendant, after B.'s claim had been made, distrained and sold the piano, together with other goods, for the rent due, when it was purchased amongst other property by B., who paid the defendant the rent due, and the costs and expenses of the distress, retaining the balance of the purchase-money. In an action for trespass in taking away the piano, and for its conversion:—Held, that the defendant could not defeat the action by shewing that the title to the chattel was in B. under the bill of sale, and that the plaintiff was entitled to a verdict. *Hoggon v. Pasley*, 2 Ir. L. R. 573.

A wrongdoer cannot set up jus tertii in answer to an action of trover. *Jeffries v. Great Western Railway Company*, *supra*.

## b. For what it Lies.

### i. In General.

**Part of Chattels.]**—It lies for an undivided part of a chattel. *Watson v. King*, 4 Camp. 272; 1 Stark. 121.

**Dog.]**—It lies for a dog that was lost, and which the defendant refused to deliver, unless paid for his keeping. *Binstead v. Buck*, 2 W. Bl. 1117.

**Agreement.]**—Trover lies for an unstamped agreement, if it can, upon payment of a penalty and stamp duty, be stamped and rendered available. *Scott v. Jones*, 4 Taunt. 865.

**Deeds.]**—In trover against an attorney, for a deed which had been prepared by him, it appeared at the trial that the defendant had delivered to the plaintiff a bill, containing a charge for preparing the deed upon the plaintiff's retainer:—Held, that the deed was the property of the plaintiff; and that the defendant could not set up, as a defence, that the deed was a voluntary conveyance by the plaintiff's father to the plaintiff, to give him a colourable right to kill game; and that the defendant retained it as the attorney of the plaintiff's father, as a lien for his professional charges. *Lord v. Wardle*, 4 Scott, 402; 3 Bing. N. C. 680.

A. having agreed to purchase of B. the remainder of a term, the latter delivered to him the lease in order that he might get an assignment made out; A. then obtained an enlargement of the term from the original landlord, and refused to accept an assignment or pay the full price agreed on, because B.'s under-tenant had removed some fixtures:—Held, that B. might insist on A. accepting the assignment, and, after demand and refusal of the lease, might maintain trover for it. *Perry v. Frame*, 2 B. & P. 451.

Upon a contract for the sale of an estate, the title and abstract to be made at the vendor's expense, the purchaser is entitled to the custody of the abstract until either the purchase is finally rescinded by consent, or declared impracticable by a court of equity; and when the contract is determined, the abstract becomes the property

of the vendor; if the sale proceeds, the abstract is the property of the vendee; but an opinion written thereon on the seller's paper by his own consent continues to be his property. *Roberts v. Wyatt*, 2 Taunt. 268.

A. sold an estate to B., who paid part of the purchase-money, and the title deeds were deposited with C. to be delivered up to B. when he paid the residue; A. got possession of them again, and pledged them to D. for a valuable consideration:—Held, that B., on tendering the remainder of the purchase-money, was entitled to recover the deeds from D. *Hooper v. Ramsbottom*, 1 Marsh. 414; 6 Taunt. 12.

Where a purchaser of a small part of an estate takes a covenant from the vendor to produce the title deeds whenever it shall be necessary, and the deeds afterwards come into the vendee's possession on his taking a mortgage of the other part of the estate, and he then assigns the mortgage to a third person, not mentioning the deeds, such third person cannot maintain trover against him for the deeds. *Yea v. Field*, 2 T. R. 708.

A. having contracted to purchase an estate of B., procured the deeds of conveyance to be prepared at his own expense, and sent them to the latter for execution; when executed, they were delivered to a servant to be returned, but the servant delivered them to C., an attorney, to whom B. was indebted for business done. In consequence of the refusal of other necessary parties to join in the conveyance, A. threw up the contract and demanded the deeds from C., who refused to deliver them up until his demand against B. was satisfied:—Held, that trover would lie by A. against C. for the deeds in a cancelled, if not in an uncanceled, state. *Esdaile v. Ozenham*, 5 D. & R. 49; 3 B. & C. 225.

## ii. Negotiable Instruments.

**Bills of Exchange.]**—If A. indorses a bill, drawn in his favour and accepted, to B., in order that he may raise money for A. by negotiating it, and B. gives it to C., who puts it into the hands of D., without consideration, two years after the bill is due, A. may recover back the bill from D. in trover. *Goggerley v. Cuthbert*, 2 N. R. 170.

R. being employed to procure a bill of exchange to be discounted for the plaintiff, instead of doing so, indorsed it, and placed it in the hands of the defendant, who was the clerk to a creditor of R. The defendant carried the bill to R.'s account with his creditor, and though afterwards apprised of the circumstances under which R. held the bill, refused to restore it:—Held, that the defendant was liable to the plaintiff in trover. *Cranch v. White*, 1 Bing. N. C. 414; 6 C. & P. 767.

The plaintiff delivered to the defendant a bill, which the latter was to get discounted for his own benefit. The defendant remitted the bill to his agents, with directions to place it to his credit, which they did, less the discount. It was left to the jury to say, whether or not the defendant had been guilty of a wrongful conversion:—Held, that this was a proper direction upon an issue on the plea of not possessed. *Wilkinson v. Whalley*, 5 M. & G. 590; 6 Scott, N. R. 631; 1 D. & L. 9; 12 L. J., C. P. 270; 7 Jur. 468.

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**—Misapplication of Part of Proceeds.]**—If a party, authorized by the holder of a bill of exchange to get it discounted, and to apply the proceeds in a particular way, does get it discounted, but misapplies any part of the proceeds, he cannot be sued in trover for the bill, but must be sued for money had and received. *Palmer v. Jarmain*, 2 M. & W. 282.

If a party receiving a bill payable to order, for the purpose of getting it indorsed for another person, procures the indorsement and pays in the bill to his own account at his banker's, with intent to appropriate the proceeds, and before the bill is due draws upon such account (though not specifically upon the credit of the bill), and his draft is honoured, an action of trover may be commenced against him before the bill is due, but not an action for money had and received. *Atkins v. Owen*, 4 A. & E. 819; 2 H. & W. 59.

**—Necessity of Demand.]**—A banker, after notice, discounted a bill drawn on a customer and by the acceptance made payable at his bank, after it had been lost by the holder, and afterwards debited his customer with the amount of the bill, wrote a discharge on it and delivered it up to the customer as the banker's voucher of his account:—Held, that the banker was thereby guilty of a conversion, and that the loser of the bill might recover in trover without a previous demand of the bill. *Lovell v. Martin*, 4 Taunt. 799.

**—Direction to Retain.]**—A., resident abroad, remitted a bill to B., his agent in England, drawn by A., and specially indorsed by him to C., with whom his children were at school, in payment of C.'s account for their board and education. B. got the bill accepted by the drawee, and sent a letter by post to C., stating that he had received a commission from A. to pay her some money on account of his children, and desired to be informed when and how it should be delivered. While the bill remained in B.'s hands, he received directions from A. to keep it, and the proceeds, in his hands, and to have a fair investigation into C.'s accounts, and after such investigation, to pay her what might be due to her. No such investigation took place, and B. detained the bill:—Held, that C. could not recover it in trover. *Brind v. Hampshire*, 1 M. & W. 365.

**—Plaintiffs not Party to Special Agreement.]**—L. & Co., a London firm, agreed with C. & Co., also a London firm, to make advances on a cargo per S., consigned to M. & Co., at Moulmein; on the terms that L. & Co. should have a lien on the cargo and its proceeds; and that M. & Co. should remit the proceeds as soon as realized through L. & Co. L. & Co. accordingly advanced to C. & Co. 6,000*l.* M. & Co. were informed of the arrangement, and agreed to it. Afterwards, L. & Co. requested C. & Co. to pay off their advances. C. & Co. informed M. & Co. of this, and requested them to draw on them in favour of L. & Co. in anticipation. L. & Co. were not aware of this application. M. & Co. wrote to C. & Co., expressing dislike to the style of draft, but assenting to do as requested, and adding, in a letter of the same date, "we trust you will take care we are protected in this matter." Inclosed was a letter, addressed to L. & Co., unsealed, advising them of a draft. The draft

was on C. & Co., payable six months after sight to L. & Co. C. & Co. accepted the draft, handed it and the letter to L. & Co., and afterwards duly honoured the draft. Afterwards a similar draft was sent in a similar letter, stating the draft to be "in anticipation of the arrival of the S., addressed to L. & Co., but open, and in a letter to C. & Co." When it arrived, C. & Co. were in such circumstances as to be aware that they could not honour it. They therefore suppressed both letter and draft; M. & Co. approved of their conduct. Subsequently C. & Co. became bankrupts; and the unaccepted draft came into the hands of their assignees. L. & Co., whose advances had not been paid off, demanded the draft from them, and, on its being refused, brought trover:—Held, that L. & Co. had no property in the draft, which had not been drawn under the agreement to which they were a party, but under a separate arrangement between C. & Co. and M. & Co.; and that, under the arrangement between C. & Co. and M. & Co., the former would have done wrong if they had handed over the draft to L. & Co., when aware that they could not protect it. *De Lizardi v. Pennell*, 6 El. & Bl. 742; 25 L. J., Q. B. 387; 2 Jur., N. S. 1227.

— **Custom on Delivery out—Negligence.**—

It is the regular and usual course of business in commercial transactions to deliver out a bill of exchange, left for acceptance, to any person who mentions the amount, and describes any private mark upon it; and if the clerk of the party leaving it by his conduct enables a stranger to discover the mark or number, in consequence of which the bill is delivered out to him, the party leaving it cannot maintain trover for the bill against the party who so delivered it out. *Morrison v. Buchanan*, 6 C. & P. 18.

— **Evidence of bona fides.**—In trover for a bill of exchange, it appeared that the defendants were bankers, and had discounted bills for A. B., who sent the bill by his clerk, to inquire whether they would discount it, and to inform them of an agreement between him and C. D., with respect to the title. The defendants subsequently placed this bill to the credit of A. B. At the trial, neither side having called the clerk to prove that he had delivered the message:—Held, that as the presumption was, that the defendants were bona fide holders of the bill for value, and also that they had acted honestly, it could not be presumed that the clerk had delivered the message, and therefore that the defendants were entitled to the bill. *Middleton v. Barned*, 4 Ex. 241.

**Scrip of Foreign Government.**—The scrip of a foreign government, issued by it on negotiating a loan (which scrip promises to give to the bearer, after all instalments have been duly paid, a bond for the amount paid, with interest), is by the custom of all the stock markets of Europe a negotiable instrument, and passes by mere delivery to a bona fide holder for value. English law follows this custom; and any person taking it in good faith obtains a title to it independently of the title of the person from whom he took it. The scrip promised to give the bearer a bond for the amount paid. *Goodwin v. Roberts*, 1 App. Cas. 476; 45 L. J., Ex. 748; 35 L. T. 179; 24 W. R. 987

A person who took this scrip as being negotiable, could not, after he had negligently allowed another person the means of transferring (even fraudulently) the possession of it to a bona fide holder, be heard to deny that the instrument was a negotiable instrument transferable to bearer by delivery. *Id.*

Where the holder of Prussian bonds, issued by the sovereign of that country to secure the payment of a national loan, deposited them with an agent for a special purpose, and the agent pledged them to a third person without fraud on the part of the latter:—Held, that, as the bonds were made payable to the bearer, they could not be recovered in trover by the real owner. *Georgier v. Mierville*, 4 D. & R. 641; 3 B. & C. 45.

**Share Certificates.**—A. deposited with B. certain share certificates in a company as security for a loan, and afterwards assigned all his personal estate to trustees for the benefit of his creditors. The assignees gave notice of the assignment to the company, but B. omitted to give notice of his equitable lien:—Held, that, notwithstanding the omission of such notice, the trustees could not maintain trover against B. for the certificates. *Broadbent v. Varley*, 12 C. B., N. S. 214.

**Exchequer Bills.**—An exchequer bill (the blank in which was not filled up) having been placed for sale in the hands of S., he instead of selling, deposited it at his bankers, who made him advances to the amount of its value:—Held, that the owner thereof could not maintain trover against the bankers, as the property in such bill passed by delivery, as in the case of bank-notes and bills of exchange. *Wookey v. Pole*, 4 B. & A. 1.

c. On Sale of Goods.

**Goods subject to Vendor's Lien.**—The purchaser of goods which remain in the possession of the vendor, subject to the vendor's lien for unpaid purchase-money, cannot maintain an action of trover against a wrongdoer. *Lord v. Price*, 9 L. R., Ex. 54; 43 L. J., Ex. 49; 30 L. T. 271; 22 W. R. 318.

**Where Goods not Paid for.**—The purchaser of goods cannot maintain trover for them, without paying the price; for though he acquires the right of property by the purchase, he can only acquire the right of possession by the payment or tender of the price; and in order to maintain trover, he must have both the right of property and the right of possession. *Blozam v. Saunders*, 7 D. & R. 396; 4 B. & C. 941.

But on the contract for the sale of a specific chattel on credit, time, without express stipulation, is not of the essence of the contract; and the vendee, on tender of the price, though after the expiration of the period of credit, may maintain trover against the vendor to recover such chattel. The vendor cannot rescind the contract on nonpayment at the day. *Martindale v. Smith*, 1 G. & D. 1; 1 Q. B. 389; 5 Jur. 932.

If a tradesman sells goods to be paid for on delivery, and his servant by mistake delivers them without receiving the money, he may, after demand and refusal to deliver or to pay—

bring trover for his goods against the purchaser. *Bishop v. Shillito*, 2 B. & Ald. 329, n.

**Appropriation of Goods.**—Trover will not lie by the purchaser of goods, which form part of a larger quantity belonging to the seller, unless there has been a separation of the specific part sold from the rest. *Austen v. Craven*, 4 Taunt. 644; 1 Marsh. 4, n.

The plaintiff, by bought and sold notes, contracted to sell to the defendant oil at a certain price, "to be free delivered and paid for in fourteen days by cash, less 2½. 10s. per cent. discount." Having at the time oil at a wharf, he gave an order to the wharfinger to transfer some of that to the defendant. The wharfinger transferred it in his books to the defendant's name, and signed a notice of the transfer directed to the defendant, which the plaintiff's clerk on the same day took to the defendant, and demanded a cheque in payment. The defendant refused to give the cheque, but retained the notice and got possession of the oil against the will of the plaintiff, who, as the jury found, never intended to part with the notice or the oil, except on condition that a cheque was given:—Held, that as the sale was of no specific oil, and as the defendant refused to comply with the condition, no property passed to him by the transfer in the wharfinger's books, and that the plaintiff could maintain trover. *Godts v. Rose*, 17 C. B. 229; 25 L. J., C. P. 61; 1 Jur., N. S. 1173.

An appropriation of goods, under a contract of sale, may mean a mere election by the vendor, where he has the right himself to choose what articles he will supply in performance of his contract, in which case the property does not pass; or it may mean that both parties to the contract have agreed that particular goods shall be the articles to be supplied, and yet the appropriation may not operate so as to pass the property. *Wait v. Baker*, 2 Ex. 1; 17 L. J., Ex. 307.

But where both parties have agreed that particular goods shall be the articles contracted for, and shall become the property of the vendee, and nothing farther remains to be done in order to transfer the goods, that is an appropriation which operates in law so as to vest the property in the vendee. *Ib.*

Under a contract for the sale of goods, to be selected by the vendor, a selection and a delivery to a common carrier for the vendee is a delivery to the vendee, whose agent the carrier becomes; and if there is a binding contract, and the article agrees with it, such delivery is such an appropriation as leaves nothing more to be done in order to transfer the goods, and therefore the property passes. *Ib.*

But in the case of a delivery on board a ship, under a bill of lading, the captain is in possession of the goods, and carries for and on behalf of the vendor, and the delivery does not operate as in the case of a common carrier, though the ship is expressly hired for the vendee; it is an appropriation only in the sense of an election, and does not vest the goods in the vendee. *Ib.*

**Delivery.**—M., being indebted to B., entered into an agreement as follows: "I, M., agree to allow B. to have my horse, van, cart and two sets of harness for what I owe B., and that B. to maintain the horse and keep possession of it and cart and harness, and to have his name on the van and cart, until I repay to B. 39l. 13s. 4d.

B. has received into possession the horse, van, cart and the two sets of harness, this 24th day of December, 1860." B. not having room on his premises for all the goods, left part with M., and having eventually been declared insolvent, M. took back the goods which B. had on his premises, which were then seized by the broker of the provisional assignees, upon which M. brought an action and obtained a verdict; leave being reserved to set it aside on the ground that the property sought to be recovered passed to B. under the agreement:—Held, that there had been a complete delivery of all the goods, and that the property had passed, and therefore that an action for conversion could not be maintained. *Martin v. Reid*, 11 C. B., N. S. 730; 31 L. J., C. P. 126; 5 L. T. 727.

**Contract for Performance of Work.**—The buyer of a chattel, ordered to be made for him, acquires no property in the chattel till it is finished and delivered to him; and therefore, before then, cannot maintain trover for it, though he has paid the price beforehand. *Mucklow v. Mangles*, 1 Taunt. 218; *S. P.*, *Woods v. Russell*, 1 D. & R. 58; 5 B. & A. 942.

An unfinished gig, which had been previously selected and paid for by the plaintiff, was taken in execution under a fi. fa., and left in care of the judgment creditor, who, when it was finished, assisted in giving it up to the plaintiff. The sheriff afterwards retook it. Trover was brought, and the execution found fraudulent:—Held, that, whether the property in the gig passed or not to the plaintiff before the seizure, trover was maintainable, and the sheriff could not retake it, even to secure his poundage. *Goode v. Langley*, 7 B. & C. 26; 9 D. & R. 791.

B., a builder, undertook to build an hotel for a company, of which the defendants were the trustees, and to do all the work, except the plumbing and ironmongery, which were to be done by the defendants' workmen. It was agreed, that if B. became bankrupt, it should be lawful for the defendants to take possession of the work already done, and put an end to the agreement, and that they should pay to B. so much money only as should be adjudged to be the value of the work already done and fixed by him. The defendants employed a clerk of the works, whose duty it was to inspect the materials supplied by the bankrupt, and none were used upon the building but such as had been approved by him. Before the hotel was completed B. became a bankrupt. Shortly before the bankruptcy, some deal sash-frames were lying at the bankrupt's premises; to these the ironmongers of the defendants had supplied pulleys, and in this state they had been seen and approved by the clerk of the works. After the bankruptcy, the sash-frames were brought to the defendants' premises; the assignees then made a demand of the sash-frames, and upon the defendants' refusal to deliver them, brought trover:—Held, first, that this was a contract for the performance of certain work, and not for the sale of goods, and that the sash-frames did not become the property of the defendants until they were fixed to the building. *Tripp v. Armitage*, 4 M. & W. 687; 1 H. & H. 442.

Held, also, that although the defendants might be entitled to keep the sash-frames, for the purpose of severing the pulleys, yet a demand of the sash-frames generally, and a general refusal, were evidence of a conversion. *Ib.*

### d. After Theft of Goods.

**Prosecution of Offender.]**—In an action for trover and trespass for a brooch, the pleas being not guilty and not possessed, the jury found a verdict for the plaintiff. A rule for a new trial having been obtained, on the ground that it appeared from the evidence that the brooch was taken by the defendant under such circumstances as to prove a charge of felony, and that the judge ought, therefore, to have nonsuited the plaintiff:—Held, that the judge was bound to try the issues on the record, and that he was right in not having nonsuited the plaintiff. *Wells v. Abrahams*, 7 L. R., Q. B. 554; 41 L. J., Q. B. 306; 26 L. T. 326; 20 W. R. 659.

The objection cannot be taken by plea. *Osborne v. Gillett*, 8 L. R., Ex. 88.

See also cases under CRIMINAL LAW (Felony).

The owner of goods stolen prosecuting the felon to conviction, cannot recover their value from the person who purchased them in market overt, and sold them again before conviction, notwithstanding the owner gave him notice of the robbery while they were in his possession. *Horwood v. Smith*, 2 T. R. 750; 2 Leach, C. C. 586, n.

But the owner of chattels stolen, who prosecutes the thief to conviction, may recover their value from a person who purchased them from the thief by a bona fide sale, but not in market overt, before the conviction, notice of the felony having been given whilst they were in his possession. *Peer v. Humphrey*, 2 A. & E. 495; 4 N. & M. 430; 1 H. & W. 28.

Trover is maintainable to recover the value of goods which have been stolen from the plaintiff, and which the defendant has innocently purchased, although no steps have been taken to bring the thief to justice; for the obligation which the law imposes on a person to prosecute the party who has stolen his goods does not apply where the action is against a third party innocent of the felony. *White v. Spettigue*, 13 M. & W. 603; 1 C. & K. 673; 14 L. J., Ex. 99; 9 Jur. 70.

It is not necessary for the owner of stolen goods to prosecute the thief to conviction before he can recover them in an action against an innocent third person. *Lee v. Bayes or Robinson*, 18 C. B. 599; 25 L. J., C. P. 249; 2 Jur., N. S. 1093.

**Against Salesmaster.]**—A salesmaster, who in market overt publicly sells and afterwards delivers a stolen beast, although he does so innocently and in the ordinary course of his business, is responsible, in trover, to the true owner for the value of the beast. *Ganly v. Ledwidge*, 10 Ir. R., C. L. 33.

**Effect of Order of Restitution.]**—Goods which have been stolen may be recovered in trover from the purchaser of them in market overt upon a conversion by him subsequent to the conviction of the felon, without any order for restitution having been made, for the effect of 7 & 8 Geo. 4, c. 29, s. 57, is to re-vest the property in stolen goods in the original owner upon conviction of the felon: *Scattergood v. Sylvester*, 15 Q. B. 506; 19 L. J., Q. B. 447; 14 Jur. 977.

Sec. 100 of the Larceny Act, 1861, gives the owner of a stolen New Zealand bond no right to recover it from the holder. *Chichester v. Hill*.

52 L. J., Q. B. 160; 48 L. T. 364; 31 W. R. 245; 47 J. P. 324; 15 Cox, C. C. 258.

See also CRIMINAL LAW (Larceny).

**Bills and Notes Stolen.]**—Trover will lie for the produce of a stolen bank-note in the hands of a third person, after conviction of the theft. *Golightly v. Ryn, Lofft*, 88.

A promissory note delivered by the defendant to the plaintiff, payable to the plaintiff's order, was stolen from the plaintiff by his clerk, who, after forging the plaintiff's indorsement, obtained payment from the defendant's banker; the banker handed the note to the defendant:—Held, that the plaintiff was entitled to recover the amount at the hands of the defendant in an action of trover, notwithstanding six weeks had elapsed before the plaintiff discovered and gave the defendant notice of the loss of the note. *Johnson v. Windle*, 3 Bing. N. C. 225; 3 Scott, 608; 2 Hodges, 202.

If a party possess himself of a stolen bill or note improperly, a demand and refusal are not necessary previously to an action brought for its recovery by the loser. *Beckwith v. Corral*, 3 Bing. 444; 11 Moore, 335; 2 C. & P. 261.

**Property in Hands of Police.]**—The plaintiff was tried and acquitted on a charge of stealing a diamond ring and pin found on his person. The defendant, a superintendent of police, into whose hands the articles had come in the ordinary course of proceedings, did not deliver them to the plaintiff, but within a reasonable time applied to a metropolitan police magistrate under 2 & 3 Vict. c. 71, s. 29, for an order as to how he was to dispose of them. The magistrate, after hearing evidence, including that of the plaintiff, adjourned the hearing to a day not yet expired. In an action for the detention and conversion of the articles:—Held, that the defendant, having within a reasonable time proceeded in accordance with the provisions of the act, to place the matter in the hands of the magistrate, was not liable. *Bullock v. Dunlap*, 2 Ex. D. 43; 46 L. J., Ex. 150; 35 L. T. 633; 25 W. R. 98. Affirmed, 13 Cox, C. C. 367; 36 L. T. 194; 25 W. R. 293—C. A.

If a person is stopped with a horse under suspicious circumstances, and the horse is placed at an inn by the police, and the innkeeper directs an auctioneer to sell the horse for its keep, the latter is liable to be sued in trover by the owner. *Binns v. Pigott*, 9 C. & P. 208.

**Purchase from Police.]**—Various quantities of tallow, the property of different persons, were deposited in warehouses on a bank of the Thames. A fire took place, in consequence of which the tallow melted and flowed down into the sewers, and thence into the river, from which several portions of it were unwarrantably taken by different persons. A., one of these persons, sold some of it to B., which was taken from him by the police, and he was charged before a magistrate with the possession of tallow supposed to have been stolen or unlawfully obtained. The magistrate dismissed the charge, but ordered the tallow to be detained, under 2 & 3 Vict. c. 71, s. 29, and it was sold by direction of the commissioner of police before the twelve months limited by s. 30 had expired. C. having purchased the tallow from the police:—Held, that A. had no property in the tallow entitling him to main-

tain an action against C. for its conversion. *Buckley v. Gross*, 3 B. & S. 566; 32 L. J., Q. B. 129; 9 Jur., N. S. 986; 7 L. T. 743; 11 W. R. 465.

**e. When Goods obtained by False Pretences and Fraud.**

**Conviction.**—Goods were obtained from the defendants by A. by false pretences, and were afterwards sold by him to the plaintiff, from whose possession they were subsequently retaken and removed by the defendants; and in trover against them, for such seizure and conversion, the plaintiff recovered a verdict for the value of the goods. At the time the action was brought and tried, the plaintiff was aware that A. was in custody awaiting his trial for the offence, and he was, in fact, tried and convicted on the day after the plaintiff had recovered the verdict. Upon a rule for a new trial, on the ground that the jury should have been directed to take into consideration the probability of A.'s conviction for false pretences, and that the damages were excessive:—Held, that by the effect and operation of 7 & 8 Geo. 4, c. 29, s. 57, upon the conviction of A. there was relation back to the time of the fraud committed by him upon the defendants, and that the goods remained the property of the defendants from the first, the property therein never having been out of them, and that what they did was simply to retake possession of their own property; and the court made the rule for a new trial absolute, subject to the plaintiff's assenting to a stay of proceedings upon payment of the costs of the action and of the rule, with 40s. damages. *Nickling v. Heaps*, 21 L. T. 754.

By 24 & 25 Vict. c. 96, s. 110, if any person guilty (inter alia) of obtaining any chattel, money, or other property by false pretences "shall be indicted on behalf of the owner of the property and convicted, in such case the property shall be restored to the owner." W. purchased and obtained delivery of certain sheep from the defendant by false pretences. The plaintiff purchased the sheep from W. and paid W. for them without knowledge of the fraud, the defendant having done nothing in the meantime to avoid the contract between himself and W. The defendant finding that the sheep were on the plaintiff's premises retook possession of them; W. having been convicted of obtaining the sheep by false pretences on the prosecution of the defendant:—Held, that the effect of 24 & 25 Vict. c. 96, s. 100, was not to revert the property in the sheep in the defendant as against the plaintiff, who had acquired a good title to them before the conviction, and consequently that the defendant was liable in an action by the plaintiff for the value of the sheep. *Moyce v. Newington*, 4 Q. B. D. 32; 48 L. J., Q. B. 125; 39 L. T. 535; 27 W. R. 319.

**Effect on Property.**—The obtaining goods upon false pretences, under colour of purchasing them, does not change the property. *Noble v. Adams*, 7 Taunt. 59; 2 Marsh. 366; Holt, 248.

**Mistake as to Vendee.**—The plaintiffs, who were linen manufacturers at Belfast, received an order for goods, signed "A. Blenkarn & Co.," 37, Wood-street, London, the word "Blenkarn," being so written as to resemble "Blenkiron."

The goods were afterwards forwarded and addressed to "A. Blenkiron & Co.," 37, Wood-street, the plaintiffs being under the belief that they were in correspondence with the well-known firm of "Blenkiron & Sons," who carried on business at 123, Wood-street. The goods were ordered and received by Alfred Blenkarn, who had an office at 37, Wood-street, and the plaintiffs were induced by his fraud to send the goods to him. The plaintiffs, on discovering the fraud, prosecuted Blenkarn for obtaining goods by false pretences, and he was found guilty. Before his conviction he had sold part of the goods to the defendants, who had no knowledge of the fraud, and they had re-sold them to other persons:—Held, that there was no valid contract for the sale of the goods by the plaintiffs, and that they were entitled to recover them from the defendants in an action of trover. *Cundy v. Lindsay*, 3 App. Cas. 459; 14 Cox, C. C. 93; 47 L. J., Q. B. 481; 38 L. T. 573; 26 W. R. 406—H. L. Affirming 2 Q. B. D. 96; 13 Cox, C. C. 583; 46 L. J., Q. B. 233; 36 L. T. 345; 25 W. R. 417—C. A.

The plaintiffs, owners of a large quantity of acid in barrels, employed brokers to sell it. The brokers contracted with B. for the purchase of part, and gave him an order on the plaintiffs that they should deliver to him, or his order, a certain number of tons of acid. B. sold his interest in this contract to E. who sold it to L. A. bought the same of L., falsely representing himself as agent for V., and thereby, on pretence of inspecting the acid, obtained from L. the brokers' orders on the plaintiffs for the quantity. These orders had been indorsed over, and passed from one purchaser to another, and when delivered by L. to A. were indorsed by L., specially deliverable to himself. A. presented the brokers' orders to the plaintiffs, and, stating that he had purchased the acid of L. on his own account, though nominally for V., induced the plaintiffs to give him a transfer, or delivery order, on the wharfinger in whose warehouse the acid was lying, authorizing the transfer into A.'s name of certain specific casks of acid, amounting to the quantity in the brokers' orders mentioned. The wharfinger thereupon transferred the specific casks of acid into A.'s name. A. immediately borrowed money of the defendant, and pledged the casks of acid with him, as a security for the repayment, handing over to the defendant the warrants which he had made out, by means of which the defendant obtained possession of the acid:—Held, that, as A. obtained the delivery order from the plaintiffs by false and fraudulent representation that he had purchased acid by a subsale from a purchaser from the plaintiffs, there was no privity of contract between the plaintiffs and A.; consequently, that the latter could not convey a good title in the casks of acid to the defendant, though a bona fide pawnee for value, but that the plaintiffs might recover the acid back from him in trover. *Kingsford v. Merry*, 1 H. & N. 503; 26 L. J., Ex. 83; 3 Jur., N. S. 68—Ex. Ch.

The plaintiff having been imposed upon by a swindler, consigned a box at Birmingham by the defendants, as common carriers, to J. W., in London. The defendants found that no such person resided there, but upon receiving a letter signed J. W., requesting that the box might be forwarded to a house at St. Albans, they delivered it there to a person calling himself J. W., who shewed

that he had a knowledge of the contents of the box: that person having disappeared:—Held, in an action of trover against the defendants that they were liable. *Stephenson v. Hart*, 4 Bing. 476; 1 M. & P. 357.

**Where Transaction Void or Voidable.**—The words "fraudulent and void as against the assignees of such" persons, contained in 1 & 2 Vict. c. 110, s. 59, do not mean fraudulent and void absolutely, but only as to the assignee, so that a transaction forbidden by that section, and declared fraudulent and void as to the assignee, may be valid as to other persons; and therefore where a debtor intending to petition the Insolvent Debtors' Court, voluntarily gave B., one of his creditors, a warrant of attorney on which B. entered up judgment and issued execution, and the sheriff seized and sold the goods, and A. afterwards presented his petition, and an assignee was appointed:—Held, that the assignee could not treat the transaction as void from the beginning, and maintain an action against B. on an alleged wrongful conversion at the time of the seizure. *Young v. Billiter*, 8 H. L. Cas. 682; 30 L. J., Q. B. 153; 7 Jur., N. S. 269. (*Billiter v. Young*, in Ex. Ch., 6 El. & Bl. 1; 24 L. J., Q. B. 169; 2 Jur., N. S. 438, reversed.)

The assignee brought trover, alleging that the creditor wrongfully deprived A. of the goods. The creditor pleaded not guilty, and also the warrant of attorney and the execution under it. The assignee replied, that after the 1 & 2 Vict. c. 110, and within three months before A.'s imprisonment, he being in insolvent circumstances, did, with the intent of petitioning the court, voluntarily, fraudulently, and contrary to the statute, charge his estate in favour of a creditor, by means of a warrant of attorney, fraudulent and void within the statute, whereby B. obtained execution:—Held, that on this pleading, trover was not maintainable against B. *Id.*

**Innocent Possession of Goods Fraudulently Obtained.**—A person who, however innocently, obtains the possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or for that of any other person, is guilty of a conversion, unless the possession was obtained by him as finder or as bailee, or by purchase in market overt or from an agent, so as to be protected by the Factors' Acts. *Hollins v. Fowler*, 7 L. R., H. L. 757; 44 L. J., Q. B. 169; 33 L. T. 73. Affirming 7 L. R., Q. B. 616; 41 L. J., Q. B. 277; 27 L. T. 168; 20 W. R. 168—Ex. Ch.

When, therefore, B. had fraudulently obtained cotton from F., and H. (whose ordinary business was that of a cotton broker, and who was utterly ignorant of the fraud of B.) purchased it from B. in the belief and expectation that M., one of his ordinary clients, would accept it, and M. did afterwards accept it, though H. only received from M. a broker's commission, and not a trade profit on the sale:—Held, that in this instance H. had made himself a principal, and by transferring the cotton to M. had committed an act of conversion which made him liable in trover to F., the real owner of the cotton. *Id.*

The 24 & 25 Vict. c. 96, s. 100, applies to cases of false pretences as well as felony, and the fact that the prisoner parted with the goods to a bona fide pawnee will not disentitle the original owner

to the restitution of the goods. *Reg. v. Standcliffe*, 11 Cox, C. C. 318.

Though a fraudulent vendee may be sued in trover by the vendor, yet the right of action does not exist against every person into whose hands the property may have passed subsequently. *Sheppard v. Shoolbred*, Car. & M. 61.

**—Evidence.**—The plaintiffs sued for goods, of which they alleged they had been deprived by fraud in the defendant's agent:—Held, that they might prove the contract made by the agent, without calling him as a witness, although the defendant was not privy to the fraud. *Irving v. Motly*, 7 Bing. 543; 5 M. & P. 380.

## f. Property Lost or Found.

**Title of Finder.**—The place in which a lost article is found does not constitute any exception to the general rule of law, that the finder is entitled to it as against all persons except the owner. *Bridges v. Hawkesworth*, 21 L. J., Q. B. 75; 15 Jur. 1079.

A person entering a shop found on the floor a bundle of bank notes which had been accidentally dropped there by a stranger. The party who lost them could not be found:—Held, that as against every one but the true owner, the property in the notes belonged to the finder and not to the owner of the shop, notwithstanding that the finder had immediately on picking up the bundle handed it over to the latter, with a view to its being restored to the true owner if he should return, and the owner of the shop had advertised the finding in the newspapers, the finder not having intended to waive his title, and having before he demanded the notes back offered to repay the expense of the advertisements, and to indemnify the shopkeeper against any claim. *Id.*

Trover lies for a lost bank note, which the defendant has tortiously converted to his own use, though part of the proceeds has been paid by him to the plaintiff. *Burn v. Morris*, 4 Tyr. 485; 2 C. & M. 579.

The acceptance of part does not affirm the taking, so as to waive the tort, but the amount received will go in reduction of damages. *Id.*

A deputy vice-admiral who received an anchor and hawser, alleged to have been left at sea, from the finder, refused on application by the real owner to deliver them up, until the salvage was paid, or security given for the payment of it:—Held, that this was a conversion, but that if he had merely refused to deliver them up until it was ascertained whether salvage was due or not, it would not have amounted to a conversion. *Clark v. Chamberlain*, 2 M. & W. 78; 2 Gale, 217.

**—Person obtaining Possession of Land.**—One who comes into possession of land, on which he finds a block of stone belonging to another, is not justified in removing it to a distance. *Forsdick v. Collins*, 1 Stark. 173.

And such removal supersedes the necessity of proving formal demand in an action of trover. *Id.*

## g. Property Given or Exchanged.

**Gift—Policy on Life.**—R. insured his life and handed the policy to his mother, telling her she might keep it; but there was no assignment of

the policy. On R.'s death his administratrix brought an action for the recovery of the policy:—Held, that though the gift passed no right to the mother to recover the money secured by the policy, the administratrix could not maintain detinue or trover against her for the document. *Rummens v. Hare*, 1 Ex. D. 169; 46 L. J., Ex. 30; 34 L. T. 407; 24 W. R. 385—C. A.

— **Intention of Intestate.**—Declarations by an intestate, that he meant that a person with whom he resided should have his furniture and effects for what he owed her, are insufficient to entitle such person to take and retain possession of the property. *Royston v. Hankey*, 3 M. & Scott, 381.

— **Effect of Delivery.**—A verbal gift of a chattel, without actual delivery, does not give the property to the donee. *Irons v. Smallpiece*, 2 B. & A. 551.

And a mere verbal gift of a chattel to a person in whose possession it is, does not pass any property to the intended donee. *Shower v. Pilch*, 4 Ex. 478; 19 L. J., Ex. 113.

A father gave his son a watch, some printed books, and several articles of wearing apparel:—Held, that, although the son was under age (viz. sixteen years old), the father could not maintain trover against a person who detained the property, because the right of possession was not in him, but in his son. *Hunter v. Westbrook*, 2 C. & P. 578.

A barge, while in the possession of the donee, and worked by him as servant to the owner, was given to him by the owner; afterwards the donee worked it, and paid the wages of the crew on his own account until the donor's death:—Held, that the property thereby became vested in the donee. *Winter v. Winter*, 4 L. T. 639; 9 W. R. 747.

See also **GIFT**.

— **On Exchange of Property.**—The plaintiff exchanged a watch with the defendant for a pair of candlesticks, which the latter warranted to be silver:—Held, that the plaintiff could not maintain trover for the watch, on proof that the candlesticks were of base metal. *Emanuel v. Dane*, 3 Camp. 299.

A person, having three bills of exchange, applied to a county banker, with whom he had had no previous dealings, to give for them a bill on London of the same amount, and the bill given by the banker was afterwards dishonoured:—Held, that this was a complete exchange of securities, and that trover would not lie for the three bills of exchange. *Hornblower v. Proud*, 2 B. & A. 327.

#### **h. Goods Seized or Taken in Execution.**

— **Liability of Purchaser.**—Where a sheriff, under a fi. fa. against A., sold the goods of B., the purchaser is liable to the latter in trover, although he purchased such goods at a public sale directed by the sheriff. *Farrant v. —*, 3 Stark. 130.

— **Of Officer of Court.**—An officer of an inferior court of record, seized, under a fi. fa. against

A., partnership property of A. and B., and sold it to various purchasers, who carried it away:—Held, that the seizure and sale, under the circumstances, did not amount to a conversion. *Mayhew v. Herrick*, 7 C. B. 229; 18 L. J., C. P. 179; 13 Jur. 1078.

— **Of Auctioneer.**—The plaintiff lent a pianoforte to W., in whose hands it was seized under a distress for rent. While the landlord's bailiff remained in possession, by W.'s consent, a fieri facias against W., at the suit of another creditor, was put into the premises, and the officer seized the pianoforte, and removed it to the premises of an auctioneer for sale:—Held, that the plaintiff (after a demand and refusal to deliver it) was entitled to recover it from the auctioneer. *Turner v. Ford*, 15 M. & W. 212; 15 L. J., Ex. 215.

— **Sale when Sheriff in Possession.**—Possession of goods by a sheriff under a fieri facias does not prevent the debtor from making an effectual sale of the goods by delivery to a purchaser while the sheriff is in possession. *Union Bank of London v. Lenanton*, 3 C. P. D. 243; 47 L. J., C. P. 409; 38 L. T. 698.

#### **i. Between Landlord and Tenant.**

— **Trees and Minerals in Copyhold Lands.**—In an ordinary estate of copyhold the property in the trees and minerals is in the lord, the possession in the copyholder. If a stranger or the copyholder cuts trees or takes minerals, the lord can bring trover. *Eardley v. Granville*, 3 Ch. D. 826; 45 L. J.; Ch. 669; 34 L. T. 609; 24 W. R. 528.

— **Crops.**—Trover will lie for corn cut by an outgoing tenant after the expiration of his term, though sown by him before that time, under an idea that he was entitled to an away-going crop. *Davies v. Cannop*, 1 Price, 53.

Trover does not lie by an in-coming tenant to recover the value of the away-going crops taken by the off-going tenant, who continued to hold the land as tenant from year to year after the expiration of an old lease, which reserved to him the right, after the end of the term at Lady-day, "to fence in and preserve all such hard corn as should be sown on the premises the winter seedness preceding, so as the same exceeded not twenty-nine acres, and was summer fallowed and well manured, and at harvest to reap and carry away the same." *Boraston v. Green*, 16 East, 71.

— **Wrongful Execution.**—Where goods leased as furniture with a house have been wrongfully taken in execution by a sheriff, the landlord cannot maintain trover against the sheriff pending the lease. *Gordon v. Harper*, 7 T. R. 9; 2 Esp. 465.

— **Wrongful Distress.**—A lodger may maintain an action if his goods are taken on an excessive distress by the landlord of the party under whom he occupies. *Fisher v. Algar*, 2 C. & P. 374.

If a party pays money in order to redeem his goods from a wrongful distress for rent, he may maintain trover against the wrongdoer. *Shipwick v. Blanchard*, 6 T. R. 298.

A., a tenant, owed rent to B., his landlord; B. distrained for more rent than was due, and removed the goods to the auction rooms of C.; A. gave C. notice not to sell, and C. delivered the goods back to the person from whom he received them:—Held, that, as some rent was due from A. to B., C. was not liable to A. in trover. *Whitworth v. Smith*, 5 C. & P. 250; 1 M. & Rob. 193.

— **Goods of Mortgagor distrained by Mortgagee—Tenancy—Notice of.]**—A mortgage deed by which a messuage and premises were conveyed to the trustees of a building society to secure payment by the mortgagor of the sums payable by him under the rules of the society contained a provision that in case of default in such payment, then immediately or at any time after such default should have been made, the mortgagor should and would hold the premises, expressed to be thereby conveyed, as yearly tenant to the trustees from the day of the date of the deed at a certain yearly rent, and that the trustees should have the same remedies for recovering the rent as if the same had been reserved by a common lease. Default was made by the mortgagor under the deed, and in the following year the trustees distrained, for a year's rent, the goods of the plaintiff which were upon the premises. No notice was ever given to the mortgagor by the trustees of the society that they intended to treat him as a tenant. The plaintiff brought trover for the goods so distrained against the trustees:—Held, that the trustees were not entitled to treat the mortgagor as a tenant until they had given him notice of their intention to alter the relation in which he stood to them, from that of mortgagor and mortgagee to that of tenant and landlord; that consequently the distress could not be justified, and that the plaintiff was entitled to recover. *Clowers v. Hughes*, 5 L. R., Ex. 160; 39 L. J., Ex. 62; 22 L. T. 103; 18 W. R. 459.

**Bill of Sale—Landlord Refusing Removal.]**—The plaintiff was the holder of a bill of sale over the goods of M. Default having been made in payment of the sum secured, he put a man in possession, and afterwards went to M.'s house to remove them. Upon his arrival at the house he was met by the defendant, M.'s landlord, who told him that rent was in arrear, and that until it was paid the goods should not be removed; and measures were taken by the defendant to use force, if necessary, to prevent their removal. It was then after sunset, and therefore too late in the day to distrain, and the defendant intended to prevent the plaintiff from removing the goods, with a view of distraining on the day following. The plaintiff continued in possession of the goods, but made no attempt actually to remove them; and, except by intimating his intention to prevent their being removed, the defendant did not take possession of, or assume dominion over, them. In an action of trover:—Held (by Kelly, C. B., Bramwell and Pollock, BB.; Martin, B., dissentiente), that there was no evidence of conversion; and by Bramwell, B., that an actual prevention by force of the removal of the goods would not have amounted to a conversion. *England v. Cowley*, 8 L. R., Ex. 126; 42 L. J., Ex. 80; 28 L. T. 67; 21 W. R. 337.

**Right to Lease.]**—After the expiration of a lease (containing covenants of the lessor under seal), the lessor is not entitled to the possession of the indenture as against the lessee, and therefore trover does not lie by the former against the latter for the lease. *Hall v. Ball*, 3 M. & G. 242; 3 Scott, N. R. 577.

And see LANDLORD AND TENANT.

#### k. Against Carriers, Warehousemen, and Wharfingers.

**Warehouseman—Pledge by Consignee—Delivery Order.]**—When goods are shipped under a bill of lading drawn in parts, to be delivered to the consignee "or his assigns, the one of which bills being accomplished, the others to stand void," the master, or the warehouseman who has the custody of the goods under the Merchant Shipping Act, 1862, ss. 66—78, is justified in delivering them to the consignee on production of one part, although there has been a prior indorsement for value to the holder of another part; provided the delivery be *bonâ fide* and without notice or knowledge of such prior indorsement. Goods having been shipped for London, consigned to C. & Co., the shipmaster signed a set of three bills of lading marked "First," "Second," and "Third," respectively, making the goods deliverable to C. & Co., or their assigns, freight payable in London, the one of the bills being accomplished, the others to stand void. During the voyage C. & Co. indorsed the bill of lading marked "First" to a bank in consideration of a loan. Upon the arrival of the ship at London the goods were landed and placed in the custody of a dock company in their warehouses; the master lodging with them notice under the Merchant Shipping Act, 1862, s. 68, &c., to detain the cargo until the freight should be paid. C. & Co. then produced to the dock company the bill of lading marked "Second" unindorsed, and the dock company entered C. & Co. in their books as proprietors of the goods. The stop for freight being afterwards removed, the dock company *bonâ fide* and without notice or knowledge of the bank's claim, delivered the goods to other persons upon delivery orders signed by C. & Co.:—Held, that the dock company had not been guilty of a conversion, and that the bank could not maintain any action against them. *Haron v. Bowers* (1 H. Bl. 364) reflected on. *Glyn, Mills & Company v. East and West India Dock Company*, 7 App. Cas. 591; 52 L. J., Q. B. 146; 47 L. T. 309; 31 W. R. 201; 4 Asp. M. C. 580—H. L. (E.). Affirming 6 Q. B. D. 475; 50 L. J., Q. B. 62; 43 L. T. 584; 29 W. R. 316—C. A.

Where A., being indebted to B., gave him for security a delivery order for goods in the hands of a wharfinger, which the wharfinger accepted; and afterwards A., being indebted to C., gave him another delivery order for the same goods, which was taken to the wharfinger, who said he could not transfer the goods, as he held them for B.; but if C. could get B.'s order, he would transfer them, and promised that he would not give up the goods without first letting C. know; and afterwards B., his debt remaining unsatisfied, gave a delivery order for the same goods to A., who gave notice of it to the wharfinger:—Held, that C. had no property upon which trover could be maintained against the wharfinger. *Melling v. Kelshaw*, 1 C. & J. 184; 1 Tyr. 109.

— **Place of Deposit.**—The defendant contracted to warehouse certain goods for the plaintiff at a particular place, but he warehoused a part of them at another place, where, without any negligence on his part, they were destroyed. In an action to recover as damages the value of the goods:—Held, that the damage was not too remote, and that the defendant, by his breach of contract, had rendered himself liable for the loss of the goods. *Lilley v. Dumbleday*, 7 Q. B. D. 510; 51 L. J., Q. B. 310; 44 L. T. 814; 46 J. P. 708.

If the owner of property gives another person authority to deal with it in a particular way, and such person chooses to deal with it in another way, he must take the risk of the consequences, and is liable for its loss or injury, unless such loss or injury would have occurred in whichever way the property had been dealt with. *Id.*

Goods were sent from Paris to London via Dunkirk, for G. N., Custom House, London-bridge. They were forwarded from Dunkirk, with a bill of lading, which made them deliverable to the defendant, who was the London agent to the Steam Shipping Company, "to hold at the disposal of G. N., Custom House, London-bridge." Upon the arrival of the goods the defendant paid the duty on them, and placed them in a warehouse, the owner of which afterwards removed them to another of his warehouses, where they were accidentally destroyed by fire. The defendant gave no notice to the owner of the goods of their arrival, and the jury found that the defendant was not authorized by the owner to warehouse the goods, and that he had not acted as a prudent man would have acted, for the best interest of the owner:—Held, that the defendant had not, under the circumstances, been guilty of a conversion. *Heald v. Carey*, 11 C. B. 977; 21 L. J., C. P. 97; 16 Jur. 197.

Where the owner of goods on board a vessel directed the captain not to land them on the wharf against which the vessel was moored, which he promised not to do, but afterwards delivered them to the wharfinger, for the owner's use, under the idea of the owner having a lien thereon for the wharfage fees, because the vessel was unloaded against the wharf; the owner upon demand and denial could maintain trover against the captain, unless the latter could maintain the wharfinger's right. *Sydes v. Hay*, 4 T. R. 260.

**Carriers.**—Trover will lie against a carrier by the consignor of goods, who has been defrauded of them by some person unknown, when the goods have been delivered to a person who knew what the parcel contained, but at a different place to that to which they were directed, as the property never passed out of the consignor. *Stephenson v. Hart*, 4 Bing. 476; 1 M. & P. 357.

If a carrier has goods to carry, and by mistake delivers them to a wrong person, this is such a tortious conversion as will support trover at the suit of the right owner. *Youl v. Harbottle*, Peake, 49.

If a carrier receives goods to be carried, he cannot retain the goods, and put the consignor of the goods upon proof of his title to them. *Axon*, 3 Esp. 115.

Upon a contract to carry and deliver goods, the possession of the goods still remaining with the defendant, trover lies. *Dewell v. Moron*, 1 Taunt. 391.

— **Evidence.**—If A. sends goods by B., a carrier, to be delivered to C., proof that B. asserted he had delivered the goods to C., whereas in truth C. had never received them, is not sufficient evidence of conversion to support trover against B. *Attersol v. Briant*, 1 Camp. 409.

And see CARRIERS—BAILMENT.

#### 4. PRACTICE.

##### a. Pleadings.

**Claims.**—A count for wrongfully depriving the plaintiff of the use and possession of divers fixtures and goods of the plaintiff in and affixed to a dwelling-house and premises of the plaintiff, is a count in trover. The words in the form in Sched. 13 to 15 & 16 Vict. c. 76, No. 28, "or wrongfully deprived the plaintiff of the use and possession of," ought to have been printed in brackets or in italics. They were introduced by Lord Denman, in the House of Lords. *London and Westminster Loan and Discount Company v. Drake*, 6 C. B., N. S. 798; 28 L. J., C. P. 297; 5 Jur., N. S. 1407.

In a declaration for goods, chattels and fixtures (enumerating, among other movable articles, stoves, shelves, closets, cupboards, &c.):—Held, after verdict (general damages having been assessed on the whole declaration), that the word "fixtures" would not necessarily be taken to mean things affixed to the freehold; and, therefore, the judgment ought not to be arrested. *Sheen v. Rickie*, 5 M. & W. 175; 7 D. P. C. 335.

A declaration stated that Y. caused to be delivered to the defendant a horse of the plaintiffs, to be taken care of and kept by the defendant for Y., and to be delivered by the defendant on request of Y., on satisfaction of all claims in respect thereof; and thereupon it became the duty of the defendant to re-deliver the horse upon request of Y., upon being paid his claims in respect of the horse. That Y. requested the defendant to deliver the horse to the plaintiff, and paid the defendant his claims. Breach, that the defendant wrongfully detained the horse:—Held, that the count could not be supported as a count in trover. *Tollit v. Shenstone*, 7 D. P. C. 455; 5 M. & W. 283.

An action brought to recover a particular sum of money may be described as an action for recovery of the said sum of money, although in form it was an action of trover. *Batchellor v. Salmon*, 2 Camp. 526.

**Plea — Not Guilty.**—The plea of not guilty admits the plaintiff's property or right of possession, but only a property or right of possession to the extent necessary to maintain the action; therefore, it is open to the defendant to shew that he and the plaintiff were tenants in common. *Stancliffe v. Hardwick*, 2 C., M. & R. 1; 3 D. P. C. 762; 5 Tyr. 551; 1 Gale, 127.

Under not guilty, the defendant cannot set up an absolute property in himself in the chattel by sale from the plaintiff, although the only evidence of a conversion is a demand and refusal. *Barton v. Brown*, 5 M. & W. 298.

Evidence of lien is not admissible under the general issue. *White v. Teale*, 4 P. & D. 43; 12 A. & E. 106.

A plaintiff is entitled to a verdict on the plea

of not guilty, if a conversion in fact is proved, although it appears that, at the time of such conversion, the plaintiff had parted with his property in the goods. *Vernon v. Shipton*, 2 M. & W. 9; 2 Gale, 195.

In trover for cotton, and a plea of stoppage in transitu, and new assignment of the conversion of the cotton, the defendant may, under not guilty to the new assignment, shew that the cotton was the same as that mentioned in the plea. *Brancker v. Molyneux*, 1 Scott, N. R. 553; 1 M. & G. 710.

Under not guilty, the defendant may shew there was not a wrongful conversion. *Mayhew v. Herrick*, 7 C. B. 229; 18 L. J., C. P. 179.

It puts in issue the legality of the conversion, and not the mere fact of conversion only. *Young v. Cooper*, 6 Ex. 259; 2 L., M. & P. 217; 20 L. J., Ex. 136; *S. P., Kynaston v. Crouch*, 14 M. & W. 266; 14 L. J., Ex. 324; 9 Jur. 584.

It admits the property of the plaintiff. *Jones v. Davies*, 2 L., M. & P. 483; 6 Ex. 663; 20 L. J., Ex. 483.

Therefore evidence that the goods had been given to the plaintiff by the defendant upon a condition which had not been performed, and that the defendant retook them, is not admissible under that plea. *Id.*

To trover for a chattel the defendant pleaded, that he and the plaintiff were joint owners and proprietors of the chattel:—Held, bad, on special demurrer, because, if the conversion was denied, the plea amounted to not guilty; and if it was confessed, the plea could be understood only as confessing a destruction of the chattel, which was not justified. *Higgins v. Thomas*, 8 Q. B. 908.

Where assignees declare for property of a bankrupt converted since the bankruptcy, the conversion since the bankruptcy is a material allegation, and must be proved under not guilty. *Edwards v. Hooper*, 11 M. & W. 363; 12 L. J., Ex. 304.

—**Denial of Possession.**—A plaintiff having proved a taking of the goods from his premises by the defendant, and a subsequent demand and refusal, the defendant may prove, under not possessed, that the plaintiff's wife, with his authority, gave the goods to the defendant, in discharge of a debt due to him from the plaintiff. *Ringham v. Clements*, 12 Q. B. 260; 17 L. J., Q. B. 289; 12 Jur. 580.

Where the defendant has a lien on goods, and there has been only a qualified refusal to deliver them, it is not necessary that the right of lien should be specially pleaded; but it may be given in evidence under a plea denying the right of possession. *Lane v. Tewson*, 12 A. & E. 116, n.; 1 G. & D. 584; *S. P., Brandao v. Barnett*, 2 Scott, N. R. 96; 1 M. & G. 908.

The plea that the plaintiff was not possessed puts in issue the right of the plaintiff to the possession of the goods, as against the defendant, at the time of the conversion. *Isaac v. Belcher*, 7 D. P. C. 516; 5 M. & W. 139; 8 C. & P. 714; *S. P., Owen v. Knight*, 4 Bing. N. C. 54; 6 D. P. C. 245; 5 Scott, 307.

In trover for goods seized under a claim of toll, alleged to be due in respect of landing them at a particular wharf, it is competent for a defendant to set up his claim to the toll under the plea of not possessed. *Webb v. Tripp*, 1 D., N. S. 589; 6 Jur. 237.

In trover by assignees of a bankrupt against a sheriff for conversion of the bankrupt's goods seized under a fi. fa. against C. and D., it appeared that immediately before the seizure the bankrupt told the officer that the goods were the property of C., and immediately afterwards he contradicted that statement and said they were the goods of D. The jury found that the goods were in reality the bankrupt's, but also that he represented the goods to the officer as the goods of C., so as to induce the officer by that false representation to seize them:—Held, that under the plea of not possessed, this finding did not estop the bankrupt and his assignees from complaining of the seizure of the goods as their own. *Freeman v. Cooke*, 2 Ex. 654; 6 D. & L. 187; 18 L. J., Ex. 114.

Under not possessed the defendant may set up the title of a third party to the goods. *Leake v. Loveday*, 2 D., N. S. 624; 5 Scott, N. R. 908; 4 M. & G. 972; 12 L. J., C. P. 65; 7 Jur. 17.

—**Other Defences.**—In trover by the assignee of a bankrupt, a plea that he is not assignee, puts in issue the petitioning creditor's debt and the act of bankruptcy. *Butler v. Hobson*, 4 Bing. N. C. 290; 6 D. P. C. 409; 5 Scott, 798.

In trover by assignees of a bankrupt, laying the possession in themselves as assignees; pleas, that they are not assignees, and were not possessed as assignees, put in issue the trading, the petitioning creditor's debt, and the act of bankruptcy; and these must be proved, if notice to dispute them has been given. *Buckton v. Frost*, 8 A. & E. 844; 1 P. & D. 102; 1 W., W. & H. 586.

#### b. Restoration of Goods and Chattels.

**Discretion of Judge as to.**—The discretion of a judge to make an order under s. 78 of the Common Law Procedure Act, 1854, for the delivery up of chattels detained, is subject to a review by the court. *Chilton v. Carrington*, 15 C. B. 730; 24 L. J., C. P. 78; 1 Jur., N. S. 477.

Such an order cannot properly be made in a case where, by agreement of the parties, the jury is discharged from finding the value of the chattel. *Id.*

**Option of Parties.**—The goods may be brought into court, upon an affidavit that they are in the same plight and condition as when taken, except they are of a perishable nature, or cumbrous. *Watts v. Phipps*, Bull. N. P. 49; *S. P., Fisher v. Prince*, 3 Burr. 1363.

If the value of the thing is uncertain, or the plaintiff insists upon going for special damages, the court will not stay proceedings on delivery of the thing sued for, and costs. *Whitten v. Fuller*, 2 W. Bl. 902.

Where the value of the goods converted was not ascertained, the court refused to stay proceedings upon delivery of the goods to the plaintiff on payment of the value thereof. *Tucker v. Wright*, 3 Bing. 601; 11 Moore, 500.

In an action brought by the assignees of a bankrupt against the sheriff, to recover the value of furniture and fixtures sold under an execution, the court will not stay the proceedings on payment of costs, except where the defendant has restored the chattel alleged to be converted, and the plaintiff claims no special damage, or

where, if the chattel is sold, there is no dispute as to the price; but the court will not interfere if the plaintiffs do not agree as to the amount. *Gibson v. Humphrey*, 1 C. & M. 544; 2 Tyr. 588.

In an action for a packet of letters, the defendant was allowed to stay the proceedings as to one of the letters, upon delivering it up and paying costs. *Earle v. Holderness*, 4 Bing. 462; 1 M. & P. 254.

**Effect of Order of Restitution.**—*See ante*, col. 167.

**Under Larceny Act.**—*See CRIMINAL LAW (Larceny).*

### c. Damages.

**Value of Goods.**—Under a count for conversion of fixtures by severing and removing them, the value of the fixtures in their severed state can only be recovered, and not the value of them when annexed to the freehold. *McGregor v. High*, 21 L. T. 803.

A wine merchant having obtained from a wine broker samples of wine then lying at a wharf of wharfingers, and which the broker had agreed to sell to the wine merchant at 14s. per dozen, sold the wine to the captain of a ship about to sail, at 24s. per dozen, to be delivered on board next day. The wine merchant obtained the delivery warrants from the broker, and claimed the wine from the wharfingers, who refused to deliver it. No other wine of the same brand and quality was to be had in the market, and the wine merchant was unable to carry out his contract with the captain of the ship, who sailed without the wine.—Held, that although the wharfingers had no notice of the bargain with the captain, yet the wine merchant was entitled to recover in an action of trover the actual value of the wine to him, which at the time of the conversion was 24s. per dozen, he having *bonâ fide* sold to the captain at that price. *France v. Gaudet*, 6 L. R., Q. B. 199; 40 L. J., Q. B. 121; 19 W. R. 622.

In trover for goods by assignees of a bankrupt, which had been purchased by him under an agreement, by which the purchase-money was to be paid by instalments, and an assignment of the property was to be executed by the vendor, when the whole purchase-money had been paid, with power for the vendor to re-enter in case of default in payment of the instalments, they are entitled to recover the full value of such goods against a mere wrongdoer, notwithstanding default had been made in payment of some of the instalments, and the vendor had to that extent an interest in the goods. *Turner v. Hardcastle*, 11 C. B., N. S. 683; 31 L. J., C. P. 193; 5 L. T. 748.

Where the plaintiff had been endeavouring to baffle his creditors by a merely ostensible transfer of goods to another, and the goods were seized upon premises in which the plaintiff's tenancy had expired.—Held, that the measure of damages was the value of the plaintiff's real and *bonâ fide* interest in the goods, and not the full value. *Cameron v. Wynch*, 2 C. & K. 264. *See Brierly v. Kendall*, 17 Q. B. 937.

A. having bought some sheep on credit, left them in the custody of the vendor. Without any default on the part of A., the vendor resold

the sheep:—Held, that the measure of damage was not the value of the sheep, but the loss A. sustained by not having the sheep delivered to him at the price agreed on. *Chinery v. Viall*, 5 H. & N. 288; 29 L. J., Ex. 180; 8 W. R. 629.

In an action for taking goods under process, upon a regular judgment, but in a place to which the process did not run, the plaintiff may recover the whole value of the goods, and not merely the amount of the damage which he has sustained by their being taken in a wrong place. *Sowell v. Champion*, 6 A. & E. 407; 2 N. & P. 627; W., W. & D. 667.

The plaintiff having purchased goods of the defendant, secretly absconded with the goods before he paid for them; the defendant followed him, and forcibly retook the goods:—Held, that in an action for taking them, the measure of damages was the value of the goods, and the defendant could not consider the debt due from the plaintiff to the defendant, or treat it as reduced by the taking. *Gillard v. Brittan*, 1 D., N. S. 424; 8 M. & W. 575.

**Nominal.**—A. deposited a dock warrant for brandies with B., as a security for a loan, which was to be repaid on the 29th of January, or, in default, the brandies were to be forfeited. On the 28th, B. agreed for the sale of the brandies to C., and on the 29th delivered to him the dock warrant, and C. took actual possession of the brandies on the 30th:—Held, that the proper measure of damages was the actual damage A. had sustained by the wrongful conversion, which, as there was no intention on his part to redeem the pledge, was merely nominal. *Johnson v. Stear*, 15 C. B., N. S. 330; 33 L. J., C. P. 130; 10 Jur., N. S. 99; 9 L. T. 804; 12 W. R. 347.

A sheriff, who held goods taken in execution, delivered them to the assignees of a bankrupt, after an action of trover had been commenced by them; the assignees accepted the goods without condition:—Held, that they could not recover more than nominal damages; at all events, not without alleging special damage in the declaration. *Moon v. Raphael*, 2 Scott, 489; 2 Bing. N. C. 310; 1 Hodges, 289.

**Misdelivery.**—Trover will lie for the misdelivery of goods by a warehouseman, although such misdelivery has occurred by mistake only. *Devereux v. Barclay*, 2 B. & A. 702.

The defendants were in possession of plaintiff's goods as bailees, under orders not to part with them except upon delivery orders signed by plaintiffs. The defendants parted with the goods upon the order of one G., who was plaintiffs' agent for the sale but not for the delivery of the goods. Shortly afterwards plaintiffs sent a delivery order for the same goods to T., who indorsed it to G., who lodged it with defendants to cover the previous delivery. Afterwards plaintiffs, being unable to obtain the price of the goods from T., sued defendants for the conversion of the goods, and claimed the full value:—Held, by Bramwell, L. J., and Thesiger, L. J., that there had been a conversion in respect of which plaintiffs were entitled to recover; but that what had occurred with respect to the delivery order was equivalent to a return of the goods by defendants to plaintiffs, and, therefore, under the circumstances of this case, the damages could only

be nominal. By *Baggallay, L. J.*, that plaintiffs were not entitled to even nominal damages. *Hiorst v. The London and North-Western Railway Company*, 4 Ex. D. 188; 48 L. J., Ex. 545; 40 L. T. 674; 27 W. R. 778—C. A.

The plaintiffs, being under contract to sell waggons, employed L. to make them according to sample at a certain price. L. then employed a waggon company to make them according to sample at a lower price. The company afterwards proposed to receive payment direct from the plaintiffs, who consented, and were authorized by L. to pay them. Some waggons were delivered by the waggon company to a railway company to the order of the plaintiffs. The plaintiffs sent a complaint to the waggon company that the waggons were unequal to sample, but did not reject them; and they informed L., and also the waggon company, that they would dispose of the waggons at the best price obtainable, and hold L. responsible for loss. L. rejected the waggons. The plaintiffs gave notice to the railway company not to deliver the waggons without their order, but the railway company nevertheless delivered them to the waggon company, who refused to give them up. In an action against both companies for conversion:—Held, that the arrangement for the advantage of the waggon company, that they should receive direct payment from the plaintiffs, had not created any relationship between them which would prevent the application of the ordinary rule as to the measure of damages in trover against mere strangers; and that the plaintiffs were, therefore, entitled to recover the full value of the goods at the time of the conversion, without deduction of the price. *Johnson v. Lancashire and Yorkshire Railway Company*, 3 C. P. D. 499; 39 L. T. 448; 27 W. R. 459.

**At what Time.**—The plaintiff warehoused hops with the defendants. The warehouse rent not being paid, the defendants on the 7th of July sold the hops to R. On the 29th July R. sold them back to the defendants, who, on the same day, sold them to L. On the 16th of August L. sold them to K., who, on the 20th of September, removed them from the defendants' warehouse, where they had remained up to that time, not having been removed by any of the purchasers. None of these sales was in market overt. A letter was sent by the defendants to the plaintiff on the 5th of July, giving him notice of their intention to sell, and a second letter was sent on the 22nd of July, informing the plaintiff of the sale, and inclosing a cheque for the balance of the purchase-money, after deducting the warehouse rent. The plaintiff never received either of these letters:—Held, in an action to recover damages for the conversion of the hops, that the measure of damages was not to be restricted to the value of the hops on the 7th July, but was their value on the 20th of September, when K. removed them from the defendants' warehouse. *Johnson v. Hook*, 31 W. R. 812.

The jury is not limited to find as damages the mere value of the property at the time of the conversion, but they may find as damages the value at a subsequent time, in their discretion. *Greening v. Wilkinson*, 1 C. & P. 625.

In an action for the conversion of goods, of which the plaintiff has the immediate right of possession, the true measure of damages is the

full value of the goods at the time of the conversion. *Edmondson v. Nuttall*, 17 C. B., N. S. 280; 13 W. R. 53.

The plaintiffs contracted with A. to build a vessel for them, and made advances from time to time in respect of her, and A. gave them as a security for the advances a bill of sale of the vessel. The defendant having converted the vessel before she was finished, and having finished her, the plaintiffs were held entitled to recover, as damages, the value of the vessel at the time of her conversion, but not her value at a subsequent time, nor, as special damage, the value of freight which the plaintiffs might have earned with her if A. had completed her and delivered her to them. *Reed v. Fairbanks*, 13 C. B. 692; 1 C. L. R. 787; 22 L. J., C. P. 206; 17 Jur. 918.

**Tools.**—The proper measure of damages is the value of the articles which the plaintiff proves the defendant has taken and kept; but if, for stonemasons' tools, the plaintiff proves that the defendant took and used some of the tools and returned them, this is a conversion, but one for which the jury ought to give small damages, and not the value of the tools so used. *Cook v. Hartle*, 8 C. & P. 568.

Damages may be given in respect of special damage, besides the value of the goods converted, if special damage is laid in the declaration; as where, for carpenter's tools, special damage was laid in respect of the owner being hindered from working for the want of the use of his tools. *Bodley v. Reynolds*, 8 Q. B. 779; 15 L. J., Q. B. 219; 10 Jur. 310.

**Bill of Exchange.**—In trover for a bill of exchange, the damages are to be calculated according to the amount of the principal and interest due upon the bill at the time of the conversion. *Mercer v. Jones*, 3 Camp. 477.

**Unstamped Agreement.**—In trover for an unstamped memorandum, whereby the defendant agreed to guarantee to the plaintiff to pay for "half the amount of certain fixtures, say about 100*l.*" (which memorandum the defendant withheld from the plaintiff, having obliterated his own signature), the jury gave an unqualified verdict for 100*l.* A motion for a new trial, on the ground that the memorandum, being unstamped, was worthless, and therefore the damages excessive, and that the judge ought to have directed the jury to find a verdict in the alternative—to be reduced to nominal damages on the memorandum being given up, was refused. *M'Leod v. M'Ghie*, 2 Scott, N. R. 604; 2 M. & G. 326.

**Insurance Policy.**—A. effected an insurance on the life of B., and, after an act of bankruptcy, assigned the policy to C., who was aware of A.'s circumstances at the time. On the death of B. it was discovered that his life was not insurable. On a memorial presented by A. to the company, they ordered half the sum for which B.'s life was insured to be paid as a gratuity, which C. received, and the policy was then cancelled, and remained in the hands of their officer. In an action by the assignee of A. against C., to recover the value of the policy:—Held, that he was only entitled to the parchment on which the policy was written, and not to the sum paid by the com-

pany to C., as it was a mere gratuitous and voluntary payment. *Wills v. Wells*, 2 Moore, 247; 8 Taunt. 264.

#### d. Costs.

**Partial Success.**—Where a declaration proceeds for a number of chattels, if the plaintiff succeeds in proving his right to a part only, the defendant is entitled to have the issue as to the residue found in his favour; but he is not entitled to any costs, unless he has been put to expense as to the residue so claimed in the declaration. *Nicholls v. Bastard*, 1 Tyr. & G. 156; 2 C. L. R. 659; 1 Gale, 295.

Where a plaintiff succeeds as to part of his claim only, the defendant is entitled to have the issue entered distributively. *Williams v. Great Western Railway Company*, 1 D., N. S. 16; 8 M. & W. 856.

**Jurisdiction.**—In an action, claiming the return of a picture or its value and damages for its detention, the plaintiff recovered a verdict of 10*l.*, being its value as assessed by the jury, and 1*s.* damages for its detention:—Held, that the action was founded on tort, within the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 5, and the plaintiff was entitled to his costs. *Bryant v. Herbert*, 3 C. P. D. 389; 47 L. J., C. P. 670; 39 L. T. 17; 26 W. R. 898—C. A.

#### e. Evidence.

**Of Taking.**—In trover to recover the value of a quantity of bricks, evidence that men fetched them away, saying, that they were ordered by the defendant so to do, and that his name was painted on the cart in which they were taken, is not evidence to connect the defendant with the taking them away. *Everest v. Wood*, 1 C. & P. 75.

**Of Property.**—If a plaintiff offers written evidence to establish property, which he fails in doing, he will not be allowed to recur to and rely on a mere possessory title. *Sheriff v. Cadell*, 2 Esp. 617.

In trover for a ship "with apparel and appurtenances thereto belonging," the plaintiff having failed as to the ship cannot set up a distinct title to a new boat and cordage. *Shannon v. Owen*, 1 M. & R. 392.

**Of Quantity.**—In an action for converting goods received, but not produced, by the defendant, slight evidence of the kind and quantity of such goods may properly be given effect to. *Great Western Railway Company v. Gurton*, 1 F. & F. 359.

**Of Quality.**—In detinue, if the defendant pleads the return and acceptance of the goods after action brought, evidence on the part of the plaintiff to shew their damaged state after the commencement of the action is admissible. *McGrath v. Bourne*, 10 Ir. R., C. L. 160.

#### f. Effect of Judgment.

**As Satisfaction.**—A recovery in trover vests the property in the chattel in the defendant as against the plaintiff. *Cooper v. Shepherd*, 3

C. B. 266; 4 D. & L. 218; 15 L. J., C. P. 237; 10 Jur. 758.

Semble, that judgment recovered for the conversion of goods, vests the property in the goods in the defendant, by relation from the time of conversion. *Buckland v. Johnson*, 15 C. B. 145; 2 C. L. R. 784; 23 L. J., C. P. 204; 18 Jur. 775.

The property in goods, in respect of which judgment has been recovered in an action of detinue, remains in the creditor until execution is issued on the judgment. *Scarth v. Scarth*, 10 L. R., Ch. 234; 44 L. J., Bk. 29; 31 L. T. 737; 23 W. R. 153.

Therefore, in the liquidation of the affairs of the defendant before execution has issued, the plaintiff cannot prove for the value of the goods. *Id.*

Where a plaintiff in an action of detinue has recovered judgment, the property in the goods obtained by the wrongdoer remains, until the judgment is satisfied, in the plaintiff, and the bankruptcy of the defendant will not vest it in the trustee. *Drake, Ex parte, Ware, In re*, 5 Ch. D. 866; 46 L. J., Bk. 105; 36 L. T. 677; 25 W. R. 641—C. A.

Judgment against one or two or more joint wrongdoers is a bar to an action against the other for the same cause of action, although such judgment is unsatisfied, so that a judgment against a defendant in trover without satisfaction does not vest the property in the goods in him. *Brinsmead v. Harrison*, 7 L. R., C. P. 547; 41 L. J., C. P. 190; 27 L. T. 99; 20 W. R. 784—Ex. Ch. Affirming 6 L. R., C. P. 584; 40 L. J., C. P. 281; 24 L. T. 798; 19 W. R. 956.

Although, if the plaintiff obtains satisfaction, he cannot afterwards bring trover in respect of the same chattel against a party to whom the defendant has transferred it; yet, if he has not obtained satisfaction, he may do so. *Marston v. Phillips*, 12 W. R. 8; 9 L. T. 289.

— **Of Prior Hearing.**—To a declaration for the recovery of some harness, the defendant pleaded that the plaintiff had previously applied to a police magistrate within the metropolitan district under 2 & 3 Vict. c. 71, s. 40, to order the delivery up to him by the defendant of the harness alleged to be unlawfully detained. That the magistrate, after due inquiry made into the title to such harness, refused to make such order, and that thereupon the plaintiff brought the action to recover the harness:—Held, that the proceedings before the magistrate did not estop the plaintiff from bringing the action, and that the plea was bad. *Dover v. Child*, 1 Ex. D. 172; 45 L. J., Ex. 462; 34 L. T. 737; 24 W. R. 537.

## TRUCK ACT.

See MASTER AND SERVANT.

## TRUST AND TRUSTEE.

[Cases relating to the CONSTRUCTION OF TRUSTS and the APPOINTMENT OF TRUSTEES are not included in this Digest.]

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### I. DECLARATION AND CREATION OF TRUSTS.

#### 1. DECLARATION OF TRUSTS.

**Validity of.**—A memorandum of a voluntary gift in this form, "I hereby give and make over to M. an Indian bond, value 1,000l.," was signed by S., and given by him to M. without handing over the bond. S. died, and the residuary legatees under his will claimed the bond:—Held, that the memorandum was a good declaration of trust in favour of M., and that he was entitled to the bond. *Morgan v. Malleon*, 10 L. R., Eq. 475; 39 L. J., Ch. 680; 23 L. T. 336; 18 W. R. 1125.

R. signed a memorandum containing these words: "I authorize my brother to claim as his own, after my death, 150l. out of the money lying in the bank at Carlisle, for the service rendered me during my lifetime." R. retained the possession of the document until his death:—Held, that the instrument was a valid declaration of trust, and that the fact of its remaining in R.'s possession up to the time of his death was immaterial. *Armstrong v. Timperon*, 24 L. T. 275; 19 W. R. 558.

F., a mortgagee with a power of sale, agreed with K., who was entitled to a reversionary interest in the lands comprised in the mortgage, not to sell without his consent; and afterwards proposed to make a lease for a term to W. at a fine; K. refused to consent, unless the lands were settled on his wife (who was the daughter of W.) and her children after the death of W.; and this being acceded to, K. gave his written consent, and thereupon the lease was executed by W., and, upon the occasion of its execution, the following document was signed by W. and K.:—"It is agreed between W. and K. that the lease and lands of Largan, after death of W., shall be and become, through his love for her, the property of Mrs. K. in trust for her child or children by K. (if blessed with such), if not, to

be for her sole use and benefit:—"Held, first, that this was a declaration of trust by W. in favour of Mrs. K. and her children, and that, after W.'s death his personal representative became a trustee for them. *Kelly v. Walsh*, 1 Ir. Ch. D. 275.

Held, secondly, that if it was not a valid declaration of trust, it was an agreement which should be specifically performed, upon the ground that, although the consideration expressed was not valuable, yet the consent by K. was a part performance which took the case out of the Statute of Frauds, and that evidence of the real consideration was admissible. *Id.*

D., who was possessed of leasehold business premises and stock-in-trade, shortly before his death purported to make a voluntary gift in favour of his grandson E., who was an infant and who assisted in the business, by the following memorandum, signed and indorsed on the lease: "This deed and all thereto belonging I give to E. from this time forth, with all the stock-in-trade." The lease was then delivered to E.'s mother on his behalf:—Held, that there was no valid declaration of trust of the property in favour of E. *Richards v. Delbridge*, 18 L. R., Eq. 11; 43 L. J., Ch. 459; 22 W. R. 584.

**When Donor has not absolutely parted with his Interest in Property.**—In order to give validity to a declaration of trust of property, it is necessary that the donor or grantor should have absolutely parted with his interest in the property, and have effectually put such interest beyond his own reach. *Warriner v. Rogers*, 16 L. R., Eq. 340; 42 L. J., Ch. 581; 28 L. T. 863; 21 W. R. 766.

An unmarried lady, possessed of large property, being under obligations to her servant, called him one day into her room and shewed him a box which, having opened it and put a note inside, she locked and handed to him, telling him to take it into his possession, that it would be of service to him some day, but that he must not open it till after her death. She herself kept the key. She afterwards made her will, whereby she gave the residue of her real and personal estate to a stranger in blood. After her death the box was opened, and found to contain a paper writing, dated and signed by the testatrix, and addressed to the servant, to the effect that the contents of the box were a deed of gift to him of certain real and personal estate therein specified and described. In the box were also found title deeds relating to an estate, M., not mentioned in the paper writing, and some other papers, but nothing answering the description of a deed of gift. After the testatrix's death there was found by the servant, in an outhouse, to which the testatrix and he alone had access, another paper writing, dated the day after the date of the former paper, and also signed by the testatrix, and addressed to the servant, to the effect that the title deeds of the real property mentioned in the former paper were to be found in a particular repository, to be handed over to him "free, and all expenses to be paid out of the bulk, and writings of M.:"—Held, that these papers were of a testamentary character, and did not amount to a valid declaration of trust in favour of the servant. *Id.*

A testatrix, who had lent 300l. to S. on his promissory note, payable on demand, directed him, after her death, to pay the interest to her

sister for her life, and afterwards to divide the principal among her sister's children, which S. agreed to do. She died without having demanded payment of the note, which was found, uncanceled, among her papers at her death:—Held, that as she had not parted with her legal title to the money, the direction did not create a trust. *Caplen, In re, Bulbeck v. Silvester*, 45 L. J., Ch. 280.

**By Expressions in Letter—To Solicitor.**—B., in 1842, transferred to three persons a debenture, without any declaration of trust other than an expression in a letter written by him to his solicitor shortly before the transfer, in which the three persons were named as trustees, and the trusts of a proposed settlement of the debenture was stated to be “for my niece C. M. and her children:”—Held, that a valid trust was declared by the letter in favour of C. M. for life, and afterwards of her children as joint tenants. *Bellasis, In re*, 12 L. R., Eq. 218; 24 L. T. 466; 19 W. R. 699.

The transferees of the debenture were already trustees of a will, which contained limitations for the benefit not only of C. M. and her children, but of the issue of deceased children, and from contemporaneous entries in a solicitor's book it appeared that, after the date of the letter, B. said he had made up his mind to transfer to the same three persons, “without stating any trust or condition;” also that B. was advised to take a letter from them that they held the debenture upon the same trusts as the will; but no trace of any such letter appeared. The trustees paid the income to C. M. during her life, and upon her death transferred the fund into court. There was issue of the deceased children of C. M.:—Held, that a trust for the issue of the deceased children had not been sufficiently declared. *Id.*

**— To Daughter.**—A father, who was the owner of a share in a colliery, on the 11th of February, 1865, wrote to his daughter as follows:—“I have another present to make shortly, one share of Ryhope colliery . . . and you may now consider that you have this yourself from 2nd January to receive dividends upon. I am also giving to Sarah one, the same.” On the 17th he attended a meeting of shareholders in the colliery, and signed the following entry in the minute book:—“That Mr. N.'s” (his own) “proposition of transferring two of his shares to the parties undernamed be agreed to, viz.” (the daughter and her sister). This signature was not sufficient, according to the regulations of the deed of partnership, to pass the property in the shares. On the 25th of February he again wrote to his daughter:—“I have arranged and made all right with the shares for you and Sarah, and dividends will be sent from 2nd January.” On the 4th of March the testator wrote to her:—“Next meeting (private) we will be enabled to make another dividend, when you and Sarah will be informed.” On the 16th of March he sent her a cheque for the first dividend, with a letter thus:—“Herewith I inclose cheque for 37l. 10s., which you can receive at the bank . . . first dividend, made this day.” On the 18th of March he again wrote to her as follows:—“I have yours in reply to the receipt of dividend—long may you live to enjoy it;” and in the same letter, after referring to the meeting of the 17th

of January, he further said:—“Well, when I got in, I openly at once asked the question in the presence of” (four persons whom he named), “I was about to give to my two daughters one share each, and which is the way to do it? They were all pleased. It was entered in the minutes of the book:”—Held, that these expressions in letters, signature of minute, and gift of dividend, did not amount to a declaration by the testator, nor to proof of an intention and determination on his part, that he would hold the shares for his daughter, but that the testator, having the desire and intention that she should, from and after the 11th of February, 1865, have the shares as her property, failed to fulfil that desire, and complete that intention. *Heartley v. Nicholson*, 19 L. R., Eq. 233; 44 L. J., Ch. 277; 32 L. T. 822; 23 W. R. 374.

**Gift of Furniture and Articles to Wife by Letters—Subsequent Will of Husband.**—A husband, by three letters written and signed by him and handed to his wife, gave her furniture and other articles for her sole and absolute use. He afterwards made his will, bequeathing certain legacies and making other dispositions of his property, and giving the residue of it to trustees in trust for his wife for life, with remainder to six nieces absolutely. The furniture and other articles were at the time of the husband's death in the house which had been occupied by him and his wife, and the whole had been used by them in the ordinary way:—Held, that there was no declaration of trust, but that the furniture, &c., formed part of the husband's estate. *Baddeley v. Baddeley*, and *For v. Hawks* (post, col. 191) observed upon, and *Milroy v. Lord* (4 De G., F. & J. 264) followed. *Breton's Estate, In re, Breton v. Woolven*, 17 Ch. D. 416; 50 L. J., Ch. 369; 44 L. T. 337; 29 W. R. 777.

**Assignment of Policy by Husband to Wife.**—In an action by the assignee of a policy of life insurance to recover the amount insured, the statement of defence alleged that the plaintiff was, at the date of the assignment, the wife of the assignor, and it set out the assignment in terms, viz., a deed poll, whereby the assignor (the deceased upon whose life the policy had been effected) in consideration of love and affection, and in order to make a provision for his wife (the plaintiff) after his death, assigned the policy to the plaintiff, her executors, administrators and assigns. The personal representative of the deceased assignor was not made a party to the action:—Held, upon demurrer to the statement of defence, that the deed poll being inoperative as an assignment between husband and wife, and no trust in favour of the plaintiff having been created either by interposition of a trustee or by declaration of trust, the plaintiff was not entitled to maintain the action. *Meek v. Kettlewell* (1 Hare, 464), *Milroy v. Lord* (4 De G., J. & S. 264), and *Richards v. Delbridge* (10 L. R., Eq. 11), followed and applied. *Baddeley v. Baddeley* (post, col. 191) distinguished. *Hayes v. Alliance British and Foreign Life and Fire Assurance Company*, 8 L. R., Ir. 149.

**Assignment of Leaseholds by Husband to Wife “as her separate Estate.”**—A husband, being about to leave England for a residence in India, executed an assignment by deed to his wife, who was to remain in England, of a leasehold

dwelling-house, "to hold the same unto" the wife, "her executors, administrators and assigns, as her separate estate." No trustees were appointed; the husband and wife being the only parties to the deed. The title deeds were allowed to remain in the possession of the wife:—Held, that the deed of assignment operated as a valid declaration of trust in favour of the wife. *For v. Hawks, Hawks v. For*, 13 Ch. D. 822; 49 L. J., Ch. 579; 42 L. T. 622; 28 W. R. 656.

The wife, having parted with possession of the deeds (all but the assignment) to an agent, in order to raise a sum of 200*l.* upon them for the wife, and having asked for a return of the deeds without success, the agent, by forging the name of the husband to a mortgage deed and other instruments, raised a sum of 1,200*l.* which he appropriated to his own use:—Held, that there was no negligence on the part of the wife so as to bar her title to relief against the mortgagees. *Ib.*

B. by a deed poll, after reciting his intention to settle certain freehold and leasehold ground rents upon his wife, continued as follows:—"I do hereby settle, assign, transfer, and set over unto her, my said wife, as though she were a single woman," the said property:—Held, that though the deed purporting to be an assignment from husband to wife was invalid as an assignment, yet it contained a sufficient declaration of trust in favour of the wife; and she was declared entitled to the property absolutely. *Baddeley v. Baddeley*, 9 Ch. D. 113; 48 L. J., Ch. 36; 38 L. T. 906; 26 W. R. 850.

**Who can Declare.**—When the legal estate in land is vested in a trustee for an absolute beneficial owner, "the party who is by law enabled to declare a trust" of the land, within the meaning of s. 7 of the Statute of Frauds, is the beneficial owner only. *Kronheim v. Johnson*, 7 Ch. D. 60; 47 L. J., Ch. 132; 37 L. T. 751; 26 W. R. 142.

In pursuance of an arrangement by which a settlement should be made on an infant by his grandmother, K., a lease was taken by J. in his own name. Part of the arrangement was that the real transaction should be kept secret, and that the settlement should appear to be made by J. Accordingly a settlement was executed by J., by which the property was settled on the infant, but which, the solicitors not having been instructed as to the real nature of the transaction, contained an ultimate trust in favour of J. In an action by K. to have the property assigned to her:—Held, that the declaration of trust not being made by the beneficial owner, was not valid within s. 7 of the Statute of Frauds. *Ib.*

**Form of Declaration.**—K. had written a letter, signed with her initials, and in the same envelope was inclosed a postscript, headed "Supplement," written in the same hand, but on a separate paper and unsigned. The postscript began with the words "I had quite omitted to tell you and Martin," and was alleged to contain a declaration of trust in favour of the infant:—Held, that the signature did not govern the postscript so as to make it valid as a declaration of trust within s. 7 of the Statute of Frauds. *Ib.*

**Limitation of.**—A will, purporting to execute a trust to divide a sum of money, made a proper division, but declared that the shares of married women should be for their separate use:—Held,

that this declaration was a valid limitation. *Willis v. Kymr*, 26 W. R. 161.

## 2. CREATION OF TRUSTS.

**When Sufficient.**—An illiterate woman having wrongfully possessed herself of bonds belonging to the estate of a testator, whose executor the plaintiff was, was ordered to repay the proceeds of the sale of the bonds, although there was much doubt as to the equitable jurisdiction of the court in such a case. *Inglis v. Pasco*, 27 L. T. 818.

It was alleged by the defendant that the testator, by whom she had several illegitimate children, had shewn her an envelope containing the bonds and bearing an indorsement to the effect that they were to be delivered to her as the property of her and her children. The envelope was lost, and the testator had always retained possession of the bonds:—Held, that there was some foundation of truth in the story of the plaintiff, though uncorroborated, and that such an indorsement would have created a trust for her and her children, which, though a slight equity, might give the court jurisdiction. *Ib.*

The Bombay Civil Fund was formed to provide retiring pensions for civil servants, and annuities and portions for their widows and children. The fund was constituted by the subscriptions of the members, and by a grant from the government. It was managed by a committee, the members of which resided in Bombay, and by the rules the property of the fund was vested in the committee of managers as trustees. In fact, however, the funds were always in the hands of the government as a floating debt due to the association. A suit having been instituted by the representatives of the widow of a member of the association, against the trustees of the fund and the Secretary of State for India, claiming payment of an annuity which they alleged ought to have been paid to her in her lifetime:—Held, that they were not mere trustees for the association, but trustees properly so called, and that the members of the fund were the beneficiaries, so that the defence of the Statute of Limitations could not be set up against a claimant on the fund, merely on account of lapse of time. *Edwards v. Warden*, 1 App. Cas. 281; 45 L. J., Ch. 713; 35 L. T. 174—H. L. Reversing 9 L. R., Ch. 495; 43 L. J., Ch. 644; 30 L. T. 540; 22 W. R. 669.

A writing opening a credit for a particular sum cannot, of itself, constitute an equitable assignment or specific appropriation of that sum so as to create a trust. It is a mere statement that the person writing it will act as paymaster to the person to whom it is written, up to a certain amount, on his performing the conditions set forth in it. *Morgan v. Larivière*, 7 L. R., H. L. 423; 44 L. J., Ch. 457; 32 L. T. 41; 23 W. R. 537.

L. entered into a contract (dated the 30th of November, 1870) with the French minister of war, represented by J., his delegate at London, to supply 20,000,000 of ball cartridges of a certain quality, the whole to be supplied by the 10th of January, 1871. Time was to be considered of the essence of the contract. L. desired some arrangements to be made as to payment. M. & Co., who acted in London as financial agents for the French government, wrote to L. a letter dated the 1st of December, 1870, in these terms: "We are instructed by J. to advise you that a special credit

for 40,000*l.* has been opened with us in your favour, and that it will be paid to you rateably as the goods are delivered, upon receipt of certificate of reception issued by the French ambassador or by J." The goods were not delivered according to the contract :—Held, that this letter did not constitute M. & Co. trustees for L. as to the sum named, nor constitute an equitable assignment as of a fund in their hands, and that consequently this was not a matter for the exercise of the jurisdiction of the Court of Chancery. *Id.*

**By Agreement of Vendor to Company, to Pay Interest.**—By an agreement for the sale of a colliery to a trustee for a company in formation, the vendor agreed to pay to the company during two years from the date of its incorporation, such a sum as, together with the net profits of the company, should be equal to interest at five per cent. per annum on the paid-up capital of the company. This agreement was stated and adopted in the articles of association. Dividends were payable twice a year. After the expiration of the second year, but before the deficiency of dividend for the fourth half-year had been paid, the company went into voluntary liquidation, and the vendor afterwards paid to the individual shareholders the amount necessary to make their fourth half-yearly dividend equal to five per cent. :—Held, that the agreement created a trust for the individual shareholders, and that the liquidator could not claim the amount so paid by the vendor as part of the assets of the company. *South Llanharra Colliery Company, In re, Jegon, Ex parte*, 12 Ch. D. 503; 41 L. T. 567; 28 W. R. 194—C. A.

**Money received by Consignee of Goods for Sale not impressed with Trust.**—When a person has goods consigned to him to sell, and he is bound, if he sells, to pay a fixed price to his employer at a fixed time after sale, but he may sell to his customers at any price and upon any credit he pleases, though he may be called an agent, yet the legal relation of principal and agent does not exist between him and his employer; on the contrary, the relation between him and his employer is that of purchaser and vendor, and a separate relation of vendor and purchaser exists between him and the persons to whom he sells, and the moneys which come to his hands by means of the sales which he effects are his own moneys, and are not impressed with any trust for his employer. *White, Ex parte, Nevill, In re*, 6 L. R., Ch. 397; 40 L. J., Bk. 73; 24 L. T. 45; 19 W. R. 488.

**Parting with Leaseholds of Deceased by Executor or Administrator.**—In selling or subletting the leaseholds of a testator or intestate, an executor or administrator stands to the beneficiaries, or next-of-kin, in the same relation as a trustee to his *cestui que trust*. Therefore, for an executor or administrator to grant an underlease with the option of purchase to be exercised by the sub-lessees at a future time, at a price now fixed, is *ultra vires*, and a breach of trust. Such a transaction cannot be supported as against the beneficiaries or next of kin, however advantageous the transaction may have been to their estate. *Oceanic Steam Navigation Company v. Sutherland*, 16 Ch. D. 236; 50 L. J., Ch. 308; 43 L. T. 743; 29 W. R. 113; 45 J. P. 238—C. A.

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**Renewable Lease—Purchase of Reversion by Trustee.**—A. became entitled, as administrator of an intestate, to certain lands held under a lease from the Commissioners of Church Temporalities in Ireland for twenty-one years, customarily renewable, and being so entitled he, as such administrator, obtained from the commissioners a renewal of the lease for twenty-one years. The commissioners subsequently, under s. 34 of the Irish Church Act, 1869, offered to sell the reversion in fee in the lands in question to A., as their immediate tenant, at a certain price. A. declined to buy at the price named, and the commissioners thereupon set up the reversion in fee for sale by auction, and A. purchased it at the auction, and obtained a conveyance from the commissioners, which was made expressly subject to the lease and to the right of renewal thereunder :—Held, that A. became a constructive trustee of the reversion so purchased for the persons beneficially entitled to the personal estate of the intestate, and that it formed portion of such personal estate, the persons claiming it to pay the purchase-money and all expenses incurred by A. in the purchase. *Randall v. Russell* (3 Mer. 190) distinguished. *Gabbett v. Lawder*, 11 L. R., Ir. 295.

**Grant of Booty by Royal Warrant to Secretary of State "in Trust."**—Her Majesty by royal warrant "granted" booty of war to the secretary of state for India in council "in trust" to distribute amongst the persons found entitled to share it by the decree of the judge of the Court of Admiralty, to whom the matter had been referred by the sovereign for that purpose, with a direction that doubts should be finally determined by the secretary of state unless her Majesty should otherwise order. An action having been brought against the secretary of state for India in council by K., on behalf of himself and all the other parties entitled, alleging that a portion only of the fund had been distributed, and claiming an account and the distribution of the residue :—Held, that the warrant did not operate as a transfer of property or create a trust; and that the defendant, being merely the agent of the sovereign to distribute the fund, was not liable to account to any of the parties found entitled. *Kinloch v. Secretary of State for India in Council*, 7 App. Cas. 619; 51 L. J., Ch. 885; 47 L. T. 133; 30 W. R. 845—H. L. (E.).

**Covenant by Husband to Settle on Wife.**—By a post-nuptial settlement executed in 1814, after reciting that S., the husband, had before marriage agreed to settle 1,000*l.*, and had paid that sum to G., G. covenanted that he would stand possessed of the money upon trust, with the approbation of S., to invest it in the names of S. and G., and trusts were declared of the fund for the benefit of the husband and wife successively for life, with remainder to the children of the marriage. By the same deed S. covenanted with G. to pay to him a further sum of 1,000*l.* to be held upon the same trusts as the first-mentioned 1,000*l.* Neither of the two sums was, in fact, ever paid. S. survived his wife, and died in 1868. In a suit instituted for the administration of the estate of S. the children of the marriage claimed to rank as creditors for both sums :—Held, that, as to the first-mentioned sum, S. had constituted himself a trustee of the settlement, and that his estate was liable for the amount;

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hold interest as would entitle them to be registered as voters for the county. *Ashworth v. Hopper*, 1 C. P. D. 178; 45 L. J., C. P. 99; 33 L. T. 667; 24 W. R. 187.

**Incomplete Voluntary Assignment.]**—The court will not enforce an incomplete voluntary assignment, evidenced by delivery of a box (retaining the key), such box containing what purported to be a written memorandum of gift of real estates and chattels, the memorandum not being under seal. *Warriner v. Rogers*, 16 L. R., Eq. 340; 42 L. J., Ch. 581; 28 L. T. 863; 21 W. R. 766.

**Deed declaring Trust Signed by Trustee—Money not Paid to Trustee.]**—A married woman executed a voluntary settlement containing a recital that she had paid 2,000*l.* to the trustee, and declaring trusts of that sum. In point of fact she had not paid and never did pay any money to the trustee. The trustee also executed the deed.—Held, that neither the settlor nor the trustee incurred any obligation whatever in respect of the 2,000*l.* *Marler v. Thomas*, 17 L. R., Eq. 8; 43 L. J., Ch. 73; 22 W. R. 25.

**Proceeds of Sale of Real Property remaining Subject to Trusts of Settlement.]**—Under a settlement, real estate was limited to such uses as A. and B. should by deed jointly appoint, and subject thereto to the use of A. for life, with remainder to the use of B. for life, with remainder to the first and other sons of B. in tail, with divers remainders over; and there was a power of sale vested in four trustees, and exercisable at the request of A. and B., and the survivor of them. By a deed (which contained a recital that A. and B. were desirous of selling part of the settled property, and with a view to facilitate the sale and conveyance thereof to the respective purchasers had agreed to execute the deed), A. and B. in exercise of the joint power of appointment, appointed part of the settled property to trustees upon trust for sale; and it was declared that the trustees should stand possessed of the proceeds upon the trusts intended to be declared by a deed of even date. No deed declaring the trusts was ever executed, and there was evidence to shew that the deed of appointment was executed with the view of avoiding the trouble and expense of an application to the trustees to exercise the power of sale.—Held, that the disposition of the proceeds of sale was a question of intention; and that both on the terms of the deed of appointment (independently of the evidence) and also having regard to the evidence, the proceeds of sale remained subject to the trusts of the settlement. *Biddulph v. Williams*, 1 Ch. D. 203.

**Illegal Trusts.]**—Although, where a trust has been created for an illegal purpose the court will not in general interfere, it will do so where the illegal purpose fails to take effect. *Symes v. Hughes*, 9 L. R., Eq. 475; 39 L. J., Ch. 304; 22 L. T. 462.

**Pleading.]**—The plaintiff conveyed an estate to the defendant by a deed, in which the conveyance was expressed to be absolute in consideration of a sum of money paid by the defendant; but no purchase-money actually passed, and the plaintiff alleged that he conveyed the estate

to the defendant as a trustee for him. The defendant, in his answer, admitted that he gave no consideration for the estate, but stated that the plaintiff made the conveyance fearing that an adverse decision would be made against him in a suit pending in chancery; and that it was understood that the defendant should account to the plaintiff for the rents until he could make arrangements for paying the purchase-money, and if no such arrangements could be made that he should reconvey the estate. The defendant claimed to hold the estate discharged from any trust, and claimed the benefit of the Statute of Frauds.—Held, first, that there was no sufficient averment that the transaction was an illegal one. *Haigh v. Kaye*, 7 L. R., Ch. 469; 41 L. J., Ch. 567; 26 L. T. 675; 20 W. R. 597.

Held, secondly, that the Statute of Frauds could not be pleaded in answer to the claim; and that, as the evidence did not establish the existence of any such agreement as was alleged by the defendant, he must reconvey the estate. *Id.*

**Transfer on Non-Fulfilment of Trust.]**—A testator gave 12,000*l.* to trustees, with the whole or such part as they should think fit of that sum to purchase an advowson, and nominate to it such persons as they should think proper. Subject to this trust, the advowson was to be held in trust for A. until he should have a benefice worth a clear 1,000*l.* a year, or died. Until the advowson was purchased the fund was to accumulate, and at the end of twenty-one years, or on the death of A., or on his being presented to a benefice worth a clear 1,000*l.* a year, the fund, or so much of it as had not been employed in the purchase, was to belong to A. absolutely. The fund had been accumulating for about twelve years. No advowson had been purchased but the trustees were not desirous to be relieved of their trust.—Held, that under such circumstances A. was not entitled to have an immediate transfer to him of the fund. *Gott v. Nairne*, 3 Ch. D. 278; 35 L. T. 209.

## II. RIGHTS AND POWERS OF TRUSTEES.

### 1. GENERAL.

**Acceptance of Trusts—Trustee cannot Dispute Title of Cestui que trust.]**—A person who has accepted property as a trustee, and held it as such, is not at liberty to dispute the title of his cestui que trust, though that title may be doubtful. *Neligan v. Roche*, 7 Ir. R., Eq. 332. *See also post*, col. 217.

**Duration of.]**—A trustee cannot, by any act of his own, denude himself of that character till he has performed his trust. *Chalmer v. Bradley*, 1 J. & W. 68.

**When Majority can Act.]**—A trust to apply funds "towards the repairs of the church of W., the payment of the fifteenths, and relief of the poor of W., buying of armour and setting forth soldiers, and repairing Sawbridge bridge, within the parish," is of a public nature; and, therefore, an act done by a majority of the trustees assembled for that purpose is valid. *Wilkinson v. Malin*, 2 C. & J. 636; 2 Tyr. 544.

One of several mortgagees can maintain an action to foreclose the mortgage, making the

others co-defendants if they are unwilling to be joined as co-plaintiffs, or have done some act precluding them from being plaintiffs. The act of a majority of trustees cannot bind a dissenting minority nor the trust estate. In order to bind the trust estate the act must be the act of all the trustees. *Luke v. South Kensington Hotel Company*, 11 Ch. D. 121; 48 L. J., Ch. 361; 40 L. T. 638; 27 W. R. 514—C. A.

**To render Property Liable to Third Party.]**—Trustees may render the property of their beneficiaries liable to third persons for an act done by them in the exercise of their trust. *Mersey Dock Trustees v. Gibbs*, 11 H. L. Cas. 686.

**Notice of Charges on Trust Property.]**—A trustee who himself has a valid charge upon the trust funds is not as a general rule bound, on receiving notice from a subsequent incumbrancer, to disclose the existence of his charge. *Wilkes, Ex parte, Lewer, In re*, 4 Ch. D. 101; 35 L. T. 557. Affirmed, 5 Ch. D. 61; 25 W. R. 364—C. A.

**Benefit acquired by Trustees.]**—When trustees acquire a benefit as ostensible owners of trust property, that benefit cannot be retained by them, but must be surrendered to those who are beneficially interested. *Aberdeen Town Council v. Aberdeen University*, 2 App. Cas. 544.

**Payments by.]**—A father devised his real estate to trustees to pay an annuity of 8,000*l.* a year to his daughter, and subject thereto upon trust to accumulate the rents for twenty-one years, and out of the accumulated fund from time to time to pay his debts, legacies, and the incumbrances on the estates, and invest the residue in the purchase of lands to be held on the same trusts; and he directed the estates, on the expiration of the trust for accumulation, to be settled in strict settlement. He directed that as soon as the incumbrances were paid off, the annuity should be increased to 8,000*l.* He gave his residuary personal estate to his trustees to pay off the incumbrances, and apply the surplus in the same way as the accumulated rents and profits. He died leaving personality which, within a month after his death, was ascertained to be amply sufficient to pay off his debts, legacies, and incumbrances. The trustees, however, retained a considerable part of the personal estate, as it was producing a high rate of interest; and they did not for several years pay off all the incumbrances:—Held, that the trustees were right in paying the annuity at the rate of 8,000*l.* a year from the testator's death, and must be allowed it in their accounts. *Atley v. Essex (Earl)*, 6 L. R., Ch. 898; 25 L. T. 470.

A widow, who was by the terms of the will to be allowed money by the trustees during the minority of an infant—her son—abandoned the child, for whom other guardians were appointed by the court, and afterwards having cohabited with a married man, and by him had several illegitimate children, lived with them in a house to the use of which she was entitled under the will. The trustees under these circumstances refused to make her any allowance out of the trust moneys:—Held, that she could not compel the trustees so to do, but was disqualified from making any claim by her abandonment of the child, independently of other misconduct. *Mellor v. Mellor*, 20 W. R. 61.

**Receipt and Discharge by Trustees.]**—A firm of solicitors having been employed by the trustees of a will to receive the proceeds of the testator's real estate which had been taken by a railway company, paid over the money to one of such trustees without the receipt or authority of the other. The money having been lost to the estate by the insolvency and death of the trustee to whom it was paid:—Held, that the receipt of one trustee only (though also an executor) was not a sufficient discharge to the solicitors for the money which they had received by the authority of the two, and that they were personally liable to make good the loss which had resulted to the trust estate from such improper payment. *Lee v. Sankey*, or *Ginger v. Sankey*, 15 L. R., Eq. 204; 27 L. T. 809; 21 W. R. 286.

**Receipts by Anticipation on Coalition of Life Interest and Reversion.]**—Where a fund is vested by a settlement in trustees for A. for life and remainder over, and the reversion has been subsequently settled, the person entitled to the life interest and the trustees of the subsequent settlement are entitled to call for a transfer of the trust fund, and can give the original trustees an effectual discharge, although the settlement does not provide for a transfer or payment by anticipation. *Anson v. Potter*, 13 Ch. D. 141; 41 L. T. 582.

**Dismissing Agent.]**—Trustees may dismiss an agent for misconduct committed by him anterior to their own appointment. *Belaney v. Kelly*, 24 L. T. 738; 19 W. R. 1171.

**Management and Improvement of Property.]**—Trustees of a term with power to apply surplus income in building and improvement were allowed to apply money standing to real estate capital account in building and improvements, including drainage. *Leslie, In re*, 2 Ch. D. 185; 45 L. J., Ch. 668; 34 L. T. 239; 24 W. R. 546.

Trustees of real estate for a term of 1,000 years from the day of the death of the settlor, had powers, during a period of certain lives in being and twenty-one years, to manage the estates, and out of the income to keep down charges and incumbrances, and subject thereto to repair, erect new or additional buildings, and generally to make such outlay for the improvement of the estates as they should think fit or conducive to the general benefit of the estates or the tenants thereof, and hold the surplus as capital, which was to be laid out in the purchase of lands to be settled to the like uses. The settlor having died in 1870, the first tenant for life being in possession, and the income being insufficient, after keeping down charges and incumbrances, to pay for repairs, for the cost of new buildings, and generally for improvement of the property, the court allowed, out of capital, payments in draining upon which the tenants paid 5*l.* per cent., and in erecting new buildings. *Ib.*

**Borrowing Money.]**—A power to apply the rents of real estate in repairing does not imply a power to borrow money for repairing on the security of the estate. *Fazakerley v. Cusshaw*, 24 L. T. 773; 19 W. R. 793.

The trustee of real estate, on which a dwelling-house was situate, who was empowered to lay out the rents in repairing the house, but was not em-

powered to borrow money for the purpose, pulled down and rebuilt the house, and borrowed money at interest for the purpose, which he afterwards repaid out of the rents:—Held, that his claim for interest on the sum borrowed must be disallowed. *Id.*

When a small estate was settled in strict settlement, and the settlement contained power for the trustees during minorities to repair and rebuild, and to pay the expenses out of the rents and profits, but no power to borrow on mortgage, the court, on being satisfied that it was for the benefit of all parties, and notwithstanding that some interested were infants, gave the trustees leave to borrow money on mortgage, not exceeding a sum fixed by the court, to rebuild the house, as no repairs would render it habitable. *Frith v. Cameron*, 12 L. R., Eq. 169; 40 L. J., Ch. 778; 24 L. T. 791; 19 W. R. 886.

**Carrying on Business — Advances — Right of Creditor.**—By a marriage settlement a lunatic asylum was assigned to trustees on trust at the request of the husband and wife to sell and to stand possessed of the proceeds of the sale for the benefit of the wife and children; but the trustees were to allow the husband to carry on the business of the asylum without paying any rent, but paying certain premiums and other moneys. The husband became bankrupt, and thereupon the surviving trustee of the settlement entered into possession of the asylum, and carried on the business until the asylum was sold for a large sum of money. A tradesman had supplied the trustee with goods for the use of the asylum, and brought an action claiming payment out of the trust funds of the settlement:—Held, that on the construction of the settlement the trustee would not have been entitled to recover moneys advanced by him for the purposes of the asylum, and that consequently the tradesman who had no better right could not recover. *Strickland v. Symons*, 22 Ch. D. 666; 52 L. J., Ch. 423; 48 L. T. 188; 31 W. R. 888. Affirmed, 26 Ch. D. 245—C. A.

**In administering Estate.**—After an administration decree has been made, all powers of management of the estate which may be vested in trustees are subject to the control of the court; and the judge who exercises such control must be personally satisfied of the propriety of the course proposed to be adopted by the trustees. *Bethell v. Abraham*, 17 L. R., Eq. 24; 43 L. J., Ch. 180; 29 L. T. 715; 22 W. R. 179.

Trustees having power to invest certain moneys belonging to a testator's estate at their discretion, and having also power to continue or change securities from time to time, as to the majority should seem meet, applied to the court in a suit for the administration of the trust estate for liberty to invest the moneys in and to convert securities into American funds or railway stocks. Infants were interested in the trust estate:—Held, that if the trustees had the discretion they claimed (which was doubtful), the court ought not, in a case where infants were interested, to permit them to exercise that discretion in the way they proposed. *Id.*

After trustees have invoked the aid of the court in administering an estate, and a decree has been made, they cannot act in the matter of

the administration except under the sanction of the court. *Minors v. Battison*, 1 App. Cas. 428; 46 L. J., Ch. 2; 39 L. T. 1; 25 W. R. 27.

**Powers of Sale.**—It is a well settled rule that where trustees of a settlement have a power of sale and exchange over the settled estates, to be exercised at the request, or with the consent, of the tenant for life, they may sell to the tenant for life just as they may to any other person. *Dicconson v. Tulbot*, 6 L. R., Ch. 32; 24 L. T. 49; 19 W. R. 138.

The reason for that rule is that the consent of the tenant for life to the exercise of the power is required for his own benefit, and does not place him in any fiduciary relation to the persons entitled in remainder. *Id.*

Provided a sale by trustees to a tenant for life is bona fide and at a fair price, it is immaterial what was the object for which he made the purchase. *Id.*

In pursuance of a power contained in a marriage settlement, lands were appointed, subject to life estates, among the five children of A., one-fifth to each of four as tenants in common, and the remaining fifth to E., the other child, for life, with remainder to the first four. E. was of unsound mind, not so found by inquisition:—Held, that a power of sale contained in the settlement was not destroyed by the appointment. *Brown, In re*, 10 L. R., Eq. 340; 39 L. J., Ch. 845; 18 W. R. 945.

The trustees of a settlement having power to sell the fee at the request of the tenant for life cannot, by an exercise of the power upon his request made, after he has alienated his particular interest, confer on the alienee a good title to the fee. *Alexander v. Mills*, 39 L. J., Ch. 437; 22 L. T. 396; 18 W. R. 635.

**Of Infants' Property.**—Two trustees having power to sell the freehold property of an infant at the request of the guardians, and one trustee having declined upon such request to exercise the power of sale, the court refused to control the discretion of the trustees by ordering them to sell the estate—there being no absolute necessity for raising money and the existing income being sufficient to keep down the charges upon the estate—notwithstanding that the effect of the sale would be to increase very considerably the income of the property. *Camden (Marquis) v. Murray*, 16 Ch. D. 161; 50 L. J., Ch. 282; 43 L. T. 661; 29 W. R. 190.

**Duration and Determination—Intention of Settlor.**—A power given to the trustees of a settlement or will to sell land comprised in it can be exercised by them after the property has, under the trusts, become absolutely vested in persons who are sui juris, if on the construction of the instrument it appears to be the intention of the settlor or testator that it should be then exercised, provided that the power in its creation was not obnoxious to the rule against perpetuities, and that the cestuis que trustent have not put an end to the trusts by electing to take the property as it stands. *Cotton's Trustees and the School Board for London, In re*, 19 Ch. D. 624; 51 L. J., Ch. 514; 46 L. T. 813; 30 W. R. 610.

**Appointment of New Trustee—Pending Action.**—Real estate was settled by will on

D. for life, with remainders over, and the will appointed two trustees, and empowered them to sell at the request and by the direction of the person entitled to the actual freehold, with the usual provisions for reinvestment in land and interim investment in other securities. The will also gave a power to appoint new trustees vested in the same person. One of the trustees was dead. D., who was over eighty years of age, proposed to sell the estate. The remaindermen brought this action for the appointment of a new trustee, and to restrain the sale as improper, adducing evidence to shew that the estate would sell to better advantage at a future date, owing to the existence of minerals at present unworked, and a projected railway which would pass through the estate. D. had no re-investment in land in view, and proposed to invest in consols. After action brought, the Settled Land Act, 1882, came into operation; and shortly before the action came on for trial, D., under the power in the will, appointed a new trustee without referring the appointment to the court. The trustees consented to the proposed sale:—Held, that D. was entitled to sell the estate as well under the power in the will as under the Settled Land Act. *Thomas v. Williams*, 24 Ch. D. 558; 52 L. J., Ch. 603; 49 L. T. 111; 31 W. R. 943.

Held, also, that the new trustee was properly appointed, notwithstanding the pending action. *Id.*

— **Property Purchased in Breach of Trust—Concurrence of one Beneficiary.**—Trustees under a will which contained a power to sell real estate, but no power of investing the trust funds in real estate, bought real estate, and had it conveyed to the trusts of the will:—Held, that they could sell and make a good title to the real estate wrongfully purchased with the trust funds on obtaining the concurrence in the sale of one of the persons beneficially interested in the trust funds. *Patten and Edmonton Union, In re*, 52 L. J., Ch. 787; 48 L. T. 870; 31 W. R. 785.

**Powers of Leasing.**—Upon a special case presented under 22 & 23 Vict. c. 35, and the 23 & 24 Vict. c. 38, the court declined to give power to trustees to grant leases of real estate for a term not exceeding ten years. *Shaw, In re*, 12 L. R., Eq. 124; 25 L. T. 22; 19 W. R. 1025.

The trustees of a will, by which two contiguous estates were devised to them upon distinct trusts, obtained from the court an order giving them power to grant mining leases in conformity with and subject to the provisions of the Settled Estates Act, 1856 (19 & 20 Vict. c. 120), s. 10, and with the consent of the respective tenants for life for the time being. The trustees and the tenants for life of the two estates afterwards entered into an agreement to grant a mining lease of the two estates for forty years, rents and royalties being reserved as if the two estates were one property. On a bill by the trustees to enforce specific performance of the agreement:—Held, that the trustees had no power to grant such a lease of the two estates, and that the bill therefore must be dismissed. *Tolson v. Sheard*, 5 Ch. D. 19; 46 L. J., Ch. 815; 36 L. T. 756; 25 W. R. 667—C. A.

— **Discretionary.**—*See post*, col. 215. •

— **To "Person or Persons"—Corporation.**—Trustees of a will had power to grant leases to any "person or persons" they should think fit:—Held, that this authorized them to grant a lease to a limited company. *Jeffcock's Trusts, In re*, 51 L. J., Ch. 507.

— **Tenancy from Year to Year.**—A trustee in whom the legal estate is vested, and who has active duties to perform, may, without any express leasing power, make a yearly or other reasonable letting of tenantable lands. *Naylor v. Arnitt* (1 Russ. & M. 501) followed; *Wood v. Patteson* (10 Beav. 541), and *Shaw's trusts, In re (ante*, col. 205), explained and distinguished. *Fitzpatrick v. Waring*, 11 L. R., Ir. 35—C. A.

— **Repairing Lease—Tenant to do Necessary Repairs.**—A settlement of house property gave power to the trustees to demise or agree to demise all or any of the messuages "to any person or persons who shall improve or repair the same, or covenant or agree to improve or repair the same, or shall expend or agree to expend such sum or sums of money in improvements thereof respectively, as shall be thought adequate for the interest therein respectively." The trustees agreed to let a house on the terms of a letter by which the tenant undertook "to do necessary repairs:—Held, by Chitty, J., that the agreement did not satisfy the terms of the power, and that specific performance of it could not be decreed at the suit of the trustees. But held, by the Court of Appeal, that the agreement imposed upon the tenant the burden of doing all repairs which were requisite during the term, and that it satisfied the requisitions of the power. *Doe v. Withers* (2 B. & Ad. 896) doubted. *Truscott v. Diamond Rock Boring Company*, 20 Ch. D. 251; 51 L. J., Ch. 259; 46 L. T. 7; 30 W. R. 277; 46 J. P. 486—C. A.

— **In Accordance with Terms agreed on by previous Tenant for Life.**—A tenant for life had entered into a binding agreement for a building lease under a power, and the intending lessee had done everything requisite to entitle him to require the tenant for life to grant him a lease. The tenant for life died, leaving an infant tenant in tail, during whose minority the trustees had a power of leasing:—Held, that the trustees had power to grant a lease in accordance with the agreement. *Davis v. Harford*, 22 Ch. D. 128; 52 L. J., Ch. 61; 47 L. T. 540; 31 W. R. 61.

— **Rights of Trustees of Leaseholds where Tenant for Life does not Repair in Accordance with Covenant.**—When leasehold houses are vested in trustees on behalf of a tenant for life and remaindermen, it is the duty of the trustees to keep the property free from the risk of forfeiture by a breach of the covenants of the lease, and they are entitled to have the rents applied in keeping the houses in a proper state of repair. The trustees are not bound to be content with the setting apart of a sum of money in the joint names of themselves and the tenant for life as an indemnity against the consequences of a breach of the covenants of the lease, but are entitled to require the covenants to be specifically performed. When a tenant for life of leasehold houses is allowed by the trustees to

receive the rents, and the houses are not kept in a proper state of repair according to the covenants of the lease, the court will, at the instance of one of the trustees, appoint a receiver of the rents, for the purpose of enforcing the proper repair of the houses. *Fowler, In re, Fowler v. Odell*, 16 Ch. D. 723; 44 L. T. 99; 29 W. R. 891.

**Power to Purchase Land—Advance by Trustee of Part of Purchase-money—Lien.]**—Under a marriage settlement the trustees were empowered, at the request of the husband and wife, to invest the trust fund in the purchase of real estate, and to resell the same. In exercise of this power the trustees, at the request of the husband and wife, bought certain real estate at a price which exceeded the whole of the trust fund, the husband promising to provide the balance out of his own moneys. The husband could not fulfil his promise, and C. P., one of the trustees, at the request of the husband and wife, borrowed the sum necessary to complete the purchase from a bank, and deposited with them the title-deeds of the estate. C. P. died, and the husband was unable to repay the loan. In an action brought by the bank for an account and the realization of their security, and for administration of C. P.'s estate:—Held, that the trust estate was entitled to a first charge upon the real estate purchased for the full amount of the trust fund; that, subject to such charge the estate of C. P. was entitled to be indemnified out of such real estate for the amount borrowed by him, and actually invested in or about the purchase, and to enforce such indemnity by sale of such real estate without the consent of the husband and wife; the bank being entitled to stand in the place of C. P. as against the trust estate for the amount due to them. *Pumfrey, In re, Worcester City and County Banking Company v. Blick*, 22 Ch. D. 255; 52 L. J., Ch. 228; 48 L. T. 516; 31 W. R. 195.

**—Employing Funds in Erecting Buildings.]**—Moneys, which under the trusts of a will, settlement, or private act of parliament, are to be invested in the purchase of land as well as moneys to be invested under the Settled Estates Act or the Lands Clauses Act, may be properly employed in the erection of new buildings on land settled to the same uses, provided the court is satisfied that it is beneficial to the estate; but repairs and permanent improvements do not come within this principle. *Drake v. Trefusis*, 10 L. R., Ch. 364; 33 L. T. 85; 23 W. R. 762. See also *Vyse v. Foster, post*, col. 225.

**Retainer by, of Debts out of Estate.]**—A trustee of an estate devised or conveyed to him for the purpose of paying debts has no right of retainer thereout, whether he is executor or not. *Bain v. Sadler*, 12 L. R., Eq. 570; 40 L. J., Ch. 791; 25 L. T. 202; 19 W. R. 1077.

An executor, who was also trustee for sale of an estate for the payment of debts, was a creditor of his testator, who died insolvent, and had received personal estate which he had retained in part satisfaction of his debt. The real estate was sold, a portion before the time when a creditor's suit was instituted, and the remainder under the decree, and the proceeds as to part were in the executor's hands, and the remainder in court:—Held, that the other creditors must

be paid out of the proceeds of sale up to an equality with the executor, and that there must then be a rateable distribution. 17.

A trustee, in answer to a request for money by his cestui que trust, refused to make any further advances until he had reduced a balance found due to him on an account previously stated between them, and subsequently, with the acquiescence of the cestui que trust, continued in receipt of the income of the trust property without furnishing any account, but, after a considerable lapse of time, giving various sums of money to the cestui que trust:—Held, that there was evidence from which it might be inferred that the trustee had, with the authority of his cestui que trust, applied the income in liquidation of the balance due to himself. *Stewart v. Connick*, 5 Ir. R., C. L. 562.

**—Of Moneys to make good Breach of Trust by defaulting Cestui que trust.]**—A policy of assurance on the life of H. was taken in the names of trustees and a settlement was executed by virtue of which the bonuses payable on the policy were to be held upon trust for H., and the money assured, on the trusts of the settlement. H. obtained possession of and misappropriated a portion of the trust funds:—Held, that the trustees were not entitled as against H.'s executrix to impound or retain the bonuses to make good the trust funds misappropriated by H., not as being settled property, because there was a prior resulting trust of them for H.: not by way of set-off, because they were not payable till after H.'s death. *Hallett v. Hallett*, 13 Ch. D. 232; 49 L. J., Ch. 61; 41 L. T. 725; 28 W. R. 321.

**Interest on Sums Advanced.]**—A trustee will be allowed interest upon money advanced by him, and applied in payment of his testator's debts, or otherwise on account of his personal estate. *Finch v. Pescott*, 17 L. R., Eq. 554; 43 L. J., Ch. 728; 30 L. T. 156; 22 W. R. 437.

The trustee of real estate, on which a dwelling-house was situate, who was empowered to lay out the rents in repairing the house, but was not empowered to borrow money for the purpose, pulled down and rebuilt the house, and borrowed money at interest for the purpose, which he afterwards repaid out of the rents:—Held, that his claim for interest on the sum borrowed must be disallowed. *Fazakerley v. Culshaw*, 24 L. T. 773; 19 W. R. 793.

**Rights of Defaulting Trustee.]**—A defaulting trustee cannot claim, as against his cestui que trust, any beneficial interest in the trust estate, even although he may have become entitled thereto derivatively, for example, as being one of the next of kin of a cestui que trust who has died intestate. *Jacobs v. Ry-lance*, 17 L. R., Eq. 341; 43 L. J., Ch. 280.

**Title-Deed of Property in Hands of Trustee for Ancestor's Widow—Right to Possession of, as between Trustee and Heir-at-Law.]**—Plaintiff, as heir-at-law of C., sued defendant to recover possession of a title-deed under the following circumstances: By a conveyance of the 12th November, 1862, certain freehold property was conveyed to C. in fee. On the 13th July, 1865, C., by an ante-nuptial settlement of that date, in consideration of his intended marriage with

the defendant's sister, charged the said property with the payment, after his death, of a yearly annuity of 12*l.* to her during her life, and secured the same by a grant of the said property to the defendant, as trustee for his sister, for a term of 100 years, with the usual powers of distress and entry, &c., in case of the quarterly payments of the annuity being in arrear. Upon the execution of the settlement C. handed the deed of conveyance of the 12th November, 1862, to the defendant and said to him, "You shall have the deed of the house to hold in your possession for the safety of your sister," and at the same time a written acknowledgment of the receipt of the conveyance, and an undertaking to deliver it to C. or his assigns, on the fulfilment of the trusts of the settlement, was signed by the defendant. The marriage took place, and on C.'s subsequent death, in December, 1875, the plaintiff, as his eldest son and heir-at-law, brought an action in the county court against defendant to recover possession of the conveyance of 12th November, 1862. The county court judge held, in favour of the plaintiff, that he was entitled to recover the deed in question:—Held, that the defendant, as trustee of the settlement, was entitled to retain possession of the deed of conveyance in question during the continuance of the trusts of the settlement on the ground that it was delivered to him by C., the settlor, as a further security for the payment of the annuity, and that the possession of it enabled him the better to perform the trusts of the settlement with the execution of which he was charged. *Corin v. Thomas*, 46 L. T. 916.

**Right to Sever Funds for Investment on behalf of Distinct Parties—Indemnity of Trustees for Liability Incurred.]**—A testatrix directed her trustees to pay the interest or annual rent of 2,000*l.* to Mrs. A. during her life, and after her death to divide that sum among her children; and to pay the interest or annual rent of a similar amount to Mrs. B. in life-rent, with the fee to her children. The trustees were empowered by the deed to realize, or to continue to "hold any or all of such shares or stocks" as might belong to the testatrix at her decease, "should they consider it advisable or expedient to do so, without any personal responsibility for loss, if any, thereby sustained:" with power also "to lend or place out on such securities, heritable or movable, as they shall consider advantageous, the aforesaid legacies of 2,000*l.* and 2,000*l.* respectively, the securities to be conceived in favour of my trustees, and that for the purposes of this trust and no otherwise." The testatrix at her death held 850*l.* stock of an unlimited bank. The trustees, at the desire of Mrs. A., and without consulting Mrs. B., set 200*l.* of this stock aside as part of the fund appropriated to Mrs. A., and realized the remainder. They afterwards, on the narrative of the purposes of the trust deed, and of the sums invested for the two specific legacies of 2,000*l.*, and that they had paid the residue, received their discharge from Mrs. A. and Mrs. B. Statements and separate accounts of interest on the investments allocated to each were sent half-yearly to Mrs. A. and Mrs. B. All the investments stood in the names of the testatrix's trustees. The bank became insolvent, and calls were made upon the trustees in respect of the 200*l.* stock. They sought to indemnify them-

selves for payment of the calls out of the whole trust estate. Mrs. B. objected to any portion of her legacy being taken:—Held, that the trustees had the power to sever and had severed the two legacies, and had placed them in separate investments for behoof of the respective beneficiaries, and therefore the trustees had no right to relief from the investments allotted to Mrs. B. and her family for liabilities incurred on those allotted to Mrs. A. and her family. *Garland, Ex parte* (10 Ves. jun. 110) followed. *Fraser or Robinson v. Murdoch*, 6 App. Cas. 855; 45 L. T. 417; 30 W. R. 162—H. L. (Sc.).

**Right of Indemnity.]**—The right of a trustee, in whose name shares in a company in liquidation were standing, to an indemnity from his cestui que trust, enforced. *Hemming v. Maddick*, 7 L. R., Ch. 395; 41 L. J., Ch. 522; 26 L. T. 565; 20 W. R. 433.

If trustees lending money on mortgage have the same solicitor as the mortgagor, they must take the utmost precaution; if they trust implicitly in the solicitor, however high his reputation, they will be held responsible for any loss which his fraud may occasion. The indemnity clause usually inserted in settlements will not protect them. *Sutton v. Wilders*, 12 L. R., Eq. 373; 41 L. J., Ch. 30; 26 L. T. 292; 19 W. R. 1021.

It is a general rule of equity that when a person accepts a trust at the request of another, and that other is a cestui que trust, the cestui que trust is liable personally to indemnify the trustee against all losses accruing in the due execution of the trust. *Jervis v. Wolferstan*, 13 L. R., Eq. 18; 43 L. J., Ch. 809; 30 L. T. 452.

When the loss in respect of which such indemnity is sought occurs after the death of the cestui que trust, the trustee is in the position of a creditor of the cestui que trust, and entitled to recover as a creditor from legatees to whom his estate has been paid. *Id.*

J. and P., at the request of a settlor, accepted transfers of shares in an unlimited company upon trust for a tenant for life and remainderman. J. and P. were executors of the will of the settlor, and distributed the residue of his estate. Subsequently, in the lifetime of the tenant for life, large calls were made on the shares, and the remaindermen under the settlement disclaimed:—Held, that J. and P. as trustees were entitled to be indemnified against the liability out of the settlor's residuary estate, and to recover the capital which they had distributed among the residuary legatees. *Id.*

**— Against future Liability—Quia Timet Action—Shares in Company in Liquidation.]**—A trustee held shares in a company on trust for an adult cestui que trust. He had applied for them at the request of the cestui que trust, who paid the money due to the company on the application and allotment. The trustee executed a transfer of the shares to the cestui que trust, and the latter sent it to the company for registration, but the directors refused to register it, and when an order was made to wind up the company the name of the trustee remained on the company's register as the holder of the shares. No further call had been made on them. The trustee brought an action against the cestui que trust, claiming an indemnity against liability on the shares. There was no evidence to

shew whether calls were likely to be made in the winding-up:—Held, that the action was a mere quia timet one, and that it was premature and could not be maintained. *Lord Ranelagh v. Hayes* (1 Vern. 189) not followed. *Hughes-Hallett v. Indian Mammoth Gold Mines Company*, 22 Ch. D. 561; 52 L. J., Ch. 418; 48 L. T. 107; 31 W. R. 285.

**Right to Reimbursement for Money expended on Settled Estate.]**—A testator devised his mansion-house and other real estate to trustees for the term of 1,000 years, upon certain trusts, and, subject thereto, he devised the same upon legal limitations, under which the plaintiff was tenant for life. Shortly after the testator's death the mansion-house was burned down. The sole acting trustee had expended, in addition to insurance moneys, a sum of 2,000*l.* in rebuilding the mansion-house, which amount he had borrowed on his own personal security and on a charge of the estate. It was admitted that this expenditure was very beneficial to the estate, and that the value thereof was increased. There were in court sums of consols, arising from the sale of part of the estate, and such funds were liable to be reinvested in land. By the decree in the action an inquiry had been directed as to what sum was necessary to complete the restoration of the mansion-house, and how the same ought to be raised, but no formal order was made sanctioning the raising of a loan for the purpose. A petition was presented by the personal representative of the trustee, asking that the funds in court might be sold, and that such further sum as, with the proceeds of such sale, would make up the 2,000*l.* borrowed by the trustee, might be raised by mortgage or sale of the settled estate, in order to enable such loan to be repaid:—Held, that the court had no jurisdiction to order a mortgage or sale of the settled estate, or to authorize the expenditure for the proposed purpose, even of moneys which were subject to a trust for reinvestment in land; but it appearing that the estate had been benefited by the outlay of the trustee to the full amount of the funds in court, and that the outlay had been bona fide made under the impression that it would be repaid out of the estate, the court would, although considering the conduct of the trustee irregular, order that he should be recouped his outlay to the extent of the funds in court, but no further. *Jesse v. Lloyd*, 48 L. T. 656.

**Right of Trustee's Executor to Costs out of Assets.]**—The trustee of a marriage settlement invested the trust moneys, with the consent of the husband, who had a life interest under the settlement, in an unauthorized security. On the trustee's death, his widow, as his administratrix, became trustee, and, on ascertaining that the settlement fund was in great danger of being lost, instituted an action for administration of the trusts of the settlement, under which the greater part of the trust fund was recovered. It was contended, on the authority of *Haldenby v. Spofforth* (9 Beav. 195), that the plaintiff was entitled to her costs of the action:—Held, that that case must be understood to decide that the representative of a defaulting executor is entitled to costs out of the executor's assets, not out of the assets of the original testator

whose estate is being administered. *Gurney v. Gurney*, 48 L. T. 529.

Held, accordingly, that the plaintiff could not be allowed to retain her costs of the action as against the cestui que trust, though she was entitled to her costs, charges, and expenses as trustee other than those of the action. *Id.*

**Right to Costs where Settlement Set Aside.]**—Where a settlement is set aside, the trustee has no claim to his costs as a matter of right, there being no contract in existence. *Dutton v. Thompson*, 23 Ch. D. 278; 52 L. J., Ch. 661; 49 L. T. 109; 31 W. R. 596—C. A.

**Right to Costs generally.]**—See *post*, col. 240.

**Sanction of Agreement by Court.]**—Part of the property of a testator consisted of a cotton mill which he directed his trustees not to sell, nor to work themselves, but to let. The will also contained a direction to the trustees not to lend any of the personal estate on mortgage, and prescribed certain strict modes of investment. The cotton mill being out of repair could not be let as it then stood; the trustees, therefore, entered into a provisional agreement with a firm of cotton spinners, by which the latter agreed to take a lease of the mill for twenty-one years, and to spend large sums of money in machinery and repairs, provided the trustees advanced to them, on the security of the machinery, rather more than half the sum required for such machinery and repairs, and also spent a considerable sum in the erection of steam boilers and other landlord's fixtures. Under the terms of the will the trustees could not comply with such proposals; but, upon it being clearly proved that such an arrangement would be highly beneficial to the trust estate, and was one which it was not unusual for lessors in similar cases to enter into, the court sanctioned the agreement, and directed the costs of all parties to the application to come out of the testator's residuary personal estate. *Lee, In re*, 32 L. T. 298.

**Applying Fund for Maintenance of Infant.]**—Trustees may, under 23 & 24 Vict. c. 145, s. 26, apply for or towards the maintenance of an infant the income of property held on trust for the infant contingently on attaining the age of twenty-one years. *Cotton, In re*, 1 Ch. D. 232; 45 L. J., Ch. 201; 33 L. T. 720; 24 W. R. 243.

Though 23 & 24 Vict. c. 145 (Lord Cranworth's Act), s. 26, enables trustees to apply for an infant's maintenance out of income to which the infant is contingently entitled, it does not enable them so to apply income to which the infant never can become entitled at all. *George, In re*, 47 L. J., Ch. 118; 26 W. R. 65—C. A.

A father, by will, gave real estate to his daughter for life, with remainders in tail, and gave her power to appoint a life estate to any husband she might marry, and he bequeathed his residuary personal estate upon corresponding trusts, but directed that the income of it should not vest in any child presumptively entitled to it, but should be applied in the maintenance of such child. The daughter married and had four children, and after appointing a life estate in the property to her husband, she and her husband appointed the whole (subject to their life estates)

in trust for their children. The sum was large to which each child would be entitled on the death of the parents. The mother died, and the husband disposed of his life estate so that he derived no income from it, and the children could not be maintained in a manner consonant with their expectations. The court sanctioned a scheme for raising 600*l.* a-year for their maintenance. *De Witte v. Palin*, 14 L. R., Eq. 251; 26 L. T. 825; 20 W. R. 858. See also *Dacey v. Ward, Hodge*, *In re, post*, col. 215.

**Powers of Court to Sanction Compromise—Married Woman.]**—The court has jurisdiction to sanction on behalf of a married woman a compromise of a suit to make a trustee liable for a breach of trust in relation to a fund in which she has a reversionary interest. *Wall v. Rogers*, *Wall v. Ogle*, 9 L. R., Eq. 58; 39 L. J., Ch. 204, 381; 21 L. T. 654.

**Right to Remuneration.]**—A trustee acting as solicitor in the trust matters is merely entitled to costs out of pocket. The rule is not inflexible; and compensation may, in special cases, be made to him, under the authority of the court, by a fixed allowance, but not by allowing him to make the usual professional charges. *Bainbrigge v. Blair*, 8 Beav. 588; 9 Jur. 765.

Trustees can only be allowed costs out of pocket for professional business transacted by a firm, one of whom is a trustee, though the business is done by one of the partners who is not a trustee. *Christophers v. White*, 10 Beav. 523.

A. assigned to B. timber and stock in trade, upon trust to sell and apply the money arising from the sale in paying the expenses of preparing for, making, and completing such sale or sales, "including the usual auctioneer's commission, and otherwise incidental to the aforesaid trusts." B. was auctioneer, and had been employed as such by A. :—Held, that the words appeared to have been inserted to provide for B. being employed in the sale, and that B. was entitled to charge his commission. *Douglas v. Archbutt*, 2 De G. & J. 148; 27 L. J., Ch. 271; 4 Jur., N. S. 315.

A trustee has no right to exact or charge any remuneration or bonus in respect of great advantages accrued to the cestui que trust from services incident to the performance of the duties imposed by the deed or trust. *Barrett v. Hartley*, 2 L. R., Eq. 789; 12 Jur., N. S. 426; 14 L. T. 474.

**Discretionary Powers—Generally.]**—By a will a sum was given to two trustees on trust to pay the income to C. for his life, with a gift over of the principal on his death; but the trustees had a discretionary power to purchase with the principal an irredeemable annuity for the life of C. for his benefit. The trustees did not purchase an annuity, but one of them paid to C. during his life, from time to time, various small sums, amounting in the aggregate to more than the total income, but less than the principal :—Held, that this was a proper exercise of the discretionary power. *Mossena v. Carr*, 9 L. R., Eq. 260; 39 L. J., Ch. 216; 22 L. T. 3; 18 W. R. 415.

A power in a settlement to withdraw funds and lay them out in the purchase of a trade for the benefit of the husband and wife may be exercised after the death of one of them for the benefit of the survivor alone. *Dooley v. Arnold*, 18 W. R. 540.

In exercising it the trustees ought to see that a purchase is bona fide made, but they need not inquire into the value of the property or expediency of the purchase. *Id.*

A father gave his property to trustees on trust during the life of his son to pay, apply, and dispose of the annual produce of a portion of it for the maintenance and support of his son and his present or any future wife, and the maintenance, education, and support of their children, or any or either of them his son and his wife and children, in such manner and such proportions as the trustees should in their discretion think fit and proper, without being answerable or accountable to any person for the way in which they should apply the same; and, after the death of his son, to pay and apply the annual proceeds in like manner unto and for the benefit of any widow for life, and any children until they should attain twenty-one or marry, and subject to those trusts in trust for the children. The son died in 1849, leaving a wife and six children, the youngest of whom attained twenty-one in 1870. In 1851 the widow married again. The settlement made on the marriage did not comprise the above annual proceeds, and the trustees continued to pay them to the wife as part of her separate estate and on her separate receipt. The second husband, who was living apart from his wife, claimed to be entitled to the income during her life :—Held, that the trustees had a discretion to pay the wife the income for her separate use. *Austin v. Austin*, *Austin v. Boyce*, 4 Ch. D. 233; 46 L. J., Ch. 92; 36 L. T. 96; 25 W. R. 346.

A testator devised his real and personal estate to trustees upon trust, that a piece of land, part of his real estate, might be absolutely sold as soon as conveniently might be after his death, in such mode as his trustees should decide upon, but in case it should so happen that at that time the complying with his will in that particular would be a sacrifice of property, then it was his will that the piece of land should not be disposed of until such time as his trustees should judge most beneficial for his estate; and when all his children attained the age of twenty-one, then he devised his real and personal estate to his children equally as tenants in common. All the children attained the age of twenty-one. The trustees did not sell the piece of land :—Held, that the trustees had a discretionary power and not a trust for sale, and that there was no constructive conversion of the piece of land; and that, consequently, the heir-at-law and not the next of kin of a deceased child was entitled to the share of such child. *Glover v. Heelin*, 32 L. T. 534; 23 W. R. 677.

When a residue comprising leaseholds, freeholds and other property is devised in strict settlement, and a direction is given to the trustees to sell so much and such part as, in their sole discretion, they may think necessary for the purpose of paying all the testator's debts, a presumption is raised against the conversion of such parts as the trustees may not think necessary to sell for the purpose mentioned, and the court will not interfere with the discretion of the trustees. *North-Western Railway Company, In re*, 19 W. R. 220.

**— Jurisdiction of Court to Interfere with Discretion of Trustees.]**—Where absolute discretion has been given to trustees as to the exercise of a power, the court will not compel them

to exercise it, but if they propose to exercise it, the court will see that they do not exercise it improperly or unreasonably. Where the power is coupled with a trust or duty the court will enforce the proper and timely exercise of the power, but will not interfere with the discretion of the trustees as to the particular time or manner of their bona fide exercise of it. *Tempest v. Camoys (Lord)* (No. 2), 21 Ch. D. 571; 51 L. J., Ch. 785; 48 L. T. 13; 31 W. R. 326—C. A.

Where in a marriage settlement the trustees had power to apply the income of the settled fund for the benefit of the husband and wife and their children as they should "in their uncontrolled and irresponsible discretion think proper," the court, while expressing an opinion that the trustees were not acting judiciously, declined to interfere with their discretion, there being no proof of mala fides. *Tabor v. Brooks*, 10 Ch. D. 273; 48 L. J., Ch. 130; 39 L. T. 528.

A complete miscarriage in the exercise of a discretionary power on the part of trustees puts the subject-matter of the trust just as much under the cognizance of the court as if such discretion had been fraudulently exercised. *Feltham v. Turner*, 23 L. T. 345.

Where there is an express direction to accumulate trust property, and the accumulation is not made, the trustees are liable to account upon the footing of yearly or half-yearly rests. *Ib.*

The court will control the discretion reposed in trustees by the provisions of a will when such discretion is dishonestly or improperly exercised. *Dacey v. Ward, Hodge, In re*, 7 Ch. D. 754; 47 L. J., Ch. 335; 26 W. R. 390.

Where, by will of a testator, the amount of income to be applied for maintenance of infant children is left to the discretion of trustees, but in the opinion of the court that discretion is not properly exercised, the court will in a proper suit control that discretion, and order the whole of the income to be allowed for maintenance, if, in the opinion of the court, having regard to all the circumstances of the case, that course will be most for the benefit of the infants. *Ib.*

After a decree in a suit for administration of trust funds the court will not without reason control a discretionary power given to the trustees by the instrument creating the trust. *Brophy v. Bellamy*, 8 L. R., Ch. 798; 43 L. J., Ch. 183; 29 L. T. 380.

— **Powers of Leasing.**—A testator gave to his trustees a special power of leasing at their absolute discretion; which formed part of a special scheme of management of his mansion house and estate for a limited period:—Held, in a suit for the execution of the trusts of the will, that the court would compel the trustees to exercise the power of leasing. *Tempest v. Camoys (Lord)* (No. 1), 21 Ch. D. 576, n.

— **When Trustees differ.**—Under a settlement discretionary power over a fund of 500*l.* a year was given to two trustees upon trust, to apply it to the maintenance of an infant, or else in their discretion to accumulate it, and if the trustees did not apply the fund to either of these objects it was to be paid to Mrs. W. They both agreed the fund was not required for maintenance, but differed in the question of accumulation:—Held, that as the maintenance was amply provided for, and the court in the exer-

cise of its discretion on the point, when the trustees differed, thought the accumulation unnecessary, Mrs. W. was entitled to the fund until further order. *Windham v. Cooper*, 24 L. T. 793.

A testator gave his trustees a power, to be exercised at their absolute discretion, of selling real estates, with a declaration that the proceeds should be applied, at the like discretion, in the purchase of other real estates. He also gave them power at their absolute discretion to raise money by mortgage for the purchase of real estates. A suit having been instituted for the execution of the trusts of the will, and a sum of money, the proceeds of the sale of real estate, having been paid into court, one of the trustees proposed to purchase a large estate and to apply the fund in court in part-payment of the purchase-money, and to raise the remainder of the purchase-money by mortgage of the purchased estate. The other trustee refused to concur in the purchase:—Held, that the court could not control the dissentient trustee in the exercise of his discretion in refusing to make the purchase, or in refusing to exercise his power of raising money by mortgage for the proposed purpose. *Ib.*

— **In Administering Estate.**—*See ante*, col. 203.

— **When not exercised.**—A husband gave his property to trustees for his wife for life, and at her death he directed his trustees to pay 1,000*l.* equally between and among such ten of the children and grandchildren and other descendants of W. B. and H. B., as his trustees should, in their uncontrolled discretion, after inquiry, judge most to require the benefit of such a bequest. The trustees died without making a selection. There were no descendants of W. B., and at the death of the testator's widow there were only six descendants of H. B. living:—Held, that the sum was divisible amongst them. *Carthew v. Enraght*, 26 L. T. 834; 20 W. R. 743.

— **Abandoning.**—A trustee having a discretionary power as to the application of a trust fund, does not necessarily abandon it by paying the trust fund into court. *Landon, In re*, 40 L. J., Ch. 370.

— **Termination of.**—A discretionary power of sale held not to have been put an end to during the life of the tenant for life by the fact that all the reversioners had acquired vested interests in their shares. *Biggs v. Peacock*, 20 Ch. D. 200; 51 L. J., Ch. 555; 46 L. T. 582; 30 W. R. 606. Affirmed, 22 Ch. D. 284; 52 L. J., Ch. 1; 47 L. T. 341; 31 W. R. 148—C. A.

— **Under Advice of Court—Payment of Money to Woman past Child-bearing.**—A woman aged fifty-two, who had been a widow for twenty-four years, was absolutely entitled in default of children to a fund in the hands of trustees:—Held, on petition for advice, that the trustees were justified in paying it over to her. *Taylor's Settlement Trusts, In re*, 43 L. T. 795; 29 W. R. 350.

— **Power of Conversion—Right of Tenant for Life before Conversion.**—A discretionary power to convert, if and when the trustees shall think

fit, entitles the tenant for life to the enjoyment of the leasehold property in specie in the meantime. Where a full discretion is by the will given to the trustees, the rule in *Howe v. Earl of Dartmouth* (7 Ves. 137) is not applicable, and the court will not interfere. *Leonard, In re, Theobald v. King*, 43 L. T. 664; 29 W. R. 234.

## 2. DEALINGS AND TRANSACTIONS WITH CESTUI QUE TRUST.

**General Rules.**—A trustee is bound not to do anything which can place him in a position inconsistent with the interests of the trust, or which can have a tendency to interfere with his duty in discharging it. Neither the trustee nor his representative can be allowed to retain an advantage acquired in violation of this rule. *Hamilton v. Wright*, 9 C. & F. 111.

A person who has accepted property as a trustee, and held it as such, is not at liberty to dispute the title of his cestui que trust, though that title may be doubtful. *Neligan v. Roche*, 7 Ir. R., Eq. 332.

If a trustee has a power or a trust to sell property, he must bona fide have some one to deal with in the sale of it. *Lewis v. Hillman*, 3 H. L. Cas. 607.

If an attorney or an agent can shew he is entitled to purchase property, notwithstanding his character of attorney or agent, yet if, instead of openly purchasing it, he purchases it in the name of a third person, as his trustee or agent, without disclosing the fact, such purchase is void. *Ib.*

**Conflicting Interests — Benefits acquired by Trustees transferred to Trust Estate.**—A trustee will not be permitted to place himself in a position in which his personal interests will conflict with those of the trust; and if he does place himself in such a position, and acquires benefits from so doing, those benefits will be transferred to the trust estate. *Bennett v. Gaslight and Coke Company*, 52 L. J., Ch. 98; 48 L. T. 156.

On the insolvency of a person who had a lucrative agency agreement with a gas company for the sale by him, at a commission, of their sulphate of ammonia, the company renewed the agency agreement for a limited period to two of the trustees of the insolvent's estate appointed by a creditors' trust deed for the benefit of the estate. Before the expiration of that agreement and the winding-up of the trust, one of those two trustees obtained for his firm from the company a fresh agency agreement, to commence from the expiration of that agreement, and to be on less lucrative, though still beneficial, terms:—Held, that the trustee was not at liberty, by obtaining a fresh agreement for the benefit of his own firm, to render it contrary to his own interest to press for a renewal of the old agreement, or a grant of a new one, for the benefit of the trust estate, and that the interest of the trustee under the fresh agreement must be transferred to the trust estate. *Hamilton v. Wright* (9 Cl. & F. 111) followed. *Ib.*

It is a rule of universal application that no trustee shall be allowed to enter into engagements in which he has or can have a personal interest conflicting, or which may possibly conflict, with the interests of those whom he is bound by fiduciary duty to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfair-

ness of the transaction; for it is enough that the parties interested object. *Aberdeen Railway Company v. Blaikie*, 1 Macq. H. L. Cas. 461; 2 Eq. R. 1281.

It may be that the terms on which a trustee has attempted to deal with the trust estate are as good as could have been obtained from any other quarter, they may even be better, but so inflexible is the rule, that no inquiry into that matter is permitted. *Ib.*

It makes no difference whether the contract relates to real estate, or personalty, or mercantile transactions; the disability arising, not from the subject-matter of the contract, but from the fiduciary character of the contracting party. *Ib.*

The law of Scotland and the law of England are the same upon these points, both coming from the Roman law itself, bottomed in the plainest maxims of good sense and equity. *Ib.*

The rules which govern fiduciary relations are equitable rules, unknown to the courts of common law. Consequently, in a case properly determinable by these equitable rules, the decision of a court of common law, when opposed to them, must be disregarded. *Ib.*

**Legal Title.**—A cestui que trust of an annuity, secured by a term in an estate, filed a bill against the trustee of the term and the purchaser for value of the estate, praying that the trusts of the term might be administered. The purchaser, who was in possession of the estate, had no notice of the term, or of any interest of the cestui que trust in the estate, and denied the existence of any term in the trustee:—Held, that until the trustee had established his right to the term at law, the cestui que trust could have no such relief as prayed in equity. *Clemow v. Beach*, 6 L. R., Ch. 147; 40 L. J., Ch. 44; 19 W. R. 53.

The tendency of modern legislation being to prevent unnecessary litigation, and to enable the tribunal which has been first applied to for redress to dispose of the case when possible, courts of equity may now determine legal rights where equitable relief is consequent upon, or ancillary to, their establishment: and in such instances (unless the balance of convenience is otherwise) a plaintiff having a reasonably clear legal title need not first establish his right by an action. *Mulville v. Fallon*, 6 Ir. R., Eq. 458.

**As to Profits made by Trustees.**—It is an established rule that a solicitor shall not, in any way whatever, in respect of any transactions in the relation between himself and his client, make gain to himself at the expense of his client, beyond the amount of his just and fair professional remuneration. *Tyrrell v. Bank of London*, 10 H. L. Cas. 26; 31 L. J., Ch. 369; 8 Jur., N. S. 849.

A solicitor had a private arrangement with R., by which he was to receive from R. a share in property belonging to R., and to share the profit to be obtained from the sale of that property. In his character of solicitor, he acted for clients (a banking company) in the purchase of the larger portion of that property, never communicating to his clients the fact of his having an interest in it:—Held, that he was to be treated as a trustee for his clients in respect of his share of so much of the property as they had actually purchased. *Ib.*

And having made a large profit on the sale, he

was ordered to pay back the amount of this profit with the full amount of interest given in cases of a breach of trust, namely, five per cent. *Ib.*

Nothing can be better settled, or more in conformity with the dictates of justice, than the rule, that persons standing in the situation of trustees or of agents must account to their principals or cestuis que trustent for all the benefits which they themselves obtain by virtue of that character or relation. *Williams v. Stevens*, 1 L. R., P. C. 352; 36 L. J., P. C. 21; 12 Jur., N. S. 952; 15 W. R. 409; 4 Moore, P. C. C., N. S. 235.

**Purchasing from Cestui que Trust.**—When a trustee purchases of his cestui que trust, the onus of proving the fairness of the transaction is not shifted by the fact that the vendor is a co-trustee. *Gray v. Warner*, 16 L. R., Eq. 577; 42 L. J., Ch. 556; 28 L. T. 835; 21 W. R. 808.

Trustees of the marriage settlement of H.'s wife, purchased at his instigation real estate of which he was sole trustee for sale. He was employed as solicitor in the purchase, and advanced some of the purchase-money. H.'s cestuis que trustent disputed the sale:—Held, that the sale was not impeachable. *Hickley v. Hickley*, 2 Ch. D. 190; 45 L. J., Ch. 401; 34 L. T. 441; 24 W. R. 604.

There is no rule that a trustee to sell cannot be the purchaser; but however fair the transaction, it must be subject to an option in the cestui que trust, if he comes in a reasonable time, to have a resale, unless the trustee, to prevent that, purchases under an application to the court. *Campbell v. Walker*, 5 Ves. 678.

To set aside a purchase by a trustee of the trust property, it is not necessary to shew that he has made an advantage. *James, Ex parte*, 8 Ves. 343.

The principle against purchases by trustees of the trust property is most strictly applicable to assignees in bankruptcy and their agents. *Ib.*

The employment of counsel as confidential legal adviser disables him from purchasing for his own benefit charges on his client's estates, without his permission; and although the confidential employment ceases, the disability continues as long as the reasons on which it is founded continue to operate. *Carter v. Palmer*, 8 C. & F. 657.

The rule that a trustee cannot purchase from his cestui que trust, does not extend to a purchase by a mortgagee from his mortgagor. *Knight v. Majoribanks*, 2 Mac. & G. 10; 2 Hall & T. 308.

**Accepting Cestui que Trust as Tenant.**—The doctrine that a cestui que trust who is in possession with the consent, or even the acquiescence of the trustee, must be regarded as his tenant at will, applies only to the case where the cestui que trust is the actual occupant. *Melling v. Leak*, 16 C. B. 652; 24 L. J., C. P. 187; 1 Jur., N. S. 759.

If he is merely allowed to receive the rents, or otherwise deal with the estate in the hands of the occupying tenant, he stands in the relation of an agent or a bailiff of the trustee. *Ib.*

If, therefore, the actual occupier is, under such circumstances, permitted to occupy for more than twenty years without paying rent or acknowledging title, the trustee is barred by 3 & 4 Will. 4, c. 27. *Ib.*

Trustees shall not recover possession from, or

dispute it with, their cestui que trust. *Armstrong v. Paise*, 3 Burr. 1898.

**Right of Cestui que Trust to Intervene on Garnishee Summons.**—A garnishee summons having been issued to attach certain moneys due to the judgment debtor on a judgment, the judgment creditor received notice from a third person that she claimed the said moneys as trust moneys recovered for her benefit by the judgment debtor as her trustee. On the hearing of the summons no suggestion was made by the garnishee under Ord. XLV. r. 6, that the moneys sought to be attached belonged to some third person, and the master refused to hear a solicitor on behalf of the claimant, on the ground that no such suggestion, as aforesaid, having been made he had no power under Ord. XLV. rr. 6, 7, to hear him, and made the order absolute:—Held, that where in garnishee proceedings circumstances are brought to the knowledge of the master which afford reasonable ground for supposing that the money sought to be attached is trust money, the master should exercise an equitable jurisdiction and withhold the order absolute, and order the money to be paid into court to abide the event of an inquiry. *Roberts v. Death*, 8 Q. B. D. 319; 51 L. J., Q. B. 15; 46 L. T. 246; 30 W. R. 76—C. A.

### III. LIABILITY OF TRUSTEES.

#### 1. GENERAL.

**Breach of Trust—What amounts to.**—The manager of a benefit building society, established under 6 & 7 Will. 4, c. 32, deposited, in pursuance of a resolution passed by the directors, but contrary to the provisions of the act and the rules of the society, money of the society with a finance company of which he was also manager. The company gave a cheque to the manager for the repayment of the money to the building society, but he did not pay over the money to the society:—Held, that the money was trust money improperly deposited with the finance company, that the giving the cheque to the manager was no discharge to the company, nor repayment to the building society, and that, therefore, the trust money being still in the hands of the finance company, a suit would lie on behalf of the real owners to recover it, and that without making the directors of the building society parties to it. *Hardy v. Metropolitan Land and Finance Company*, 7 L. R., Ch. 427; 41 L. J., Ch. 257; 26 L. T. 407; 20 W. R. 425.

In 1828 two trustees executed a marriage settlement, which recited that a sum of money (for which they also signed and indorsed receipt) had been paid to them as such trustees. The trustees had never in fact received the money, and by their neglect to do so it was ultimately lost. The trustees died, having left all their property upon trust for the payment of their debts:—Held, that a breach of trust had been committed, for which the estates of the deceased trustees were liable. *Westmoreland v. Holland*, 23 L. T. 797; 19 W. R. 302.

**Lost Deed.**—Trustees having power to sell under such special or other conditions or stipulations as they should think fit, sold by auction with a condition limiting the title to commence in 1858 (fourteen years previously).

The next convenient root of title was a deed of 1819, from which a good title could be deduced; but the trustees could not find this deed, and had only recitals of its contents. There was also a condition that all recitals and statements in the deeds and particulars should be accepted as conclusive evidence:—Held, that the sale under such conditions was a breach of trust, and an injunction was granted at the suit of a cestui que trust to restrain completion. *Dance v. Goldingham*, 8 L. R., Ch. 902; 42 L. J., Ch. 777; 29 L. T. 166; 21 W. R. 761.

The bill was filed in the name of an infant having a very small interest:—Held, that the court could not look into the motives of the next friend. *Ib.*

Such a suit can be maintained by one cestui que trust without making the others parties. *Ib.*

—Of Trustee having a Charge on Trust Estate.]—See *Wilkes, Ex parte, Lewer, In re, ante*, col. 201.

—Conditions—When Depreciatory—Sale by Trustees.]—A testator devised real estate to trustees upon trust at their discretion, to sell the same and invest and deal with the proceeds in manner mentioned in his will. The real estate was put up for sale in lots by public auction in November, 1882, and F. was the highest bidder and declared to be the purchaser of part. The sale was made subject to certain conditions of sale and “general conditions.” The conditions of sale provided that the abstract of title to the property purchased by F. should commence with the conveyance to the testator, dated the 2nd of October, 1872, and that every recital or statement in any abstracted document should be deemed conclusive evidence of the fact or matter recited or stated therein, or to be assumed or implied therefrom. F. refused to complete his purchase, and the trustees commenced an action for specific performance:—Held, that the conditions of sale were depreciatory, and rendered the sale liable to be impeached by the cestui que trust, and that the plaintiffs were, therefore, not entitled to a decree for specific performance. *Dance v. Goldingham, supra*, followed. *Dunn v. Flood*, 49 L. T. 670; 32 W. R. 197.

Liability of Tenant for Life for Loss of Trust Funds—Satisfaction.]—By a marriage settlement of 1832, real and personal estate of H., the intended wife, was conveyed to trustees in trust for R., the intended husband, for life, and after the death of the survivor of R. and H., in trust for the children of the marriage, as R. and H. or the survivor should appoint, and in default of appointment for the children equally. The trustees allowed R. to obtain possession of the trust fund, which he mixed with moneys of his own, and in 1861 one of the trustees commenced a suit to compel him to replace the fund. By arrangement of the trustees with R., he and H., by deed of the 25th September, 1861, irrevocably appointed the fund equally among the children, four of whom were of age, and one (the plaintiff) a minor. On the following day the four adult children, and two years afterwards the plaintiff, when of age, executed a deed releasing the trustees from the trusts of the settlement. The children executed the release by the direction of their father, without any professional advice or

assistance, and in ignorance of its contents or effect, and of their rights under the settlement. R. from time to time paid sums of money for the plaintiff; he purchased for the plaintiff a commission in the army, paid for his outfit, &c., made him an adequate yearly allowance, and paid a large sum for his promotion. No one of the sums so advanced was equal in amount to the plaintiff's share of the trust fund, nor was there any evidence that it was stated at the time of the advances, or understood between the plaintiff and R., that they were made out of the trust fund in R.'s hands:—Held, 1st, that the release should be set aside; 2nd, that R.'s position was that of a debtor to his five children for their respective shares of the trust fund; 3rd, that the sums advanced being respectively less in amount than the plaintiff's share was not a satisfaction of it, pro tanto, and that R. was not entitled to credit for them. *Reade v. Reade*, 9 L. R., Ir. 409—C. A.

#### Liability for Employing Incompetent Solicitor.]

—Trustees are bound to employ competent solicitors and agents; and therefore, where trustees lent trust funds upon mortgage, and their solicitor accepted without inquiry an abstract and a valuation made for the purpose of a previous mortgage, and it afterwards turned out that the solicitor for the mortgagor had concealed the fact that since the date of the mortgage and valuation two other mortgages had been effected, and loss resulted to the trust estate in consequence:—Held, that the trustees were liable to make good the loss to their cestuis que trustent. *Hopgood v. Parkin*, 11 L. R., Eq. 74; 22 L. T. 772; 18 W. R. 908.

Accepting New Shares.]—A testator had, at the time of his death, one hundred shares in a bank with unlimited liability. By his will he directed his trustees and executors to convert his personal estate at their sole discretion, and at such time or times as they should think fit, and to invest the proceeds in shares in any public company incorporated by act of parliament and paying a dividend. The shares, which were very profitable, were retained by the sole trustee, who subsequently accepted twenty-five additional new shares allotted in respect of the old ones. The trustee then retired, and appointed two new trustees. Ultimately the bank stopped payment:—Held, that the original trustee had not committed a breach of trust in retaining the old shares, but had done so in accepting the new ones, and was liable to indemnify the testator's estate for losses incurred thereby. *Edwards v. Edmunds*, 34 L. T. 522.

Liability of Trustee's Estate.]—In a suit to render the estate of a deceased trustee of a will liable for certain breaches of trust, a decree was made declaring the liability of the estate to make good what should be found due in respect of such breaches of trust, and directing accounts and inquiries. Before the chief clerk had made his certificate, but it having appeared in the course of taking the accounts and inquiries that the estate was liable for a considerable amount which the personal estate was insufficient to satisfy, the cestuis que trustent applied by petition, under 15 & 16 Vict. c. 86, s. 56, for the sale of certain real estate belonging to the deceased trustee, a mortgage on which had been redeemed

by the existing trustee of the will:—Held, that the court had jurisdiction to order the sale, and that it was in accordance with the practice of the court in such a case, when once it had been ascertained that the real estate would have to be resorted to, to make an order for the sale of the real estate without waiting for further consideration. *Bell v. Turner*, 2 Ch. D. 409; 45 L. J., Ch. 681; 24 W. R. 451.

A trustee and executor, who took a life interest in his testator's residuary real and personal estate, misappropriated and wasted portions of the estates specifically devised and bequeathed, and subsequently became bankrupt:—Held, that his estate in the residuary realty being legal could not be applied in making good his breaches of trust. *For v. Buckley*, 3 Ch. D. 508; 25 W. R. 170—C. A.

**Assigning to Single Trustee.]**—By a marriage settlement the husband assigned a policy of assurance on his life to the two trustees of the settlement, and covenanted to pay the premiums. One trustee disclaimed, and the other, by assigning the policy to a single new trustee, enabled the husband to mortgage and dispose of the policy and a bonus thereon:—Held, that such breach of trust being an act of commission and not of omission only, the trustee so assigning to the new trustee was liable to pay to the trust estate the money actually received for the policy. *Kingdon v. Castleman*, 46 L. J., Ch. 448; 36 L. T. 141; 25 W. R. 345.

**Withholding Trust Money.]**—A trustee who, on untenable grounds, withholds trust money from his cestui que trust may commit what in equity may be considered a fraud, without being chargeable with personal fraud. *Thompson v. Eastwood*, 2 App. Cas. 215.

A legacy was given on an express trust in 1807; it was not paid to the original legatee. He became insolvent, released the legacy, and died. His only child came of age in 1849. Litigation on matters connected with the legacy, but not upon a direct claim to it, was going on in 1865. A. took an assignment of the legacy, and also became the administrator of the original legatee's estate, and the assignee under his insolvency; in 1872 he filed a bill to enforce payment of the legacy with interest. He was held entitled to the assistance of a court of equity in respect of it. *Id.*

**— For Payment to Others.]**—Under a settlement a sum of 10,000*l.* secured by mortgage, was vested in trustees for the wife of S. for her life, and after her death for S. for his life, and subject as aforesaid, for such persons as the wife should by deed or will appoint, and in default of appointment for S. The wife made a will, by which she directed that her husband should enjoy the income of the fund during his life, subject to payment of two annuities; and she directed certain pecuniary legacies to be paid, after his death, out of one moiety of the fund, and she gave the other moiety of the fund and the residue of her property to her husband, whom she appointed executor. The trustees of the settlement paid over the whole trust fund to the husband; and part of the 5,000*l.* applicable to the payment of the pecuniary legacies was lost by him:—Held, that the payment to him was proper, and that the trustees were not

answerable for the loss. *Hayes v. Oatley*, 14 L. R., Eq. 1; 41 L. J., Ch. 510; 26 L. T. 26.

**Abstraction of Trust Funds.]**—A fraudulent abstraction of trust property by the trustee, and a fraudulent receipt and appropriation of it by another person for his own personal benefit, place the receiver in the same situation as the trustee from whom he received it, and he becomes subject in a court of equity to the same rights and remedies as may be enforced by the parties beneficially entitled against the fraudulent trustee himself; and when it is said that the person who receives under such circumstances is converted by the court into a trustee, the expression is used for the purpose of describing the nature and extent of the remedy against him, and denotes that the parties entitled beneficially have the same rights and remedies against him as they would be entitled to against an express trustee who had fraudulently committed a breach of trust. *Rolfe v. Gregory*, 4 De G., J. & S. 576.

But the relief against the receiver in such cases is founded on fraud and not constructive trust, and therefore the right of the party defrauded is not affected by lapse of time, or, generally speaking, by anything done or omitted to be done so long as he remains without any fault of his own in ignorance of the fraud that has been committed. *Id.*

**Loss of Shares by Negligence.]**—Certain gas shares were settled upon trust for a woman for life, then for her husband for life, and then for their children. New shares were allotted in respect of the original shares, and the husband, without the interference of the trustee, obtained possession of the old and new shares, paid calls on the new shares, and disposed of all the shares. He then became bankrupt:—Held, that the trustee was only liable to make good to the estate the value of the shares less the amount paid for calls. *Briggs v. Massey*, 51 L. J., Ch. 447; 46 L. T. 354; 30 W. R. 325—C. A. Reversing 50 L. J., Ch. 747; 45 L. T. 139; 29 W. R. 926.

**Dividends received by Solicitor of Trustee—Interest.]**—An administratrix, who had permitted her solicitor to receive dividends of a fund set apart for an infant next of kin, was ordered to account for the dividends, with interest at the rate of 3*l.* per cent. with half-yearly rests. *Gilroy v. Stevens or Stephen*, 51 L. J., Ch. 834; 46 L. T. 761; 30 W. R. 745.

**Loss of Trust Fund—Employment of Broker—Ordinary Course of Business—Negligence.]**—A trustee is bound to conduct the business of the trust in the same way in which an ordinary prudent man of business conducts his own, and has no further obligation. He may employ brokers and agents in cases in which they are employed in the ordinary course of business. *Speight, In re, Speight v. Gaunt*, 22 Ch. D. 727; 52 L. J., Ch. 503; 48 L. T. 279; 31 W. R. 401—C. A. Affirmed, 9 App. Cas. 1; 53 L. J., Ch. 419.

A trustee, with the consent of his cestui que trust, employed a broker for the investment of 15,000*l.* of the trust funds in corporation stocks. On the day before the next settling day, the broker brought to the trustee a bought-note, and obtained the 15,000*l.* from him, on the statement that the money would have to be paid

next day. The space left in the bought-note for the date of the settling-day was not filled up, and no charge was inserted for commission. The broker never acquired the securities, but appropriated the money to his own purposes, as was discovered about a month afterwards, when he became bankrupt. A few days after the payment, the trustee had inquired of the broker whether the securities were ready, and was told it would take some time to obtain them. On subsequent occasions similar excuses were given. There was evidence that about a fortnight was generally required to get corporation bonds completed when obtained direct, the broker holding in the meantime a banker's receipt for the money. Evidence was given that the form of the bought-note would indicate to brokers, though probably not to others, that the bonds were to be procured from the corporation direct:—Held, that the trustee, having acted in the ordinary course of business, was not liable to make good the loss occasioned by the embezzlement of the trust moneys by the broker. *Bostock v. Floyer* (1 L. R., Eq. 26) explained; *Hopgood v. Parkin* (ante, col. 222) questioned. *Id.*

Whether the trustee would have been justified in paying the money to the broker if he had had notice that the bonds were to be procured direct from the corporation, *quære*. *Id.*

**To Account.**—Though the employment of a trust fund in trade by a firm is technically a breach of trust, yet if the amount of profit attributable to capital alone is not ascertainable, and the trustees acted *bonâ fide* and accounted to the cestui que trust for the value of her share with five per cent. compound interest, the court would not call upon them for an account of the profits, so as to enable her to exercise an option between the profits and the compound interest. *Vyne v. Foster*, 8 L. R., Ch. 309; 42 L. J., Ch. 245; 27 L. T. 774; 21 W. R. 207. Affirmed, 7 L. R., H. L. 318; 44 L. J., Ch. 37; 31 L. T. 177; 23 W. R. 355.

The trustees of a mixed fund of realty and personality laid out 1,600*l.*, part of the personality, upon the erection of a house on the real estate, for the *bonâ fide* purpose of increasing the value of the whole as building land:—Held, that the trustees should not be entirely disallowed the sum so expended, but if the cestui que trust desired it, they should be ordered to take the house themselves at the price of 1,600*l.*, and the value of the site as unbuilt upon. *Id.*

When an annuity was given to A. in trust to apply it at his discretion for the benefit of B. during his life, and for his advancement, maintenance, support, or otherwise for his benefit, without being answerable for any of the moneys so laid out, or the exercise of the discretion so vested in the trustee as to the mode and extent of expending and laying out the same:—Held, that A. could not apply any portion of the annuity for his own benefit, but was bound to account for all sums not shewn to be applied for the advancement, maintenance, support, or benefit of B. *Wainford v. Heyl*, 20 L. R., Eq. 321; 44 L. J., Ch. 567; 33 L. T. 155; 23 W. R. 848.

A trustee, without authority from the cestui que trust, agreed with his agent that the latter should pay him 100*l.* a year from the trust property, and retain the residue (130*l.*) for himself. No fraud was proved by the agent (who denied knowledge of the trust), but no explanation was

given. In a suit for account by a cestui que trust after the trustee's death:—Held, that, notwithstanding the general rule that a trustee's agent is accountable to the trustee only, an inquiry should be had of the circumstances of the agent's appointment and his knowledge of the trusts affecting the property. *Archer v. Lavender*, 9 Ir. R., Eq. 220.

A testator directed his trustees to invest a sufficient sum on government or real securities or railway stock to produce an annuity of 100*l.* a year, and after the death of the annuitant to call in and divide the principal among his brothers then living, or the children of such as should be then dead. The testator left three brothers; and the trustees (of whom the annuitant was one) provided for the annuity in part by appropriating a railway debenture for 1,500*l.*, which bore interest at first at 5*l.* per cent., and afterwards at 4*l.* per cent., and in part by interest paid by one of the brothers upon a loan to him of moneys of the testator. A child of another brother who was dead, having filed a bill, during the annuitant's life, against the surviving trustees, to have a sufficient fund properly invested:—Held, that he was entitled to an inquiry as to what sum should have been invested at the end of a year from the testator's death to meet the annuity, and to a declaration that the trustees were liable to make good the sum so ascertained. *Starkey v. Dyson*, 24 W. R. 37.

**Trust to Accumulate during Minority.—Holding Trust Funds afterwards.—Rate of Interest.**—The trustee of a will held a fund upon trust (after the determination of a previous life interest) to transfer and pay the same to a child when and as he should attain twenty-one, with a proviso that in case the child should be under age at the determination of the life interest the income of the fund or any part thereof should or might be applied for or towards his maintenance, education, and advancement, and the surplus, if any, should accumulate to and become part of the fund. After the child attained twenty-one (the life interest having previously determined), the trustee retained the fund without making any arrangement with the child or explaining to him his rights:—Held, that the trustee must be taken to have continued to hold the fund after the child attained twenty-one, upon the same trusts and with the same obligations to accumulate as before, and that he was liable to account for the fund with compound interest. *Wilson v. Peake* (3 Jur., N. S. 155) distinguished; *Amiss v. Hall* (3 Jur., N. S. 584) observed upon; *Emmet's Estate, In re, Emmet v. Emmet* (No. 2), 17 Ch. D. 142; 50 L. J., Ch. 341; 44 L. T. 172; 29 W. R. 464.

Part of the fund had been invested at 5*l.* per cent. or other rates of interest upon authorized securities, and the rest of it had been either improperly invested or had not been kept separate from the trustee's own moneys:—Held, that as to so much of the fund as had been invested at 5*l.* per cent. or any other rate upon authorized securities, interest must be calculated at the rate actually yielded; that the rest of the fund must be treated as having been in the trustee's hands uninvested, and that under the circumstances he must be charged with interest thereon calculated at 4*l.* per cent. only. *Id.*

**Non-Performance of Unknown Trust.] — A**

trustee was held not liable for the non-performance of a trust of which he was ignorant, but inasmuch as he had been guilty of negligence in not ascertaining the nature of certain deeds in his possession, or giving his cestuis que trustent an opportunity of doing so, the bill against him was dismissed without costs. *Youde v. Cloud*, 18 L. R., Eq. 634; 44 L. J., Ch. 93; 22 W. R. 764.

**Trustee Submitting to Arbitration.**—Trustees, by submitting matters to arbitration, do not make themselves personally liable. *Davies v. Ridge*, 3 Esp. 101.

And an admission by one trustee will not bind his co-trustees; aliter where parties are personally liable. *Ib.*

**Waiver of Breach of Trust by Cestui que Trust.**—A testator died in 1810 in India, having bequeathed his English property to two infants, whom he acknowledged as his natural children; and having appointed his nephew, E., to be their guardian. Part of his property consisted of a bond, dated in 1810, in which he was obligee, the obligor being seised of real estate in Ireland. In 1811, E. obtained possession of the bond from the testator's executor; but he did not register it, nor did he ever take any steps towards realizing the security. In 1821, the elder of the infants attained twenty-one; in 1832 she married; and in 1833, when the bond had become irrevocable, E., for the first time, informed the elder child and her husband of the existence of the bond; and upon finding it was then too late to register it, he handed it to the husband, directing him to see to it. No step was taken until E.'s death in 1870, after which, in 1871, a bill was filed, seeking to make E.'s estate liable as for a breach of trust. At this time the younger infant was dead, and had no legal personal representative; but his son, who was entitled to administer, was made a defendant. Semble, that E. was not at any time liable for any breach of trust. *Sleeman v. Wilson*, 13 L. R., Eq. 36; 25 L. T. 408; 20 W. R. 109.

Held, that the parties, by acquiescing for thirty-eight years, and waiting till E.'s death, had lost their right to make any claim against his estate. *Ib.*

When trustees have committed a breach of trust, in order to discharge themselves they must clearly show that their cestui que trust, on becoming beneficially entitled, adopted the transaction. *Cope v. Clark*, 18 W. R. 279.

**Stale Demand.**—A cestui que trust, who, with knowledge that his trustee has committed a breach of trust, obtains from him a part only of that to which he is entitled, does not thereby waive his right to such further relief as he may be able to obtain unless an intention so to do can be clearly inferred from the surrounding circumstances. In November, 1860, an order was made in a suit for administering the trusts of the will of J. C., to which H. C., a former trustee, was defendant, directing her to pay into court a sum of money in respect of breaches of trust committed in 1843 and 1845, the amount of which had been ascertained by the chief clerk in the suit. H. C. went abroad, and substituted service of the order was made upon her. By the order on further consideration, in 1863, H. C. appearing by counsel, certain sums of money to which she was entitled, and her life interest

under the testator's will, were ordered to be impounded and paid over "to the account of H. C. funds applicable for the repayment of trust funds misappropriated," and an inquiry was directed as to what steps should be taken to obtain restitution of the funds. Certain other orders were made in the suit, but no personal order was made on H. C. for payment of the amount of her defalcation, nor any steps taken against her, although she returned to England in 1870, where she remained till her death in 1880, and her residence was known to the then trustees of the will and some of the cestuis que trustent. On her death the surviving trustee of the will of J. C. brought this action against her executors, claiming the administration of her real and personal estate on behalf of himself and all other the creditors, alleging himself a creditor in respect of the unpaid balance of the sum representing the breach of trust. At the date of the institution of the action several beneficiaries under J. C.'s will were infants:—Held, that the action was not an attempt to enforce a stale demand, and that the cestuis que trustent must not be taken to have elected to abandon their claim against her, and to rest content with impounding her life interest: that there being a debt due from H. C. at her death to the estate of J. C., and the trusts of his will not being completed, the surviving trustee was the proper person to bring the action, and that the cestuis que trustent need not be parties. Although as between the cestui que trust and a stranger the claim of the cestui que trust is barred by lapse of time operating against his trustee, lapse of time is no bar as between cestui que trust and trustee. *Cross, In re, Harston v. Tenison*, 20 Ch. D. 109; 51 L. J., Ch. 645; 45 L. T. 777; 30 W. R. 376—C. A.

**Not Suing for Specialty Debt.**—There is no rule in equity, any more than at law, that the mere non-suing by a specialty creditor for any period within the statutory limit of twenty years is such negligence as deprives him of the right of requiring payment of the specialty debt. S. covenanted with B. for immediate payment of a sum of money in exoneration of B., and in substitution for a similar sum which B. was liable to pay within six months of his death. S. died without having paid, or been called on to pay that sum, leaving property amply sufficient to meet it, but her executor, instead of providing out of her estate funds to meet the liability on her covenant, left her estate, consisting entirely of shares in a bank, which afterwards failed, unconverted. The investment in bank shares was authorized by the will of S.:—Held, that the executors of B. were entitled, after a lapse of eighteen and a half years, to enforce that covenant against the estate of S., and that the executor of S., having committed a devastavit in not converting the shares to provide for payment of the debt, was liable to make good the amount for which his testatrix was so liable under her covenant. *Baker, In re, Collins v. Rhodes, Seaman, In re, Rhodes v. Wish*, 20 Ch. D. 230; 51 L. J., Ch. 315; 45 L. T. 658; 30 W. R. 858—C. A.

**Notice to affect Trustees.**—Funds belonging to M. were, on her marriage in 1834, vested in three trustees (one of whom died in 1840) in trust for her for life for her separate use, with-

out power of anticipation, and after her death for the children of the marriage, and in case there should be none, for such persons, if she should die in her husband's lifetime, as she should appoint. In 1843 the husband and wife executed a deed to secure the payment of moneys due from him, and the wife appointed that in case there should be no child of the marriage, and if she should die in the husband's lifetime, the trustees of the settlement of 1834 should, out of the trust funds, raise sufficient to pay the husband's debt. Notice was given of the deed of 1843 to the two surviving trustees of the settlement. In 1848 the wife and the sole surviving trustee of the settlement, who desired to retire, appointed three new trustees, and assigned to them the trust funds. One of those trustees died, and the two surviving trustees and the survivor of them, at the request of the husband and wife, dealt with some of the trust funds, which ultimately were much diminished. A portion of the funds was invested in the purchase of leasehold premises, which were held upon the trusts of the settlement. The wife died in March, 1870, without having had any child. The husband survived. The survivor of the trustees of 1848 in May, 1870, received a notice from L. of a charge on the leaseholds in his favour, dated the 5th of October, 1864; and in October, 1870, he received a notice of the deed of 1843:—Held, that the surviving trustees of 1848 were not liable to make good the funds which had been lost; that L. was not entitled to priority over the trustees of the deed of 1843; and that the persons claiming under the deed of 1843 were entitled to the funds which remained in part satisfaction for the moneys due to them. *Phipps v. Lovegrove, Prosser v. Phipps*, 16 L. R., Eq. 80; 42 L. J., Ch. 392; 28 L. T. 534; 21 W. R. 590.

Assignees of an equitable interest should, if they desire to be perfectly secured, obtain a distringas on the funds; or have their deed indorsed on the original deed; or obtain a transfer of the funds into court. *Ib.*

**Extension of Rules as to Liability of Persons other than Trustees.]—**A., the surviving trustee of a fund, one moiety of which was settled upon his wife and children, and the other moiety upon the wife and children of B., in exercise of a power in the settlement, appointed B. sole trustee of half the fund, taking an indemnity from him, and retained the other half in his own name. B. sold out and misapplied the moiety of the fund transferred to him, and became bankrupt. A.'s solicitor advised him against the appointment of B. as sole trustee, but prepared the deeds of appointment and of indemnity, and introduced him to a broker for the purpose of selling out some of the stock to pay costs to which it was liable, and the same broker afterwards transferred a moiety of the residue to B. B. employed another solicitor, who warned B.'s wife of the risk attending the proposed transaction, but settled the deed of indemnity on her behalf:—Held, in a suit by B.'s children, seeking to make A. and the two solicitors responsible for the fund which was lost, that, as neither of the solicitors had any knowledge of, nor any reason to suspect, a dishonest design in the transaction, and as the fund had not passed into their hands, the bill must be dismissed against them both with costs. *Barnes v. Addy*,

9 L. R., Ch. 244; 43 L. J., Ch. 513; 30 L. T. 4; 22 W. R. 505.

Although the responsibility of trustees may be extended in equity to persons who are not properly trustees, if they are found either making themselves trustees de son tort, or actively participating in any fraudulent conduct of the trustee, to the injury of the cestui que trust, yet strangers are not to be made constructive trustees, merely because they act as agents of trustees in transactions within their legal power, even though such transactions may be such as the court would not approve of. *Ib.*

**Rate of Interest charged against Trustee.]—**A deceased trustee had invested money on mortgage at 5 per cent. on an insufficient security, and for some years, both before and after his decease, interest was paid at that rate to the cestui que trust; but some years after his decease the payment of interest ceased:—Held, that his estate was chargeable with interest at the rate of 5 per cent. from the time of the last payment. *Price v. Price*, 42 L. T. 626.

When a trustee has employed trust funds for his own benefit, he will be charged as of course with simple interest at 5l. per cent. But compound interest will only be given when the money has been used in trade, and the payment of it by a solicitor into his bank to the general account of his firm is not such an employment of the money in trade as to make him liable to be charged with compound interest. *Burdick v. Garrick*, 5 L. R., Ch. 233; 39 L. J., Ch. 369; 18 W. R. 387.

Interest at 5l. per cent is only exacted in cases of grave misconduct or fraud on the part of a trustee. *Imperial Credit Association v. Coleman*, 6 L. R., H. L. 189; 43 L. J., Ch. 644; 29 L. T. 1; 21 W. R. 696.

**— Employment of Trust Fund in Trade—Profits accrued.]—**The plaintiff was tenant for life under the settlement executed on her marriage, part of the settled property consisting of a sum of 15,500l. This sum was allowed to remain in the hands of the plaintiff's father, who employed it in trade, he covenanting at his death to pay it to the trustees. Upon the death of the father, 10,000l., part of the 15,500l., was allowed to remain in the business, such investment being unauthorized by the settlement. Large profits accrued to the 10,000l., some of which, with the plaintiff's consent, had been paid to her husband:—Held, that the plaintiff was entitled in respect of income to 4 per cent. on the original 10,000l. and upon all accretions of profits retained and employed in the business, and that the rest of the profits must be regarded as capital subject to the trust of the settlement, and must be made good out of the husband's estate, so far as he had received any part thereof. *Hill, In re, Hill v. Hill*, 50 L. J., Ch. 551; 45 L. T. 126.

**For Costs.]—**See post, col. 240.

## 2. FOR ACTS OF CO-TRUSTEE.

**For Breach of Trust.]—**Each of two trustees retained possession of a moiety of bonds held in trust, and which passed by delivery, and one trustee committed a breach of trust:—Held, that the other trustee was liable to make good

the loss sustained. *Lewis v. Nobbs*, 8 Ch. D. 591; 47 L. J., Ch. 662.

**Effect of Indemnity Clause.**—A testator authorized his two trustees and executors, A. and D., to carry on his business, giving them full discretion as to its management, and power to employ collectors of debts and accountants. The will contained an indemnity clause, that each trustee should be answerable only for losses arising from his own default, and that any trustee who should pay over to his co-trustee, or should concur in any act enabling him to receive any moneys for the purposes of the will, should not be obliged to see to the application thereof, nor should such trustee be rendered responsible by an express notice of the actual misapplication of the same moneys. The business was carried on, with the consent of the beneficiaries, by one trustee, A., the testator's son, and an account was opened at the bank, and a letter signed by both executors and trustees, authorizing the bank to honour the signature of the one trustee, viz., A., the son. Under this authority the trustee (A.) drew out, nominally for the business, large sums of money, which he misappropriated to his own purposes:—Held (following *Wilkins v. Hogg*, 3 Giff. 116), that in the absence of proof of gross negligence or personal misconduct on the part of the trustee, D., he was fully protected by the indemnity clause from liability in respect of the loss to the estate occasioned by the defalcations of his co-trustee. *Pass v. Dundas*, 43 L. T. 665; 29 W. R. 332.

A clause in a marriage settlement, "that the trustee should not be chargeable with, or accountable for, any money arising in execution of the trusts, but what the person or persons so to be accountable should actually receive," does not bind the trustees as a covenant, but is a clause of indemnity, to take away that responsibility which each would be subject to for the acts of the others, were it not for this clause; and only leaves each of them accountable for what he actually receives as for a simple contract debt. *Bartlett v. Hodgson*, 1 T. R. 42.

**For Negligence.**—An appointment of new trustees recited that certain stock and shares had been transferred into the names of the new trustees, and that by an indenture of even date a mortgage debt and the premises subject thereto had been assigned and conveyed to the new trustees; the trust property having been sold and the proceeds received by one of the trustees and lost, the court on the hearing decided that the co-trustee, not having inquired what had been done with the proceeds, was liable for all sums actually received by him, jointly with his co-trustee, and which had been lost, and referred it to the chief clerk to find what had been jointly received. The chief clerk by his certificate found that all the trust property had been jointly received:—Held, that the chief clerk had rightly found by his certificate. *Hale v. Adams*, 21 W. R. 400.

When one of two trustees allows the trust fund to be under the sole control of the other, both trustees are liable to make good to the trust estate any money misapplied. *Rodbard v. Cooke*, 36 L. T. 504; 25 W. R. 555.

L. appointed G. C. and I. A. C. executors and trustees of his will. They kept at their bankers' an account relating to the estate, separately

from their own. Cheques were drawn against that account with the knowledge of G. C., but signed by I. A. C. alone. In 1867 a sum of 4,000*l.* was received by I. A. C. on account of the estate, and handed by him to accountants through whose hands all money transactions relating to the trust passed, and paid by them into the bank to the account of the trust estate. Shortly after a sum of 3,645*l.* 2*s.* 7*d.* was drawn out by cheques signed by I. A. C. alone. Of that amount a sum of 628*l.* was applied by I. A. C. to his own use, without the knowledge of G. C. I. A. C. had since died:—Held, that G. C. having allowed the fund to be under the sole control of I. A. C., the estates of I. A. C. and G. C. were jointly and severally liable to make good the loss of the estate. *Ib.*

Accountants employed by trustees, through whose hands the accounts of the trust estate passed, are in the nature of servants, and bound to accept as correct statements made by one or other of the trustees with regard to the intended application of the trust fund, and are not liable for the misapplication of the trust fund by their employers, on the ground of negligence, by not seeing that the fund was applied properly. *Ib.*

Two trustees advanced to a builder money on mortgage of land and houses thereon. The land had belonged to one of the trustees, and part of the money advanced was applied by the builder in payment of the price of the land and of other money due by him to that trustee. The other trustee filed a bill against him, alleging that the security was insufficient, and asking that the security should be realized, and that he should make good any deficiency:—Held, that under such circumstances one trustee had no equity to make the other trustee primarily liable. *Butler v. Butler*, 5 Ch. D. 554; 46 L. J., Ch. 548; 37 L. T. 33. Affirmed, 7 Ch. D. 116; 47 L. J., Ch. 77; 37 L. T. 518; 26 W. R. 85—C. A.

Held, that the court would not direct a sale in the absence of the *cestui que trustent*, and merely to ascertain the deficiency, if any. *Ib.*

### 3. IN RESPECT OF INVESTMENTS.

**In Improper Security.**—A testator by a will dated in August, 1862, bequeathed his shares in a public company and the rest of his estate to his trustees, to convert, "immediately after his death, or so soon thereafter as they might see fit to do so." Part of the estate consisted of thirty-six shares in an unlimited banking company. At his death the shares were at a premium, and considered a good and safe investment. Soon after his death the bank issued new shares, offering them to the original shareholders at par. Nine were offered to the trustees in respect of the testator's shares, and being at a premium were purchased by them, though the trust for investment did not authorize investment in shares. The old and new shares were held together by the trustees until July, 1866, when the bank broke:—Held, that the trustees should not have purchased the new shares, and should have sold the old shares in reasonable time after the testator's death; that reasonable time, in such case, if no cause is shewn for delay, is a year after a testator's death; and that the trustees must replace not only the amount of the calls made upon all the forty-six shares and the purchase-money of the shares purchased, but

also the loss to the estate in respect of the shares having become valueless. *Sculthorpe v. Tipper*, 13 L. R., Eq. 232; 41 L. J., Ch. 266; 26 L. T. 119; 20 W. R. 276.

Trustees having power to invest upon real security invested 1,400*l.*, part of the trust fund, upon the security of a freehold house at Broadstairs, used as an hotel. The evidence of value, upon which they made the investment, was a report made by a London surveyor, who, according to his report, went to Broadstairs, and examined the property, and made some inquiries; he valued the security at 2,700*l.*, including in this sum 800*l.*, as the value of the beer and spirit licence. No other inquiries appeared to have been made. In fact, the house had only recently been opened as an hotel, and did not prove successful. The security turned out to be deficient:—Held, that the security was not a proper security for the investment of trust funds, and that the trustees must be charged with the amount advanced. *Budge v. Gummow*, 7 L. R., Ch. 719; 42 L. J., Ch. 22; 27 L. T. 666; 20 W. R. 1022.

Trustees lent trust moneys on a second mortgage of house property greatly out of repair, and the principal part was lost:—Held, that they were liable as for a breach of trust, notwithstanding an indemnity clause declaring they should not be liable for the insufficiency or deficiency in value of any securities, except through their willful default. *Drosier v. Brereton*, 15 Beav. 221.

A trustee who lodges money in a banker's hands merely on personal security, at the same time that he takes a bond for his own money, is guilty of gross negligence, and liable on the failure of the banker; and it is no excuse that he could not get a good mortgage security. *Anon.*, Loft, 492.

— **Mortgage—Advance on Valuation.**—In May, 1870, F. and G., the trustees of a will, one of whom, F., was an experienced farmer, and the other, G., a solicitor, advanced a sum of 2,400*l.*, part of the trust estate, along with another sum of 2,600*l.* not part of the estate, making together 5,000*l.* at 4 per cent., on the security of a freehold farm, which in 1868 had been sold to the mortgagor, who was farming that and neighbouring land on a peculiar system of husbandry. The trustees had power to advance on contributory mortgages. In 1868 the farm had been valued on behalf of the vendors, of whom G. was one, and also the solicitor, at 6,895*l.* This valuation was communicated to F. at the time of the mortgage; and no other valuation was made. Interest was paid in full, but irregularly, down to November, 1877, since which time the farm, which was situated on clay soil, in a wet situation, had become unsaleable and unlettable, owing to unfavourable seasons, and had yielded no income. The mortgagor became insolvent. Upon claim by the *cestui que trust* against F. and the executors of G. to be declared entitled to payment of the 2,400*l.* and interest since November, 1877:—Held,—notwithstanding that no valuation was used at the date of the mortgage other than the valuation made on behalf of the vendors at the time of the sale to the mortgagor; that G., the trustee, was himself one, and solicitor of the others, of the vendors to the mortgagor; and that the sum advanced was more than two-thirds of the estimated value of the

farm—that the trustees were not liable to make good the deficient security. *Godfrey, In re, Godfrey v. Faulkner*, 23 Ch. D. 483; 52 L. J., Ch. 820; 48 L. T. 853; 32 W. R. 23; 47 J. P. 676.

The test of liability always is, whether or not the trustees have acted as prudent men would have acted in dealing with their own property. The “two-thirds” rule is not enforceable with exact strictness. *Ib.*

**Negligence of Solicitor.**—A trustee is liable for the loss of a trust fund occasioned by his solicitor having neglected to take proper precautions on the occasion of the investment of the fund on mortgage. *Hopgood v. Parkin*, 11 L. R., Eq. 74; 22 L. T. 722; 18 W. R. 908.

**Fraud of Solicitor.**—Upon the occasion of the investment of a trust fund on mortgage, the trustee employed the same solicitor as the mortgagor. Subsequently he had reason to suspect the sufficiency of the security, but took no steps to inquire into the matter. It afterwards turned out that the solicitor had practised a fraud on the trustee, and that the security was insufficient:—Held, that the trustee was liable for the loss occasioned to the trust estate. *Sutton v. Wilders*, 12 L. R., Eq. 373; 41 L. J., Ch. 30; 25 L. T. 292; 19 W. R. 1021.

**Obtaining Opinion of Court as to Investments.**—On a petition (not served on any person) by English and Irish trustees, under 22 & 23 Vict. c. 35, s. 30 (the domicile of the testator and the tenant for life being Irish and English respectively), for the opinion of the court as to the power of the trustees to make certain investments, the court, there having been no application to the Court of Chancery in Ireland, exercised jurisdiction, and did not require the petition to be served on any one. *French, In re*, 15 L. R., Eq. 68.

#### 4. TO ATTACHMENT.

**For Non-Payment of Money.**—A trustee who has received trust money is deemed to have it in his possession until he discharges himself of his trust, and he may be attached, as being within the third exception to s. 4 of the Debtors Act, 1869, for making default in payment of a sum so received, and ordered by a court of equity to be paid by him, notwithstanding that he may have parted with the actual possession of or control over the money prior to the order for payment. *Middleton v. Chichester*, 6 L. R., Ch. 152; 40 L. J., Ch. 237; 24 L. T. 173; 19 W. R. 299, 369.

But interest, due from him in respect of trust money so received, is not money in his possession or under his control, and an attachment will not issue for non-compliance with an order directing payment of such interest. *Ib.*

The court has no discretion to refuse an application for leave to issue a writ of attachment against a person making default in payment of money in a case falling within exception 3 of s. 4 of the Debtors Act, 1869. *Evans v. Bear*, 10 L. R., Ch. 76; 31 L. T. 625; 23 W. R. 67.

A trustee, who had been ordered in a suit to pay into court an amount admitted to be due from him, and mixed with his own moneys, was adjudicated bankrupt:—Held, that although the debt was one from which an order of discharge

would not release him, still, as it was a debt provable under the bankruptcy, he was, pending the bankruptcy proceedings, protected by the Bankruptcy Act, 1869, s. 12, from attachment for disobedience to the order. *Cobham v. Dalton*, 10 L. R., Ch. 655; 44 L. J., Ch. 702; 23 W. R. 865.

A residuary legatee, being entitled to a sum of money which the trustee of the will admitted having received, obtained judgment against the trustee in an action in the Exchequer Division, and levied execution. The execution did not produce sufficient to satisfy the judgment; and the plaintiff applied for an order on the trustee to pay the money within a definite time, intending, on his making default, to attach him under s. 4, sub-s. 3 of the Debtors Act, 1869:—Held, that the order asked for could not be obtained after judgment in a common law division. *Drewitt v. Edwards*, 37 L. T. 622; 26 W. R. 122—C. A.

The 32 & 33 Vict. c. 62, s. 4, extends to an application under 41 Geo. 3, c. 90, to commit for disobedience to a decree of the Irish Court of Chancery. *Ferguson v. Ferguson*, 10 L. R., Ch. 661; 44 L. J., Ch. 615.

But a trustee who has been ordered to pay money which he had neglected to recover is not within the third exception of that section, and cannot be committed for default in paying the money. *Id.*

**Application, how made.]**—Semble, that an order for an attachment against a defendant who is said to be within that exception ought not to be made *ex parte*. *Id.*

**For Non-Transfer of Funds.]**—When a trustee is ordered to transfer a fund of consols admitted to be due from him and subsequently default is made, a writ of attachment will issue. *Digby v. Turner*, 28 L. T. 296; 21 W. R. 471.

**For Non-Execution of Lease.]**—When a person has been directed to execute a lease, but refuses to do so, the court can only enforce such execution by attachment, the Trustee Act, 1850, having omitted to provide for such a case. *Grace v. Baynton*, 25 W. R. 506.

#### IV. FOLLOWING TRUST MONEY.

**When Permissible.]**—Money was advanced to a solicitor by A. for the purpose of being invested on mortgage security. The solicitor wrote that he had invested the money on mortgage to M. on leaseholds in Camden Town, and that A. was receiving interest at the rate of 5 per cent. The solicitor in fact, subsequently to this, advanced large sums on mortgage to M., but no specific mortgage was made in favour of A. The draft, however, of a mortgage for the sum advanced in favour of A. was found unexecuted after the solicitor's death. The solicitor had died insolvent. A. applied that a sum equal to the sum advanced by him should be paid to him out of a large sum in court representing the moneys advanced by the solicitor to M.:—Held, that the solicitor was bound by his representation; that the money was trust money, and that A. ought to be paid in priority to the general creditors. *Middleton v. Pollock, Wetherall, Ex parte*, 4 Ch. D. 49; 46 L. J., Ch. 39; 35 L. T. 608; 25 W. R. 94.

A trustee employed a broker, who had notice of the trust, to sell out consols and invest the proceeds in railway stock. The broker sold the consols for cash, bought railway stock to the same amount for the settling day, and received the price of the consols in a cheque, which he paid in to his account at his bankers'. He stopped payment before the settling day, and went into liquidation. The trustee claimed so much of the broker's balance at his bankers' as was attributable to the price of the consols:—Held, that as the price of the consols was known by the broker to be trust money, it could be followed, and that the claim must therefore be allowed. *Cooke, Ex parte, Strachan, In re*, 4 Ch. D. 123; 46 L. J., Bk. 52; 35 L. T. 649; 25 W. R. 171—C. A.

A solicitor was employed by the trustees for sale of an estate, his duty being to receive the purchase-moneys and pay them in to the trustees' banking account. He received large sums, paid them in to his private account, and died insolvent. His banking account at his death shewed a large credit, principally made up of specific sums which corresponded with receipts by him on account of sales of the trust estate:—Held, that these specific sums could be followed by the trustees, and that there could not be a set-off allowed in respect of sums alleged to have been paid by the solicitor on account of the trust estate. *Birt v. Burt*, 36 L. T. 943.

**Identification.]**—Trust moneys cannot be followed unless clearly identified. Where, therefore, a solicitor, having trust moneys in his hands, paid certain sums, part of such moneys, in to his banking account without distinguishing them as trust moneys, and subsequently filed a liquidation petition:—Held, that the trustee in the liquidation was entitled to the balance of the moneys in the hands of the bank as against the persons claiming to be entitled as trustees of the alleged trust funds under the marriage settlement of the bankrupt. *Hardcastle, Ex parte, Mauson, In re*, 44 L. T. 523; 29 W. R. 615.

W. A., who at the time of his death in 1867 was carrying on the business of a farmer, gave his residuary personal estate to his widow and a co-trustee, upon trust to permit his widow to have the use and enjoyment of his household furniture, and the dividends, interest, and annual income and produce of his other residuary estate for life, and then upon trusts in favour of the testator's two sons. The testator's residuary estate consisted almost entirely of the household furniture and farm stock, and the widow, with the consent of her co-trustee, carried on the business of the farm. She took a new lease of the farm in her own name, and painted her own name upon the carts; but the financial part of the business was carried on through a joint banking account opened in the names of "the executors of the late W. A." In 1879 the widow presented her petition for liquidation. All the property in her possession consisted of the furniture and farm stock bequeathed by the testator, or of stock which had replaced the original stock in the ordinary course of business. Upon being sold it realized a sum of 2,063*l.* 15*s.* 6*d.*, with produce estimated at 250*l.* still to be realized. The testator's residuary account had been passed at 1,917*l.* 7*s.* 6*d.*:—Held, that the farming stock in the hands of the widow was well car-marked as trust property, and that only the life interest of the

widow in the proceeds of the realization passed to the trustees in the liquidation. *Barber, Ex parte, Anslow, In re*, 42 L. T. 411; 28 W. R. 522.

**Deposit—Forfeiture for Non-completion—Payment by Bankrupt in Fraud of Creditors.]—**A bankrupt, having disposed of his goods in fraud of his creditors, opened an account in a bank with the proceeds, and having entered into a contract for the purchase of land in an assumed name, paid a deposit to the defendant, the auctioneer, by a cheque drawn upon the bank. The vendor and the defendant acted *bonâ fide* and without notice of the bankruptcy or of the fraudulent conduct of the bankrupt:—Held, that the bankrupt's trustee was not entitled to recover the deposit from the defendant so as to prevent it from being forfeited to the vendor on the non-completion of the contract. *Collins v. Stimson*, 11 Q. B. D. 142; 52 L. J., Q. B. 440; 48 L. T. 828; 31 W. R. 920; 47 J. P. 439.

**Undisclosed Principal—Principal cannot Recover Money or Goods from Third Persons without a general Set-off between latter and Agent.]—**

The plaintiffs, who were landowners in New Zealand, were in the habit of shipping wheat from New Zealand to England for sale on the London market, taking bills of lading which made the wheat deliverable to themselves in London, and indorsing these bills to M. and T. merchants and factors at Glasgow, with instructions to sell the wheat in London. M. and T. having no house or agency in London were themselves in the habit of indorsing these bills of lading to the defendants, who were corn-factors and brokers in London, for the purpose of their selling there the wheat. When any sales were effected, M. and T. delivered account sales to the plaintiffs in the usual form, deducting a *del credere* commission of 3l. per cent., whilst the terms upon which the defendants were employed by M. and T. were different, being a factorage of 2l. per cent. and not a *del credere* commission. The indorsement of the bills of lading by the plaintiffs to M. and T. and by M. and T. to the defendants, was in each case only for the purpose of selling the wheat and without the intention of passing any property in it. The plaintiffs knew that the sales effected for them by M. and T. in London were made by brokers employed by M. and T., but the plaintiffs were in no way parties to the particular contracts of sale nor were their names disclosed upon them. The defendants effected sales of certain cargoes of wheat which had been so consigned for sale by the plaintiffs in the above mode, and paid the proceeds into their own account at their bankers', and from time to time made remittances to M. and T. on account of them; but upon reference to the defendants' books of account the proceeds of the particular cargoes could be separated and identified. M. and T. carried on a business at Leith as well as at Glasgow, and they employed the defendants in respect of both, and when they stopped payment, which they did, they were indebted to the defendants on the Leith account but not on the Glasgow account. The plaintiffs having brought an action against the defendants for the net balance of the proceeds of the said cargoes of wheat after deducting the remittances made to M. and T. in respect thereof, but without

giving credit due to them from M. and T. on other transactions, the jury found at the trial, first, that the plaintiffs did not, through their agents, employ the defendants to sell and account for the proceeds of the wheat; secondly, that the defendants knew, or had reason to believe, that M. and T. were acting in the sales as agents for a third person:—Held, that the plaintiffs were not entitled to recover, as there was no privity of contract between them and the defendants, and the defendants did not stand in any fiduciary character towards the plaintiffs so as to entitle the latter to follow the proceeds of their property in the defendants' hands, and as whatever right the plaintiffs might have had as owners to claim the wheat before it had been sold, they had no right, after such sale, to the proceeds, without giving credit for the sum due to the defendants from M. and T. on their general account. *New Zealand and Australian Land Company v. Watson*, 7 Q. B. D. 374; 50 L. J., Q. B. 433; 44 L. T. 675; 29 W. R. 694—C. A.

**Rule in Clayton's Case as applied to Trust Money.]—**A solicitor died insolvent; he had, without authority, sold a client's property, and mixed the proceeds with his own money at his bank, and had drawn out part for his own use:—Held, that the client could not follow the money, the rule in *Clayton's case* not applying between *cestui que trust* and trustee. *Hallett, In re, Knatchbull v. Hallett, Cotterill v. Hallett*, 13 Ch. D. 696; 49 L. J., Ch. 415; 42 L. T. 421.

**Transfer to Trustee's Private Account—Liability of Bank.]—**Where a sum of money was standing in the books of a banking company to the credit of "the account of the trustees of the late W. H.," and the bank, knowing that the trustees (each of whom had an overdrawn account at the bank) were not beneficially entitled, allowed them to transfer sums at different times from the trust account to their respective private accounts:—Held that the *cestui que trust* were entitled to recover from the bank the sums so allowed to be transferred, and that it was immaterial whether or not the bank knew what were the circumstances of the trust, and also whether or not the bank profited by the transfer from the one account to the other, so long as they were aware that the money dealt with was trust money. *Foxton v. Manchester and Liverpool District Banking Company*, 44 L. T. 406.

## V. ACTIONS, BY AND AGAINST TRUSTEES.

### 1. GENERALLY.

**Service out of Jurisdiction.]—**Upon a petition under the Trustee Relief Act the court has jurisdiction to order service on a respondent out of the jurisdiction, and also substituted service. *Bonelli's Electric Telegraph Company, In re, Cook's claim*, 18 L. R., Eq. 655; 43 L. J., Ch. 720; 31 L. T. 83; 22 W. R. 856.

The court has authority to order service, upon minors residing out of the jurisdiction, of a petition under the Trustee Acts, 1850 and 1852 (13 & 14 Vict. c. 59, and 15 & 16 Vict. c. 55): and also of a petition under the Trustee Relief Act (11 & 12 Vict. c. 68). *Wycherley, In re, Dunne In re*, 1 Ir. L. R. 12.

The court has jurisdiction to order service of a petition under the Trustee Relief Act (10 & 11 Vict. c. 96), on a party out of the jurisdiction. *Haney. In re*, 10 L. R., Ch. 275; 44 L. J., Ch. 272. Affirming 44 L. J., Ch. 207; 31 L. T. 645.

No action will lie against trustees, either by their cestui que trust, or, in case of his bankruptcy, by the assignees of such cestui que trust. *Allen v. Imlett*, Holt, 641.

**Parties.]**—Persons claiming a title purely adverse to a trust cannot be made parties to a suit for the execution of the trust. *Att.-Gen. v. Aron*, otherwise *Aberavon Corporation*, 3 De G. J. & S. 637.

In 1840, a father left a legacy to his daughter to be paid ten years after his death. In 1847, the executor assigned to her husband certain leaseholds, which formed part of her father's estate, in consideration of the amount of the legacy, the assignee having notice of the trusts of the will. In 1870, the persons entitled to the residuary estate filed a bill against the executor and the assignee of the leaseholds, alleging that the leaseholds had been sold at an undervalue, and that the assignee was a party to the breach of trust thus committed, and praying for administration of the trusts of the will, and that the assignment might be set aside.—Held, that the bill was not multifarious. *Pyrah v. Woodcock*, 24 L. T. 407; 19 W. R. 463.

Held, also, that the assignee was not an express trustee so as to bring the case within s. 25 of the 3 & 4 Will. 4, c. 27, the Statute of Limitations. *Id.*

**Death of Trustee after Institution of Suit.]**—Where one of two trustees of an estate which was being administered in court died intestate and insolvent, after a decree for an account against himself and his co-trustee, and after the certificate had been settled by the chief clerk except in some formal particulars.—Held, that the proceedings ought to be carried on in the absence of a representative of his estate, although considerable balances were proved to be due from the trustees, and although one of the parties having the conduct of the cause was entitled to take out representation to the deceased trustee. *Moore v. Morris*, 13 L. R., Eq. 139; 41 L. J., Ch. 161.

**Actions against—For Money paid for the Use of Cestui que Trust.]**—An infant having been injured by a railway accident, her claims were compromised for a sum of money, which was paid by the company to her attorney. The money was intended for her exclusive benefit, and it having been arranged between her parents and the company that the money should be settled, it was paid over to trustees of a settlement, the trusts of which gave the income only of the money to her for life. When she came of age she repudiated this arrangement, and sued the trustees for money received to her use.—Held, that the contract entered into by the trustees was to hold the money on the trusts of the settlement, and that they were not liable to her in that form of action. *Schofield v. Robinson*, 24 L. T. 591; 19 W. R. 938.

If a trustee admits that a balance belonging to the cestui que trust is in his hands, an action for money had and received may be maintained by the cestui que trust on such admission. *Roper*

*v. Holland*, 4 N. & M. 668; 3 A. & E. 99; 1 H. & W. 167.

Where the trustee of an estate, who had funds belonging to his cestui que trust in his hands, said that he was ready to pay him 10l. down if he would give credit for certain repairs.—Held, that it was such a statement of account and declaration of a balance due as would maintain an action. *Id.*

An action for breach of duty is not maintainable by a cestui que trust against his trustees, where the only breach complained of is the non-payment of money which the trustee holds, as such, to be paid by him to the cestui que trust, but which he has not specifically appropriated for that purpose. *Edwardes v. Lowndes*, 1 El. & Bl. 81; 22 L. J., Q. B. 104; 17 Jur. 412.

Trustees of a sum of money bequeathed to the separate use of the wife acknowledged, by letter, that they held a sum due as interest, ready to be paid to the wife upon her own receipt and execution of a trust deed, prepared by order of the Court of Chancery.—Held, that though they had no right to require execution of the deed, an action would not lie against them for money had and received, or for money due on an account stated, until the wife's receipt was produced. *Bond v. Nurse*, 10 Q. B. 244; 16 L. J., Q. B. 196; 11 Jur. 655.

**—For Detinue of Deed under which Trust Arises.]**—A cestui que trust cannot maintain, against a bailee of the trustee, detinue for the deed under which the trust arises, even although before the detention the cestui que trust had first obtained possession of the deed; for the right to hold a deed is not permanently attached to the first possessor of it, so as to prevent another having an equal interest in the deed from holding it even against such first possessor. *Foster v. Crabb*, 12 C. B. 136; 21 L. J., C. P. 189; 16 Jur. 835.

**Evidence in.]**—In an action by a trustee, he is not bound by the statements of a party admitted to be cestui que trust, unless the nature of the interest of such party in the trust estate is shewn. *May v. Taylor*, 6 M. & G. 261; 6 Scott, N. R. 974.

An authority to a married woman to receive the rents from parties professing to be her trustees, is admissible in an action against them, or a party who has acted as their bailiff in distraining. *Roberts v. Shalless*, 1 F. & F. 139.

## 2. COSTS.

**Of Trustees—When Allowed.]**—The trustees of a will agreed to settle disputes with the surviving partner in a firm of which the testator had been a member by selling the testator's share to him at a certain price. They then filed a bill to have this agreement sanctioned; a decree was made accordingly, and the sale carried out. Some years afterwards some of the residuary legatees, who were infants, filed a bill by their next friend to set aside the decree on the ground that the compromise was an improper one, and that it had been entered into, and the decree sanctioning it obtained, by the personal fraud of one of the trustees. This trustee answered separately; and at the hearing Lord Romilly dismissed the bill with costs, being of opinion that the compromise had been beneficial and the decree sanc-

tioning it properly obtained. The next friend could not pay the costs, and the trustee applied by summons in a suit for the administration of the testator's estate to have them taxed as between solicitor and client and paid out of the estate:—Held, that the trustee was entitled to be paid his costs out of the estate as he had defended the suit for the benefit of the estate, though he had at the same time defended his own character. *Walters v. Woodbridge*, 7 Ch. D. 504; 47 L. J., Ch. 516; 38 L. T. 83; 26 W. R. 469. Reversing 20 W. R. 520.

The estate of a testator, who died in 1832, was distributed in 1847, at the written request of the persons beneficially entitled. Another part of the estate, which fell in in 1852, was distributed also at the request, but not in writing, of the beneficiaries, and in 1871 the acting trustee died. No accounts or vouchers were forthcoming from the trustees. A bill filed in 1872 by one of the beneficiaries and her husband against the surviving trustee and the representative of the deceased trustee for administration was dismissed, but, owing to the negligence of the trustees in not keeping accounts and vouchers, without costs. *Payne v. Evans*, 18 L. R., Eq. 356.

A trustee is entitled to be reimbursed out of the trust property all the charges and expenses incurred in the execution of the trust, and in this the court will always deal liberally with a trustee acting *bonâ fide*. *Courtney v. Rumley*, 6 Ir. R., Eq. 99.

When the costs or expenses claimed have been incurred through the misconduct or negligence of the trustee, he will not be allowed them; but the fact of his having been unsuccessful in litigation, either as plaintiff or defendant, will not, in the absence of misconduct, disentitle him to be reimbursed his costs. *Ib.*

Trustees who have lodged money under the Trustee Relief Act will be allowed their costs of appearing on the hearing of a petition to draw it, if the claimant's title be doubtful. *Blayney, In re*, 9 Ir. R., Eq. 413.

The sum of 8*l.* is the proper sum to be deducted by trustees in the first instance for the costs of lodging the money. *Ib.*

A trustee refused to join his co-trustees in suing to recover trust property, and put in an answer. He was disallowed costs. *Gompertz v. Kensit*, 13 L. R., Eq. 369; 41 L. J., Ch. 382; 26 L. T. 95; 20 W. R. 313.

Upon a petition by tenant for life of stock which had been paid into court under the Trustee Relief Act, for payment out of the dividends, the trustee, who appears on the petition after notice from the petitioner's solicitor not to do so, upon the ground that the petition relates to the income only, will not be allowed his costs of the appearance out of the funds representing income. *Battell, In re*, 21 W. R. 138.

Trustees, on paying a fund into court, deducted 4*l.* 1*s.* 6*d.* in respect of their costs. On a petition by the person entitled to the dividends, praying that the same might be paid to her, and that the costs of the trustees, who appeared on the petition, might be taxed:—Held, that the costs of their appearance, and their costs, charges, and expenses properly incurred in relation to the fund in court, ought to be taxed, and that they ought to be charged with the sum deducted by them on payment into court. *Sweeper, In re*, 24 L. T. 413; 19 W. R. 793.

— **Settlement set aside.**—Where a settlement is set aside the trustee has no claim to his costs as a matter of right, there being no contract in existence, and, therefore, if costs are given against him he has no right of appeal. *Dutton v. Thompson*, 23 Ch. D. 278; 52 L. J., Ch. 661; 31 W. R. 596—C. A.

— **Of Defaulting Trustee.**—A defaulting trustee is entitled to his costs of a suit for the execution of the trusts incurred after his bankruptcy, or after the registration of a creditor's deed, executed by him under the Bankruptcy Act, 1861. *Bowyer v. Griffin*, 9 L. R., Eq. 340; 39 L. J., Ch. 159.

In an administration action one defendant was an executor. He was a defaulting trustee under a settlement. After the action was commenced he was adjudicated bankrupt, and a trustee in bankruptcy was appointed and made a defendant:—Held, that the defaulting trustee was entitled to be paid his costs incurred after his bankruptcy. *Bowyer v. Griffin* (9 L. R., Eq. 340) followed. *Clare v. Clare, Clare, In re*, 21 Ch. D. 865; 51 L. J., Ch. 533; 46 L. T. 851; 30 W. R. 789.

Two executors, defendants in an administration action, were represented by the same solicitor, to whom they had given a joint retainer, and one of them was a debtor to the estate, and became bankrupt after the passing of the Bankruptcy Act, 1869:—Held, that the solvent executor was entitled to be paid his separate costs out of the estate, and that the separate costs of the insolvent executor must be set off against the debt due from him to the estate; but that whether the whole or what part of the common costs of both executors was to be paid out of the estate was a question for the taxing master to determine according to the settled practice of the taxing office. *McEwan v. Crombie, Porter v. Grant*, 25 Ch. D. 175; 53 L. J., Ch. 24; 49 L. T. 499; 32 W. R. 115.

Where, after the commencement of an administration action against a defaulting executor or trustee, he becomes bankrupt, and under s. 49 of the Bankruptcy Act, 1869, his debt remains undischarged by the bankruptcy, he is not entitled to be paid any of his costs of the action, whether incurred before or after the bankruptcy, until he has made good his default. But where the debt of the defaulting executor or trustee has been discharged by his bankruptcy, as where the bankruptcy has taken place prior to the Bankruptcy Act, 1869; or where, after the bankruptcy, his debt remaining undischarged, he renders services in the action in his character of executor or trustee, he is entitled to be paid his costs incurred subsequently to his bankruptcy, though his prior costs must be set off against his debt. *Lewis v. Trask* (21 Ch. D. 862) followed. *Clare v. Clare* (21 Ch. D. 865) not followed. *Basham, In re, Hannay v. Basham*, 23 Ch. D. 195; 52 L. J., Ch. 408; 48 L. T. 476; 31 W. R. 743.

Where the trustee of a settlement became bankrupt shortly after the commencement of an action for the execution of the trusts, and an order was made for payment by him into court of a sum of money certified to be due from him to the estate, he was held entitled to his costs of the action, though he was not to receive them until he had made good his default. *Bowyer v. Griffin* (9 L. R., Eq. 340) considered. *Lewis v. Trask*, 21 Ch. D. 862.

— **Trustee Guilty of Misconduct.**—The right of a trustee to his costs, like that of a mortgagee, is a matter of contract, and is not in the discretion of the judge; although he may be deprived of them for misconduct. The mere fact that a trustee denies that he is indebted to the estate, and on taking the accounts turns out to be indebted, is no reason for depriving him of his costs. *Turner v. Hancock*, 20 Ch. D. 303; 51 L. J., Ch. 517; 46 L. T. 750; 30 W. R. 480—C. A.

**Out of what Fund Payable.**—An action to carry into execution the trusts of a fund having been instituted unnecessarily by the beneficial owner of one out of six shares, the other beneficiaries, who had not been served with notice of or attended proceedings in the action, or derived any benefit therefrom, received payment of their shares in full from the trustee pending the action:—Held, that the costs of the action were to be borne by the plaintiff's share alone. *Chennell, In re, Jones v. Chennell*, 47 L. J., Ch. 80. Affirmed, 8 Ch. D. 492; 47 L. J., Ch. 583; 38 L. T. 494; 36 W. R. 595—C. A.

The costs of a trustee, who was served with and appeared upon a petition by a tenant for life for payment of dividends, were ordered to be paid out of income. *Mason, In re, Smithett, Ex parte*, 12 L. R., Eq. 111; 24 L. T. 869; 19 W. R. 1025.

When a fund has been paid into court on account of the inability of a sole trustee to act, on an application relating solely to the payment of the dividends, the costs of the appearance of the trustee may be properly charged on the corpus. *Wood, In re*, 11 L. R., Eq. 155; 40 L. J., Ch. 179; 23 L. T. 586; 19 W. R. 227.

The representative of a defaulting executor is entitled to costs out of the executor's assets, not out of the assets of the original testator whose estate is being administered. *Gurney v. Gurney*, 48 L. T. 529.

**Scale.**—When a trust fund is reduced to 500*l.* before the filing of the bill, the court will only allow costs according to the county court scale. *Ali v. Forrester*, 21 L. T. 819.

**Liability of Trustees to Pay.**—If trustees, by wilful neglect of their duty, render a suit for the administration of the estate under their charge necessary, they will be ordered to pay the costs of it. *Jefferys v. Marshall*, 23 L. T. 548; 19 W. R. 94.

Trustees who pay into court a fund claimed in default of appointment after satisfactory evidence of the non-exercise of the power, will be ordered to pay the costs of paying the fund into court. *Cull, In re*, 20 L. R., Eq. 561; 44 L. J., Ch. 664; 32 L. T. 853; 23 W. R. 850.

To a bill filed in 1873 to establish the validity of certain appointments made under a power contained in a will, the trustees were made defendants and were interrogated, and put in a long answer, alleging that the appointments were a fraud on the power. When the new procedure came into operation, the cause was a pending suit, in which replication had not been filed, nor notice of motion given before the 2nd November, 1875. A motion by the plaintiff that the evidence might be taken by affidavit, on the ground that, although none of the affidavits were sworn until after the 2nd November, the greater part of the cost of preparing them had been incurred before

that time, was successfully resisted by the trustees, but the costs of the motion were reserved. At the hearing the trustees consented to a decree without any evidence being gone into:—Held, that although the trustees were entitled to the usual trustees' costs of the suit, they, under the circumstances, must pay the costs of their own answer. *Patterson v. Wooler*, 34 L. T. 415.

Held, also, that the trustees, having unjustly and unreasonably opposed the motion for taking the evidence by affidavit, must pay the costs of that motion. *Ib.*

Held, that the trustees could not be ordered to pay the costs incurred by the plaintiff in bringing the witnesses up to town for the hearing. *Ib.*

When, in an action for administration of trusts, the plaintiff makes a special case of breach of trust in relation to the property, not depending upon a mere point of construction, the rule is that, the breach of trust being established, the trustee must bear the costs of the action so far as it relates thereto. *Bell v. Turner*, 47 L. J., Ch. 75.

Though a solicitor who accidentally (or upon separate retainers) represents two or more parties ought to distinguish the charges incurred for each separate party, yet where there is a joint retainer (or by trustees not severing in their defence) he can enforce the whole bill of costs incurred against either of the parties. *Watson v. Row*, 18 L. R., Eq. 680; 43 L. J., Ch. 664; 22 W. R. 793.

Two trustees gave a joint retainer in a suit to administer the trust estate. One became insolvent and was indebted to the estate:—Held, that the solvent trustee should have the whole costs of himself and his co-trustee allowed out of the estate without any set-off in respect of the estate. *Ib.*

— **Of Vexatious Action.**—Where two co-executors of a trustee, one of them a solicitor, were jointly liable in respect of a breach of trust committed by their testator, the solicitor having had the sole management of the trust estate, and having resorted to vexatious means to evade legal proceedings, an order was made, as between him and his co-trustee, that the latter was entitled to recover from him the whole costs of the action. *Price v. Price*, 42 L. T. 626.

— **Of Unnecessary Action to execute Trusts of Settlement.**—One of two tenants for life under a settlement brought an action, claiming to have the trusts executed by the court. The statement of claim alleged that the surviving trustee had committed a breach of trust, and asked to have new trustees appointed in the place of him and a deceased trustee. The settlement contained a power to appoint new trustees, exercisable by the tenants for life. The plaintiff's income had always been regularly paid to him. At the trial the charges against the trustee were abandoned, and it was admitted that there was no ground for his removal:—Held, that the plaintiff was entitled to judgment for the execution of the trusts, but that, the action being unnecessary, he must pay the costs of it up to and including the trial. *Fane v. Fane*, 13 L. R., Ch. 228; 41 L. T. 551; 28 W. R. 348.

— **Of Administration Action.**—Plaintiff, a trustee and executor under a will, brought an

action for the administration of a small estate, on the ground that it was in the interest of all parties, as there were doubts as to the true construction of the will, and difficulties and disagreements with regard to the interpretation of the trusts, and that he needed the protection of the court. The defendants, the beneficiaries (who, after the commencement of the action, had suggested that the quickest and least expensive mode would be to state a special case for the opinion of the court), denied that it was in the interest of all parties that the estate should be administered under the direction of the court, and contended that the question of construction was in no respect doubtful. They submitted that the action should be dismissed, as being unnecessary, harassing, and destructive of the trust property:—Held, that the action must be dismissed with costs to be paid by the trustee personally, as the court will not allow itself to be made an instrument or mere agent of oppression, nor interfere where the only result must be to despoil of their property persons unable to protect themselves, and in this case there was no ground whatever on which the court could be asked to interfere except the question of construction of the will, and that was not in doubt. *Cabburn, In re, Gage v. Rutland*, 46 L. T. 848.

— **Payment of Legacy—Refusal to Pay Legatee upon attaining Twenty-one.**—A legatee immediately upon attaining twenty-one required payment of a pecuniary legacy to which she then became entitled. The trustees of the will, who had stock to answer the legacy, were supplied with evidence of the legatee's age and identity, and that she was unmarried, but, acting on representations made by the legatee's brother, they required that they or one of them should have a personal interview with the legatee for the purpose of explaining her rights, and guarding her against the influence of her mother and step-father, with whom she was residing; and they proposed, unless such interview were granted, to pay the legacy into court under the Trustee Relief Act. The legatee having brought an action to recover the legacy:—Held, that the trustees were not justified in withholding or delaying payment of the legacy, and they were ordered to pay the costs of the action. *De Burgh v. McClintock*, 11 L. R., Ir. 220.

— **Of Appeal.**—The judge of the county court set aside a voluntary settlement. He gave the trustee in the liquidation his costs out of the debtor's estate, but made no order as to the costs of the trustees of the settlement. The trustees of the settlement appealed to the chief judge, who discharged the order of the county court. The Court of Appeal restored the order of the county court:—Held, that the trustees of the settlement ought to have been satisfied with the decision of the county court, and that they must bear their own costs of both appeals, and must pay the costs of the trustee in the liquidation of both appeals. *Russell, Ex parte, Butterworth, In re*, 19 Ch. D. 588; 51 L. J., Ch. 521; 46 L. T. 113; 30 W. R. 584—C. A.

## TURNPIKE.

See WAY.

## UMPIRE.

See ARBITRATION—LANDS CLAUSES ACT.

## UNCONSCIONABLE BARGAINS.

See UNDUE INFLUENCE.

## UNDERWRITER.

See INSURANCE.

## UNDUE INFLUENCE AND UNCONSCIONABLE BARGAINS.

1. *Sale of Reversionary Interests.*
2. *Undue Influence*, 249.
3. *Remedies*, 255.

### 1. SALE OF REVERSIONARY INTERESTS.

**In what Cases the Court will Interfere.**—Mere inadequacy of price will entitle an expectant heir to apply to a court of equity to set aside the sale of a reversion; and the onus of proving the transaction fair, and the price sufficient, is on the purchaser. *O'Rorke v. Bolingbroke*, 2 App. Cas. 814; 26 W. R. 239.

The repeal of the usury laws has not affected the jurisdiction of the Court of Chancery to give adequate protection, in such cases, to expectant heirs, or persons under pressure. *Id.*

A money-lender, having agreed with a young gentleman who was just twenty-one, and was in difficulties, to lend him 150*l.* on his reversionary

interest under his father's will, exacted securities for 200*l.*, with interest at 20 per cent., reducible to 10 per cent. on punctual payment, and advanced only 123*l.*, but claimed interest on the whole amount secured. The court declared that the securities should stand as a security for the money actually advanced with interest at 5 per cent., although the borrower had been assisted by a solicitor, who, however, stated that he was not accurately informed of the transaction. *Miller v. Cook*, 10 L. R., Eq. 641; 40 L. J., Ch. 11; 22 L. T. 740; 18 W. R. 1061.

The jurisdiction of the court over unconscionable bargains is not affected by the repeal of the usury laws, or by 31 & 32 Vict. c. 4, s. 1. *Ib.*

Although by 17 & 18 Vict. c. 60, the usury laws are repealed, and by 31 & 32 Vict. c. 4, dealings with reversionary interests can no longer be set aside for inadequacy of consideration, a court has still jurisdiction to protect the unwary from unconscionable bargains. *Tyler v. Yates*, 6 L. R., Ch. 665; 40 L. J., Ch. 768; 25 L. T. 284; 19 W. R. 909. Affirming 11 L. R., Eq. 265.

Therefore, where a bill discounter on advancing money on a bill of exchange required a former bill accepted by a minor without consideration to be provided for out of the proceeds, and this was made the foundation for other bills which were secured by charges on a reversionary interest:—Held, that the charges could only stand as security for the money actually advanced and interest. *Ib.*

An exorbitant rate of interest agreed to be paid by a young and needy man on the security of property in reversion held by an indefeasible title, is unfair dealing within 31 & 32 Vict. c. 4. *Ib.*

A very young man in necessitous circumstances received advances from money-lenders on unconscionable terms, and charged them on his reversionary interest in certain real estate. A foreclosure suit was subsequently instituted by one of the incumbrancers, the young man was then made a bankrupt, and an assignee fraudulently appointed, who, in concert with the incumbrancers, procured part of the property to be sold in the suit, and the greater part of the proceeds to be paid to some of the incumbrancers. To a bill by the bankrupt, containing these statements, and also stating that the defendants, who were the incumbrancers, and the assignee had fraudulently colluded together to deprive him of his property, and also averring generally, that there would be a large surplus after satisfying all claims against him, and that the assignee had refused to sue or lend his name for that purpose, and praying that the securities might stand as a security only for the moneys actually advanced to him, and for an account of such moneys, and for repayment to him by the incumbrancers of the moneys overpaid to them out of the proceeds of sale, a demurrer was allowed without costs, and with liberty to amend. *Payne v. Dicker*, 19 W. R. 695.

The doctrines of equity as to the relief of expectant heirs from unconscionable bargains have not been affected by the repeal of the usury laws, or by the alteration of the law as to sales of reversionary interests. *Aylesford (Earl) v. Morris*, 8 L. R., Ch. 484; 42 L. J., Ch. 546; 28 L. T. 541; 21 W. R. 424. Affirming 42 L. J., Ch. 146; 27 L. T. 753; 21 W. R. 188.

A young nobleman in his twenty-second year,

entitled to large property in the event of his surviving his father, was largely indebted. The creditor pressed for payment, and recommended the young nobleman to apply to a certain money-lender. The money-lender advanced enough money to in part pay off the creditor, and made a further advance to the young nobleman, taking by way of security his acceptances at three months for the sum advanced, with interest and discount together exceeding the rate of 60 per cent. The acceptances became due, and the process was repeated, the young nobleman receiving a small advance. The young nobleman had no professional assistance in these matters, and no application was made to his father or to the solicitors of the father. The father died before the second set of bills became due, and the money-lender commenced actions upon them:—Held, that the actions would be restrained, and a decree made for delivery up of the bills on payment of the sums actually advanced, and interest at 5 per cent. *Ib.*

A younger son, twenty-six years of age, and in great pecuniary distress, in July, 1861, borrowed 85*l.* of a money-lender, on his promissory note for 100*l.* at six months, and as a collateral security mortgaged a bond for 600*l.* payable on the death of his father, then aged fifty-four, which he had taken from his eldest brother as consideration for his releasing his portion of 600*l.* charged on the family estate. The interest reserved by the mortgage, in the event (which happened) of the note not being paid when due, was 5 per cent. per month. He died in October, 1872. The bond became payable in October, 1873, by the death of his father, and in February, 1874, his legal personal representative filed a bill to redeem:—Held, that he was an expectant heir and that the bargain was unconscionable, and redemption was decreed on payment to the money-lender of the amount actually advanced, with interest at 5 per cent. per annum. *Beynon v. Cook*, 23 W. R. 413. Affirmed, 10 L. R., Ch. 389; 32 L. T. 353; 23 W. R. 531.

A married woman and her brothers, persons in a humble position, being entitled in reversion expectant on the death of a tenant for life, to a sum of 1,500*l.* charged on land, purported to mortgage this interest to B. as security for 500*l.*, though 250*l.* only was actually advanced. B. subsequently advanced 150*l.* more, for which a further charge for 300*l.* on the same reversionary interest was taken as security. This deed of further charge contained recitals and clauses to the effect that the nature of the transaction was perfectly understood by the borrowers, and that the difference between the sums actually advanced and the sums expressed to be secured, was considered reasonable remuneration for the delay that must occur before repayment, on account of the age of the tenant for life. The securities were prepared by B.'s solicitor, acting for all parties, and the borrowers had no independent advice. Only one year's interest was ever paid. On the death of the tenant for life the 1,500*l.* was paid into court, and upon a petition by the reversioners to set aside these securities on the ground of fraud, and for payment out of the fund:—Held, that the mortgage and further charge could stand as security only for the sums actually advanced, with six years' arrears of interest only. *Slater's Trusts, In re*, 11 Ch. D. 227; 48 L. J., Ch. 473; 40 L. T. 184; 27 W. R. 448.

**Where mere General Expectation of Property.]**

—The principle on which a court of equity has granted relief from an unconscionable bargain entered into with an expectant heir or reversioner for the loan of money applies also to the case of money being lent on unconscionable terms (not fully understood by the borrower, and known not to be fully understood by him by the lender), to a young man, being a minor at the time of the first transaction, the son of a father possessing large property, who has no property of his own and no expectation of any, except such general expectations as are founded on his father's position in life, the money being lent without any thought of repayment by the borrower, but on the credit of such general expectations and in the hope of extorting payment from the father to avoid the exposure attendant on his son's being made a bankrupt. *Nevill v. Snelling*, 15 Ch. D. 679; 49 L. J., Ch. 777; 43 L. T. 244; *S. P., Bennett v. Bennett*, 43 L. T. 246, n.

**Before Repeal of Usury Laws.]—See USURY.****2. UNDUE INFLUENCE.**

**Medical Men.]**—Although a gift made to a person standing in a confidential relation to the donor, as by a patient to a physician, may be voidable, yet if, after the confidential relation has ceased to exist, the donor intentionally elects to abide by the gift, and does in fact abide by it, it cannot be impeached after his death, even if it is not proved that the donor was aware that the gift was voidable at his election. The plaintiffs were executors of G., to whom the defendant had acted as medical adviser. G. made a gift of 800*l.* to the defendant. At the time of the gift no independent advice was given to G., and the relation of physician and patient then existed; but the defendant had not been guilty of any undue influence, and after the relation of physician and patient had ceased, G. elected to abide by the gift, and did in fact abide by it during the rest of her life. It was not proved that G. was aware that the gift was voidable:—Held, that the gift made by G. to the defendant could not be impeached after her death. *Rhodes v. Bate* (1 L. R., Ch. 252) commented on. *Mitchell v. Homfray*, 8 Q. B. D. 587; 50 L. J., Q. B. 460; 45 L. T. 694; 29 W. R. 558—C. A.

A medical man obtained an agreement for the sale of land from his patient, an aged and infirm man; the testimony as to the value of the property was very conflicting. The court being of opinion that the patient was aware of the nature of the contract into which he was entering, decreed specific performance with costs. *Holmes v. Howes*, 20 W. R. 310.

**Clergyman.]**—A voluntary settlement by a widow on a clergyman and his family set aside as being obtained by undue spiritual influence. *Huguenin v. Baseley*, 14 Ves. 273; *S. P., Nottidge v. Prince*, 2 Giff. 246; 29 L. J., Ch. 857; *Norton v. Kelly*, 2 Eden, 286.

**Barrister.]**—When a client, two months after protracted and complicated litigation, with reference to the ownership of an estate of considerable value, had been brought to a successful issue

under the guidance of a barrister, executed in favour of the latter a grant of the reversion in the estate expectant on the client's own death, charged with the client's debts and legacies to a specified amount:—Held, that the deed must be set aside, whether as a deed of gift or as a contract, undue influence over, and want of independent advice on the part of the client being established by the evidence. *Brown v. Kennedy*, 4 De G., J. & S. 217.

**Persons in other Fiduciary Relationships.]—**

A woman having been induced, by the fraud and undue influence of her agent and trustee, to execute deeds by which, without any consideration, she conveyed all her property to him absolutely, filed a bill against his executor to set them aside. Her former solicitor, who prepared and had the custody of the deeds, was joined as a defendant for purposes of discovery, and costs were prayed against him, as well as the executor, on the ground of neglect of duty. The bill also charged him with fraud, which however was not proved. Throughout the litigation he acted as the solicitor of the executor. A decree was made, setting aside the deeds with costs against the trustee's estate, and the solicitor was ordered to pay the whole costs of the suit, in case the estate proved insufficient to pay them. *Baker v. Loader*, 16 L. R., Eq. 49; 42 L. J., Ch. 113; 21 W. R. 167.

A testator devised his real estate to the plaintiff, and gave various legacies to his other relations; and then, after reciting that he held a farm from year to year, he declared it to be his wish, and he authorized his trustees to give up the tenancy in favour of the plaintiff, provided the landlord would accept him as tenant, and in that event he bequeathed to him all the stock on the farm. On the testator's death it appeared that his personalty, other than the farming stock, would be insufficient to pay his debts and legacies, and the trustees of the will, one of whom was the landlord's agent, induced the landlord to refuse to accept the plaintiff as tenant of his farm, unless he agreed to take 200*l.* and give up the testator's realty for payment of his debts and legacies. The plaintiff agreed accordingly, was accepted as tenant, and executed a deed conveying the realty to the trustees. About four years afterwards he filed a bill to set aside this transaction:—Held, that the trustees had been guilty of a clear breach of trust in what they had done to induce the plaintiff to execute the deed, and that it must be set aside, and the trustees must pay the costs of the suit. *Ellis v. Barker*, 7 L. R., Ch. 104; 41 L. J., Ch. 64; 25 L. T. 688; 20 W. R. 160.

A young man, interested in a certain business, under the advice of his family solicitor, entered into an arrangement relating to the business with P., who stood in a fiduciary position towards him, and at the same time unknown to his solicitor was induced by the influence of P. to enter into other agreements completely nullifying the effect of such arrangement:—Held, that P. could not upon abandoning the fraudulent agreements set up the arrangement. *Moxon v. Payne*, 8 L. R., Ch. 881; 43 L. J., Ch. 240.

A bill alleged that the defendant had formed the design of possessing himself of the plaintiff's property, and in pursuance of this design had perpetrated a series of frauds. There was no evidence to sustain this allegation to the full

extent of it, but there was substantial proof of fraud in respect of several transactions:—Held, that the plaintiff was entitled to relief. *Ib.*

**Parental Influence.**—When a deed conferring a benefit on a father is executed by a child who is not emancipated from the father's control, if the deed is subsequently impeached by the child, the onus is on the father to shew that the child had independent advice, and that he executed the deed with full knowledge of its contents, and with a free intention of giving the father the benefit conferred by it. If this onus be not discharged, the deed will be set aside. This onus extends to a volunteer claiming through the father, and to any person taking with notice of the circumstances which raise the equity, but not further. *Bainbrigg v. Browne*, 18 Ch. D. 188; 50 L. J., Ch. 522; 44 L. T. 705; 29 W. R. 782.

— **Solicitor advising Child.**—If a solicitor purports to act in the transaction on behalf of the child, a purchaser for value is entitled to assume that he has given the child proper advice even though he be also acting as the father's solicitor. There is no absolute rule that in such a transaction the father and the child must be advised by different solicitors. *Ib.*

— **Second Security given in ignorance of Invalidity of First.**—A young lady who was living with her mother and step-father in 1859, shortly after she came of age, at the solicitation of her step-father, executed a bond as surety to secure the repayment of a sum of money advanced by the defendant payable at the end of six years. In 1866 the defendant brought an action and recovered judgment against the step-father on the bond, and, to avoid an execution, the lady, who was then twenty-nine years of age, but who still resided principally with her step-father, was induced by him to execute a second bond as surety to secure the amount of the judgment and costs. Both bonds were prepared by the step-father's solicitor, and she had no independent advice. In 1872 the defendant brought an action against her on the bonds, and she then filed her bill to set them aside:—Held, that the second bond must be taken as connected with the first, and that, as there was no proof that she was aware of the invalidity of the first bond, the execution of the second bond was not a confirmation of the first, and both bonds were set aside against her. *Kempson v. Ashbee*, 10 L. R., Ch. 15; 44 L. J., Ch. 195; 31 L. T. 525; 23 W. R. 38.

— **Delay.**—Held, also, that she was not barred by laches, notwithstanding the time which had elapsed before she asserted her right to relief. *Ib.*

In order to maintain a voluntary deed of gift from a son for the benefit of a father, it must be shewn both that the son understood the contents of the deed and that he was not under undue parental influence. *Turner v. Collins*, 7 L. R., Ch. 329; 41 L. J., Ch. 558; 25 L. T. 779; 20 W. R. 305.

A voluntary deed of gift cannot, after unreasonable delay, be set aside, though the gift was of a reversion and remained a reversion. *Ib.*

Part of a voluntary settlement may be set aside. *Ib.*

Under a marriage settlement, the son of the

marriage was entitled to the reversion expectant on the life estate of the father in two sums of money, one of which had come from the father's side, the other from the mother's side. The son had also a large income under the will of his grandfather, and would have a much larger income on attaining the age of twenty-five years. The son had lately attained the age of twenty-one, and was residing with his father. The son, without employing a separate solicitor, executed a deed giving to his father's second wife and her daughter the reversion in both the sums which were included in the marriage settlement, and giving to the father power to appoint the sum which came from the mother's side to any third wife and her children. The son left the father's house five years after the execution of the deed, and employed a separate solicitor two years afterwards, when the subject of setting aside the deeds was mentioned. Seven years afterwards the son filed a bill to set aside so much of the deed as related to the sum which had come from the mother's side:—Held, that though the son understood all the contents of the deed except the power to appoint to a third wife and her children, he was not sufficiently protected from parental influence, and that if the bill had been filed at an earlier time the deed must have been set aside to the extent prayed. *Ib.*

Held, also, that, as the filing of the bill had been so long deferred, the deed must be rectified only by striking out the power. *Ib.*

— **Satisfaction.**—By a marriage settlement of 1832, real and personal estate of H., the intended wife, was conveyed to trustees in trust for R., the intended husband, for life, and after the death of the survivor of R. and H., in trust for the children of the marriage, as R. and H. or the survivor should appoint, and in default of appointment for the children equally. The trustees allowed R. to obtain possession of the trust fund, which he mixed with moneys of his own, and in 1861 one of the trustees commenced a suit to compel him to replace the fund. By arrangement of the trustees with R., he and H., by deed of the 25th September, 1861, irrevocably appointed the fund equally among the children, four of whom were of age, and one (the plaintiff) a minor. On the following day the four adult children, and two years afterwards the plaintiff, when of age, executed a deed releasing the trustees from the trusts of the settlement. The children executed the release by the direction of their father, without any professional advice or assistance, and in ignorance of its contents or effect, and of their rights under the settlement. R. from time to time paid sums of money for the plaintiff; he purchased for the plaintiff a commission in the army, paid for his outfit, &c., made him an adequate yearly allowance, and paid a large sum for his promotion. No one of the sums so advanced was equal in amount to the plaintiff's share of the trust fund, nor was there any evidence that it was stated at the time of the advances, or understood between the plaintiff and R., that they were made out of the trust fund in R.'s hands:—Held, 1st, that the release should be set aside; 2nd, that R.'s position was that of a debtor to his five children for their respective shares of the trust fund; 3rd, that the sums advanced, being respectively less in amount than the plaintiff's share, were not a satisfaction of it, pro tanto, and that R. was not

entitled to credit for them. *Reade v. Reade*, 9 L. R., Ir. 409—C. A. ●

**Gift of Personal Estate by Infant to Relative.]**

—In the absence of proof of the exercise of control or influence on the part of the donee, or of the existence of the relation of guardian and ward between the donee and the donor, a gift of her property within a month before her death by an infant aged twenty, of business habits, firm will, and fully capable of managing her own affairs, to a relative with whom she had been residing from her father's death, for a period of five months until her own death, is not invalid. *Taylor v. Johnston*, 19 Ch. D. 603; 51 L. J., Ch. 879; 46 L. T. 219; 30 W. R. 508.

**Agreement Entered into without Advice.]**

A purchase from an illiterate poor man, who was ill at the time, set aside, the price being inadequate, the vendor having no professional advice, and the transaction being completed in great haste and on terms unduly disadvantageous to him. *Clark v. Malpas*, 4 De G., F. & J. 401.

The Master of the Rolls declared the conveyance void and directed it to be cancelled, but declined to direct a reconveyance:—Held, that the proper form of decree in such a case is not to declare the deed void, but to direct it to be set aside and order a reconveyance. *Id.*

In 1841, sisters voluntarily surrendered to their brother his promissory notes for money owing to them, but under such circumstances that the transaction could not be sustained if complained of in due time. One sister died in 1852, and the other in 1857, and the brother died in 1860. In the following year, a bill was filed by the representative of the sisters to set aside the transaction:—Held, that the plaintiff wholly failed, this being an attempt to rip up a transaction nineteen years old, when all the actors in it were dead, and which transaction they all understood at the time. *Mackintosh v. Stuart*, 36 Beav. 21.

Where a single woman was informed by her brother's agent that on his death she had succeeded to a small estate, of which she knew nothing, and on the agent's representations of its value, which were inaccurate, and, without legal advice, she conveyed the estate for an inadequate sum to the agent's daughter, the court set the deed aside, with costs. *Haygarth v. Wearing*, 12 L. R., Eq. 320; 40 L. J., Ch. 577; 24 L. T. 825; 20 W. R. 11.

—Held, also, that there was no such relation between the parties as to incapacitate the agent from purchasing. *Id.*

Held, also, that the agent's claim for advances to the brother, as to which he pledged his oath, but of which there was no corroborative evidence of any kind, must be disallowed. *Id.*

The repeal of the usury laws does not affect the power of a court of equity to review and set aside usurious transactions where they are founded on fraud. *Howley v. Cook*, 8 Ir. R., Eq. 571.

Accordingly, a series of deeds, charging sums, advanced by a money-lender with exorbitant interest, on the borrower's estates, which were ample security, was set aside, save to the extent of securing the actual advances, with moderate interest; the deeds containing unprecedented clauses, such as authorizing a sale without notice,

and empowering the lender to pay off existing charges (which bore interest at 6l. per cent. only), and to charge 20l. per cent. thereon, and other clauses of a similar character; the court being of opinion that the clauses were introduced by the fraud and device of the money-lender without the knowledge of the borrower, who was unprotected by proper professional advice. *Id.*

—**Solicitor of Mature Age.]**—It is not easy to overcome the presumption that a man of mature age, who has long acted as a legal practitioner, is competent in an ordinary transaction to take care of himself, though unassisted by counsel. But there is an equity which in certain circumstances will give relief even to such an individual. *Tennent v. Tennents*, 2 L. R., H. L. (Sc.) 6.

There is an equity which may be founded on gross inadequacy of consideration, where it involves the conclusion that the complainant either did not understand what he was about, or was the victim of some imposition. *Id.*

**Sale by Administratrix to her Son under a Lien.]**

—Sale by administratrix of the intestate's property, to her own son under an open contract and for under-value, set aside. The mere fact of this agreement being made with the son of the administratrix would have been sufficient to vitiate the sale, irrespective of the improvidence of the contract, which imposed no conditions on the intending purchaser, and of the under-value. *John v. Jones*, 34 L. T. 570.

**When Onus on Purchaser to Prove Value.]**

—A small freehold property was agreed to be sold by an elderly spinster in humble life to a person far above her in station. The agreement was come to between the parties alone. In respect of the consideration, the vendor sought and obtained a slight advance on that offered by the purchaser. The purchaser's solicitor drew the conveyance, and it was presented to the vendor ready for execution, and executed by her without any advice. The Master of the Rolls having set aside the conveyance:—Held (per Knight Bruce, L. J.), that his decree was right, because the parties to the contract were in such relative positions, that (a case of under-value being on the evidence affirmatively deposed to) it lay on the purchaser (contrary to the usual rule) to shew affirmatively that the price he had given was the value, and on the evidence he had failed in doing so. *Baker v. Monk*, 4 De G., J. & S. 388.

There was such a difference between the position of the parties to the contract as to render it incumbent on the purchaser to throw further protection round the vendor before he made the bargain with her, and the contract was an improvident one, from which she was entitled to be relieved. *Id.*

The circumstance, standing alone, of the vendor being acquainted with the value of the property, might amount to nothing, or next to nothing. *Id.*

In ascertaining, in a case of disputed sale, the value of land with dilapidated cottages on it, the rent which the cottages would produce is not the only element to be considered; the value of the site at the time of the sale must also be considered. *Id.*

**Confirmation.**—Where a settlor filed a bill to obtain the declaration of the court that a settlement executed by him eleven years previously was not binding upon him by reason of its being an unreasonable one, and of his having executed it in ignorance of its effect:—Held, that a subsequent deed executed by the settlor, reciting part of the former deed, and purporting to be in exercise of one of the powers therein contained, was an absolute confirmation of the whole, and was a bar to his suit, though the deed was one which, apart from lapse of time and subsequent confirmation, the court could not have upheld. *Jarratt v. Aldam*, 9 L. R., Eq. 463; 39 L. J., Ch. 349; 21 L. T. 192; 18 W. R. 511.

There can be no confirmation of a fraudulent gift or bargain obtained through undue influence by a donee or bargainee standing in a confidential relationship towards the donor or bargainor unless there is full knowledge on the part of the latter of all of the facts and the rights arising out of them, and an absolute release from the undue influence by means of which the fraud was practised. *Mozon v. Payne*, 8 L. R., Ch. 881; 43 L. J., Ch. 240. And see *Kempson v. Ashbee*, ante, col. 251.

**Imprudence.**—A voluntary settlement was agreed to be made by a young lady, an orphan, some weeks before she attained twenty-one, upon the recommendation of the family solicitor, and was executed by her eight weeks after she attained twenty-one without any independent advice. Thereby she assigned to her stepfather and an uncle as trustees the whole of her fortune upon trusts for herself for life, with remainder to her children or testamentary appointees, and in case there were no children, then, in default of appointment, to her next of kin. A power of raising 700*l.*, and paying it to the settlor, was reserved, but the settlement contained no power of revocation or of appointment by deed, and gave her no voice in the investments or in the appointment of new trustees:—Held, that although the solicitors and trustees acted really with the intention of benefiting the lady, the settlement must be set aside on the ground of imprudence. *Everitt v. Everitt*, 10 L. R., Eq. 405; 39 L. J., Ch. 777; 23 L. T. 136; 18 W. R. 1020.

### 3. REMEDIES.

**Where no Action lies for the Delivery up of Instrument.**—In 1869, B. gave a bond to H. for payment of money in 1874, with interest in the meantime. B. and H. both admitted that the bond was satisfied in July, 1870, but before complete satisfaction H. had deposited the bond with his bankers, who claimed a lien, and expressed an intention of suing at law on the bond when it should become due. The bankers had given no notice to B. of the deposit until after the alleged satisfaction, but they charged collusion between B. and H.:—Held, in 1873, that a bill would not lie for delivery up of the bond. *Binns v. Fisher*, 43 L. J., Ch. 188.

**Action not in Chancery Division.**—When a defendant in an action in one of the divisions of the High Court of Justice other than the Chancery Division relies on an equity to have a deed set aside as part of his defence, the division in which the action is may give effect to the

equity so far as is incidental to the purposes of the defence. *Mostyn v. West Mostyn Coal and Iron Company*, 1 C. P. D. 145; 45 L. J., Ch. 401; 34 L. T. 325; 24 W. R. 401.

**When Court of Law Proper Tribunal.**—A bill having been filed for the cancellation of two agreements entered into between the plaintiff and defendant, as having been obtained by the misrepresentation of the latter, a motion was made to restrain an action which had been commenced by the defendant upon the first agreement, shortly before filing the bill:—Held, that although the Court of Chancery had complete jurisdiction in such a case, yet a court of law was the more proper tribunal for dealing with disputed facts respecting the circumstances under which the agreements were entered into; and the motion was accordingly refused with costs. *Clark v. Chapple*, 29 L. T. 204.

## UNION.

I. POOR.—See POOR LAW.

II. TRADE.—See TRADE AND TRADE-MARK.

## UNIVERSITY.

1. *Election of Fellows, &c.*
2. *Visitation*, 258.
3. *Connuance*, 259.
4. *Other Matters*, 260.

### 1. ELECTION OF FELLOWS, &c.

**Universities Tests Act.**—By the Hertford College Act, 1874 (37 & 38 Vict. c. 55), Magdalen Hall, in the University of Oxford, was dissolved, Hertford College created, and the property of Magdalen Hall transferred to Hertford College. An endowment for a lay fellowship, restricted to members of certain specified churches, was afterwards accepted by Hertford College. T., who was not a member of any of the specified churches, tendered himself for examination as a candidate, and was informed that he might be examined if he desired it, but he must understand that he would not be elected even if he stood at the head of the list. He did not present himself for examination, and M., a duly qualified candidate, was elected, after examination, to the fellowship. After the election T. applied for a mandamus:—Held, first, that there was no refusal to examine T. *Reg. v. Hertford College*, 3 Q. B. D. 693; 47 L. J., Q. B. 649; 39 L. T. 18; 27 W. R. 347—C. A.

Held, secondly, assuming that T. was refused examination, the office being full, of a candidate properly qualified, a mandamus would not lie commanding the college to examine T. and to proceed to an election; and that his remedy, if any, was by way of appeal to the visitor. *Ib.*

The operation of the Universities Tests Act, 1871 (34 Vict. c. 26), is confined to colleges subsisting before it was passed; and the act does not prevent the creation in the universities of fresh colleges, the endowments of which are confined to the members of a particular religious community. *Ib.*

The Universities Tests Act, 1871, is not incorporated with the Hertford College Act, 1874; and s. 13 of the latter act, which provides "that nothing in this act contained shall be construed to repeal any of the provisions of the Universities Tests Act, 1871," does not render Hertford College a subsisting college within the former statute. *Ib.*

**Right to Nominate—to Fellowship.]**—The right of nomination to a fellowship being in dispute between two parties claiming under the same grant, the court directed an issue to try "whether the plaintiff had a better right than the defendant to nominate." On the trial it appeared that the defendant had nominated for nearly twenty years, and that vacancies occurred about once in five years; that the right of nomination was limited by the grant to the heirs male of E., with limitations over in default of such heirs; that the eldest son of E. had three sons; that the plaintiff was lineally descended from the third; but that in 1634 the two elder sons were living, and one had then living male issue. No further evidence was given:—Held, that, on the issue directed, the plaintiff might recover upon this evidence, without shewing that the two elder branches were extinct. *Sandys v. Sandys*, 1 Q. B. 316, n.

**—Warden.]**—James I., by letters patent, in 1619, granted to A. licence to found a college, which should consist of one master, one warden, four fellows, six poor brethren, six poor sisters and twelve poor scholars, to be maintained, sustained, governed and ruled according to the ordinances, statutes and foundation as should be made and established by A.; and that A. should have power to ordain and make ordinances, rules, constitutions and statutes, for the maintenance, sustenance, education, instruction, government and rule of the master, warden, &c. The letters-patent named the college, and created the master, warden, &c., a body corporate. In 1619, A. founded the college, and endowed it with land in three parishes. By an instrument, in 1626, A., by virtue of the power given to him by the letters-patent, made ordinances and statutes for the maintenance, relief, sustenance, education, government and ordering of the college. The 2nd statute ordained that there should be "six assistants touching the ordering of the college, and the rents, revenues and profits thereof;" and the 8th, that the churchwardens of the three parishes in which the college lands were situate should be "assistants to the master, warden and fellows of the college in the governing thereof." The 10th, 11th, and 23rd statutes gave the assistants power to nominate poor persons of the parishes to which they respectively belonged, to be the poor brethren and sisters and scholars. By

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the 15th statute, "upon the day of the election of the warden, the master, the assistants and fellows shall go into chapel, and after service and sermon proceed to the election of a new warden; after that, the senior fellow shall read the ordinances expressing of what condition and quality the person elected ought to be; and after that, the electors shall make the election." By the 20th statute, if both the places of master and warden should be void at one time, notice was to be given by the senior fellow to the assistants to repair to the college within three days, "to join with the fellows in the election of a new master, which shall be in all points as is formerly described in the election of warden." A mandamus to admit the prosecutor to the office of warden, alleged that the assistants had always, from the foundation of the college, been accustomed as of right to vote at the election of warden. The return did not negative the usage:—Held, first, that by the 15th statute the assistants had a voice in the election of warden; and that if that statute was doubtful, the usage would so interpret it. *Reg. v. Dulwich College (Master and Fellows)*, 17 Q. B. 600; 21 L. J., Q. B. 36; 16 Jur. 654.

Held, secondly, that although in 1626, after the foundation and endowment of the college, A. could not alter the constitution of the college, or add to the number of the corporate members, he had power to make ordinances for the government of the college, and to give the right of voting in the election of warden to the assistants who were not members of the corporation. *Ib.*

**—Council of Medical Education.]**—By 21 & 22 Vict. c. 90, s. 4, the general council of medical education and registration is to consist of one person chosen from time to time by each of the several bodies therein named, and by the university of London:—Held, that the authority to choose such member is vested in the senate, consisting of the chancellor, vice-chancellor and fellows for the time being, and not in the whole body of the graduates of the university. *Reg. v. Storrar*, 2 El. & El. 133; 28 L. J., Q. B. 326; 5 Jur., N. S. 1304.

**Remedies.]**—Disputes as to elections in lay foundations are to be tried in the king's courts. *Marriott v. Gregory*, Lofft, 21.

In the case of a private eleemosynary lay foundation, if no special visitor is appointed by the founder, the right of visitation, in default of his heirs, devolves upon the king, to be exercised by the great seal; on this ground the court refused to interfere by mandamus to compel the master and fellows to declare one of the fellowships vacant, and to proceed to a new election. *Re v. St. Catherine's Hall, Cambridge*, 4 T. R. 233.

The court thought that a mandamus was the proper mode of trying the validity of an election to a vacant fellowship made by the fellows of Trinity Hall, Cambridge, which was disputed by the master. *Re v. Gregory*, 4 T. R. 244.

## 2. VISITATION.

**Appointment of Visitor.]**—The appointment of a visitor may be collected from the general tenure of the statutes. *St. John's College, Cambridge v. Todington*, 1 Rurr. 158; 1 Ld. Ken. 441.

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In the case of a private eleemosynary lay foundation, if no special visitor is appointed by the founder, the right of visitation, in default of his heirs, devolves upon the king, to be exercised by the great seal. *Rex v. St. Catherine's Hall, Cambridge*, 4 T. R. 233.

**Jurisdiction of.**—The visitors of colleges are not tied up to any particular forms, nor are they liable to prohibition for irregularity in their proceedings, or informality in their acts, but only for want of jurisdiction. *Ely (Bishop) v. Bentley*, 2 Bro. P. C. 220.

A visitor's power may be limited by the founder. *St. John's College, Cambridge v. Todington*, *supra*.

Visitors, though restrained to certain times, may visit whenever called in. *Ib.*

The power to interpret statutes constitutes a visitor. *Rex v. Ely (Bishop)*, 1 W. Bl. 85.

Visitorial power may be delegated generally or specially. *Ib.*

It is incidental to the office of visitors to hear complaints. *Ib.*

Where a university is incorporated by charter under a visitor, all matters relating to the internal management of the domus, as to passing resolutions, holding examinations, conferring degrees, &c., are under the exclusive control of the visitor, a court of law or equity having only jurisdiction with respect to matters out of the house, as between the university and third persons. *Thomson v. University of London*, 33 L. J., Ch. 625; 10 Jur., N. S. 669; 10 L. T. 403; 12 W. R. 733.

**Appeal.**—If the visitor of a college in one of the universities refuses to exercise his visitorial power by receiving and hearing an appeal, the court will grant a mandamus to compel him. *Rex v. Ely (Bishop)*, 5 T. R. 475. And see *Rex v. Worcester (Bishop)*, 4 M. & S. 416.

But cannot afterwards review his decision. *Buller, Ex parte*, 1 Jur., N. S. 709.

And where it is doubtful who is the visitor of a college, the court will not grant a mandamus. *Rex v. Ely (Bishop)*, 1 Wils. 266; 1 W. Bl. 52. See also *Reg. v. Hertford College, ante*, col. 256.

The visitor need not hear parol evidence on an appeal to him; it is sufficient if he receives the grounds of the appeal, and the answer to it, in writing. *Rex v. Ely (Bishop)*, 2 T. R. 475.

### 3. CONUSANCE.

**Claiming.**—Conusance must be claimed either in the first instance, or at the first day. *Rex v. Agar*, 5 Burr. 2820.

But need not be before appearance in the action. *Parsons v. Willoughby de Broke (Lord)*, 11 L. T. 628; 13 W. R. 315, 402.

How the claim of conusance by the chancellor of Oxford is made. *Kendrick v. Kynaston*, 1 W. Bl. 454. And see *Leasingby v. Smith*, 2 Wils. 406.

**When Allowed.**—A claim of conusance was refused to the university of Oxford, because the party, although a member, was not resident at Oxford. *Hayes v. Long*, 2 Wils. 810.

But a claim of conusance was allowed in an action against a proctor, a pro-proctor, and the marshal of the university, though the affidavit of the latter, describing him as of a parish in the

suburbs of Oxford, only verified that he then was and had been for the last fourteen years a common servant of the university, called marshal of the university; and that he was sued for an act done by him in discharge of his duty, and in obedience to the orders of the other two defendants, without stating that he resided within the university, or was matriculated. *Thornton v. Ford*, 15 East, 634.

Conusance of a plea of trespass sued against a resident member of the university of Cambridge, for a cause of action verified by affidavit to have arisen within the town and suburbs of Cambridge, over which the university court had jurisdiction, was allowed upon the claim of the vice-chancellor on behalf of the chancellor, masters and scholars of the university, entered on the roll in due form. *Brown v. Renourd*, 12 East, 12. And see the objections to the claim fully stated.

A claim of conusance by the vice-chancellor of the university of Oxford, in the vacancy of the office of chancellor by death, on behalf of the university, allowed. *Williams v. Brickenden*, 11 East, 543.

Where the university of Cambridge claimed conusance in the case of A., B. and C., alleged in the claim to have been summoned in an action of trespass, at the suit of D., against the form of the privilege of the university; and the affidavit stated that B. and C. were servants of the university, called proctor's men; and that the trespass was an act done by them in discharge of their duty, in obedience to the order of a pro-proctor of the university:—Held, that an affidavit might be received in answer, shewing that B. and C. were constables appointed under 6 Geo. 4, c. 97; and therefore liable to be sued at common law, notwithstanding any privilege of the university. *Turner v. Bates*, 10 Q. B. 292.

Held, also, that the affidavit, alleging that B. and C. were constables in and for the university, appointed and acting under and by virtue of the above statute, and that the action was brought against them for and in respect of acts done by them in execution of their office, without further detail, was an answer to the claim as to B. and C. *Ib.*

In an action by an indorsee against a maker of two promissory notes, with a count for interest, he pleaded to the jurisdiction of the court, that he was a member of the university of Oxford, and resident within the suburbs of the borough and city of Oxford and university of Oxford, and a student and scholar thereof; and that the causes of action arose in respect of the promissory notes, which were made and given by him within the borough and city of Oxford, and within the university of Oxford, as securities for money lent to the defendant within the borough and university; and that the cause of action in the third count arose in respect of interest which had become due in respect of the notes:—Held, a bad plea. *Dormor v. Howard*, 9 Jur. 737.

### 4. OTHER MATTERS.

**Who are Residents.**—By 17 & 18 Vict. c. 81, s. 16, the congregation of the university of Oxford shall be composed of the chancellor and certain other persons, and also of all residents. By s. 48, the word "residents" means and includes all members of convocation who shall

have resided twenty weeks within one mile and a half of Carfax during the year that shall expire on the 1st of September next preceding the making of the register. A fellow of a college held a living which was distant nine miles from Oxford, and he resided at the vicarage house; but he rented a set of rooms within St. John's College (of which he was a resident), which he had furnished, and for which he paid rent, and which were not occupied by any one else. When he visited Oxford, he sometimes slept there, but he generally returned to the vicarage the same day:—Held, that there must be an actual as distinguished from a constructive residence, and that he was not a resident. *Reg. v. Oxford (Vice-Chancellor)*, 7 L. R., Q. B. 471; 26 L. T. 506.

**Authority of Vice-Chancellor.**—The publication of a pamphlet against the established religion in the university of Cambridge is an offence within one of the statutes of the university, and punishable by banishment by the vice-chancellor, assisted by the heads of colleges in the vice-chancellor's court. *Rex v. Cambridge (University)*, 6 T. R. 89.

The governing body of a university may lawfully issue a decree, that every tradesman with whom a person in statu pupillari within the university contracts a debt exceeding 5*l.* shall make the same known to the tutor of such person's college, on pain of being discommoded if he omits doing so; and, in case of disobedience, they may enforce such decree by ordering that no person in statu pupillari shall deal with the tradesman for a given period. *Death, Ex parte*, 18 Q. B. 647; 21 L. J., Q. B. 337; 17 Jur. 112.

If the vice-chancellor, attended, on summons, by the heads of colleges, makes an order to discommodate, in pursuance of such decree, this is not a judicial proceeding which the superior courts can restrain by prohibition. *Id.*

A milliner residing in Cambridge was apprehended by the proctors while proceeding to a party given by a bachelor of arts of the university and his friends, and conveyed by them to the spinning-house, a gaol used by the university for confining women suspected of evil found within its precincts. Upon arriving at the gaol the vice-chancellor was sent for, and he heard the statements of the proctors and examined the woman, but not on oath, and finally committed her for imprisonment, but no warrant in writing was made out. An action was brought by her against the vice-chancellor:—Held, first, that as the charter, in express terms, invested the vice-chancellor with authority to punish by imprisonment or otherwise, as he should think fit, he thereby became invested with judicial authority as a judge of record, and entitled to all the protection attached by law to the judicial office. *Kemp v. Neville*, 10 C. B., N. S. 523; 31 L. J., C. P. 158; 7 Jur., N. S. 913; 4 L. T. 640; 10 W. R. 6.

Held, secondly, that as judges of a court of record have power to commit to the custody of their officer, sedente curia, by oral command, without any warrant made at the time, and that as the vice-chancellor was a judge of a court of record, therefore a warrant was not necessary, and a committal in the exercise of this peculiar jurisdiction, where no special method was directed by the charter, although it was not shewn to be made under a warrant, gave no cause of action. *Id.*

Held, thirdly, that the hearing was legal, as there was no express provision in the charter which enabled him to administer an oath, and that it was not essential for the purpose that he should do so. *Id.*

Held, fourthly, that the place of confinement appeared to be the accustomed place used for that purpose by the university, and therefore that the usage must be presumed to be lawful till the contrary was shewn. *Id.*

Where the chancellor's court of the university of Oxford had proceeded against a party, not a member of the university, for contumacy in suing a resident undergraduate in one of the superior courts of Westminster, and had issued a warrant to arrest him for not paying the costs of the proceedings, the court made a rule absolute for a prohibition without requiring the applicant to declare in prohibition. *Reg. v. Oxford (University)*, 1 G. & D. 537; 1 Q. B. 952; 6 Jur. 319.

**Privileges.**—Statutes conferring privileges on the members of the universities, mean only the members of the universities of Oxford and Cambridge, unless otherwise expressed. *Jones v. Smart*, 1 T. R. 49.

A college barber at Oxford, though he resides in the city out of college, is entitled to the privileges of the university. *Rex v. Routledge*, 2 Dougl. 531.

Independent members of a college are mere boarders, and have no corporate rights; nor can they appeal to the visitor. *Rex v. Grundon*, Cowp. 319.

If a college does not exceed its jurisdiction, the king's courts have no cognizance; and expulsion of a member is a matter entirely within its jurisdiction. *Id.*

The head of a college has the whole seisin in his office. *Phillips v. Bury*, 2 T. R. 355.

**Seal.**—A mandamus lies to compel the warden of a college to affix the common seal of the college to an answer of the fellows, in chancery, contrary to his own separate answer put in. *Rex v. Windham*, Cowp. 377.

Also to the keeper of the common seal of the university of Cambridge, commanding him to put it to the instrument of appointment of their high steward, pursuant to a grace passed in senate. *Rex v. Cambridge (University)*, 3 Burr. 1647; 1 W. Bl. 547.

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## URINAL.

See NUISANCE.

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## USAGE.

See CUSTOM—EVIDENCE.

## USE AND OCCUPATION.

See LANDLORD AND TENANT.

### USURY.

**Effect of Repeal of Usury Laws.**—See UNDUE INFLUENCE AND UNCONSCIONABLE BARGAINS.

**Before Repeal of Usury Laws—What amounts to Usury.**—A revolted colony of Spain, not recognized as an independent state by Great Britain, executed bonds, at six per cent. interest, as a security for a loan:—Held, that the bonds were not usurious, as it did not appear that the contract for the loan was made, or the amount of it to be paid, in this country. *Thompson v. Powles*, 2 Sim. 194.

It was questionable whether the law as to usury applied to a bare transfer of stock by a proposed lender (the proposed borrower being under no obligation to sell it and convert it into money), it being of the essence of usury that there should be an advance of money. *Att.-Gen. v. Hollingworth*, 2 H. & N. 416; 27 L. J., Ex. 102.

A. & Co. were general merchants, bankers, and commission agents, at Montreal, and their course of trade consisted principally in procuring and advancing to colonial dealers supplies of goods, cash and negotiable securities, as required, from time to time, by their customers, to support them in their dealings, returns being made by them, after some interval of time, at their convenience, in the freight of produce, and in the payment of cash and negotiable securities. In the accounts they kept with C. and D. there was kept a column on both sides for interest from the time the payment was made or due; and, at the periodical close of the account, A. & Co. made a charge for their commission, calculated upon the balance due, and afterwards upon the cash advances:—Held, that it did not appear from the accounts that the charge for commission was a cloak for usury, but was to be treated as a bonâ fide compensation for the labour and inconvenience in conducting such business. *Pollok v. Bradbury*, 8 Moore, P. C. C. 227.

**— Hazardous Risks.**—The payment of annual sums, exceeding 5l. per cent. per annum on the sum advanced, was secured, by an annuity deed, upon land, and the principal by a policy on the life of one of the grantors, with a covenant for payment of the premium:—Held, that as the principal was in some risk, the transaction was not void on the ground of usury. *Hawkins v. Bennet*, 7 C. B., N. S. 507; 30 L. J., C. P. 193.

**— Bills and Notes.**—The 2 & 3 Vict. c. 37, before its repeal, did not, in cases of loans on security of lands, merely invalidate the security on lands, and leave the contract valid, but it left in such cases the statute of Anne untouched, and consequently, the contract being invalid, not only were the securities on land avoided, but also any personal securities, whether bonds or bills of exchange, were likewise avoided. *Langton v.*

*Haynes*, 1 H. & N. 366; 25 L. J., Ex. 319; *S. P., Hodgkinson v. Wyatt*, 4 Q. B. 749; 13 L. J., Q. B. 54; *Fussell v. Daniel*, 10 Ex. 581; 24 L. J., Ex. 130. Overruling *Warrington, Ex parte*, 3 De G., M. & G. 159; 1 Kay, 231; 22 L. J., Bk. 33.

Where money was advanced at usurious interest on the security of bills of exchange, having only three months to run, such advance was protected, and the bills themselves were valid under 3 & 4 Will. 4, c. 98, s. 7, and though a warrant of attorney to confess judgment might be taken at the same moment on which judgment was the next day entered up and registered, so as to become a charge on the lands of the debtor, the transaction was not thereby rendered invalid under the proviso of the 1st section of the 2 & 3 Vict. c. 37. *Lane v. Horlock*, 5 H. L. Cas. 580; 25 L. J., Ch. 253; 2 Jur., N. S. 289.

The 2 & 3 Vict. c. 37, did not repeal 3 & 4 Will. 4, c. 98, s. 7. *Id.*

A mortgage on land, or other charge given as a collateral security for the payment of a bill or a note bonâ fide discounted, was valid, independently of the statutes relaxing the operation of the usury laws. *Doc d. Haughton v. King*, 11 M. & W. 333; 12 L. J., Ex. 320; 7 Jur. 517.

**— Renewed Securities.**—Bills of exchange given after the repeal of the usury laws, in renewal of bills given while those laws were in force, to secure payment of money lent with usurious interest, are valid, the receipt of the money being a sufficient consideration to support a new promise to pay it. *Flight v. Reed*, 1 H. & C. 703; 32 L. J., Ex. 265; 9 Jur., N. S. 1016; 8 L. T. 638; 11 W. R. 1019.

**— Who entitled to take advantage of.**—Usury could be set up as the foundation of a *jus tertii*, where the third person had settled with the plaintiff, and abandoned all further claim. *Betteley v. Reed*, 4 Q. B. 511; 3 G. & D. 561.

## VACATION.

See PRACTICE.

## VACCINATION.

**Non-Production of Child not Condition Precedent.**—Under 30 & 31 Vict. c. 84, s. 31 (repealed), a parent having been summoned appeared before the justice, but refused to produce his child; the justice was satisfied upon the evidence given that the child was under two years old, and had not been vaccinated:—Held, that the production of the child was not a condition precedent to the justice's power to make an order for it to be vaccinated. *Dutton v. Atkins*, 6 L. R., Q. B. 373; 40 L. J., M. C. 157; 24 L. T. 507; 19 W. R. 799.

**What Children are Affected by.]**—Under the Vaccination Acts, 1867 (30 & 31 Vict. c. 84), and 1871 (34 & 35 Vict. c. 98), every child is subject to the legislation thereby provided, whether born within or without the district of the registrar who gives the information, or whether born before or after either act was passed, until the age of fourteen. *Knight v. Halliwell, infra.*

**Authority of Officer.]**—A resolution of guardians, appointing a vaccination officer, is sufficient authority for the officer so appointed to take proceedings under 30 & 31 Vict. c. 84, s. 31. *Ib.*

**Limitation as to Time.]**—By 34 & 35 Vict. c. 98, s. 11, any complaint may be made and any information laid for an offence under the Vaccination Acts, 1867 and 1871, at any time not exceeding twelve calendar months from the time when the matter of such complaint or information arose, and not subsequently. On the 10th of May, 1872, a father received a notice under 30 & 31 Vict. c. 84, s. 31, requiring him to have his child vaccinated within fourteen days. Having disregarded the notice, on the 24th of June, 1873, he was summoned before justices, who made an order that he should procure the child to be vaccinated:—Held, that the information having been laid at a time exceeding twelve months from the time the matter of such complaint (that is, the giving of the notice) arose, the father could not be convicted without a fresh notice being given. *Knight v. Halliwell*, 9 L. R., Q. B. 412; 43 L. J., M. C. 113; 30 L. T. 359; 22 W. R. 689.

The Vaccination Act, 1871 (34 & 35 Vict. c. 98), s. 11, which provides that any complaint may be made for an offence under that act, or the Vaccination Act of 1867, at any time not exceeding twelve months from the time when the matter of complaint arose, impliedly repeals s. 44 of the Metropolitan Police Act (2 & 3 Vict. c. 71), so far as regards the limitation of time (six calendar months) for proceedings under the Vaccination Acts, within the metropolis as well as elsewhere. *Miller v. Rhind*, 29 L. T. 29.

**Certificate.]**—A parent who holds a certificate of his child having had small pox, but not one of its insusceptibility of successful vaccination, is not within, and is not required by, the terms of s. 7 of the Vaccination Act, 1871 (34 & 35 Vict. c. 98), to transmit such certificate to the vaccination officer; nor, inasmuch as having had small pox and insusceptibility of successful vaccination are two distinct and different things, is he liable to the penalty imposed by that section upon persons failing to transmit a certificate of such insusceptibility. *Broadhead v. Holdsworth*, 2 Ex. D. 321; 46 L. J., M. C. 172; 36 L. T. 320.

By 30 & 31 Vict. c. 84, s. 34, in any prosecution for neglect to procure the vaccination of a child, . . . if the defendant produces the certificate in the form B., it shall be a sufficient defence, except when the time specified therein for the postponement of the vaccination shall have expired before the time when the information shall have been laid:—Held, that the certificate was no answer to proceedings under s. 31. *Allen v. Worthy, infra.*

**Previous Conviction.]**—T. was ordered by a

magistrate, under s. 31 of the Vaccination Act, 1867 (30 & 31 Vict. c. 84), to cause his child to be vaccinated upon a notice from the vaccination officer headed Vaccination Acts, 1867 and 1871, and reciting that he was in default under the above acts in respect of his child; the notice proceeded to require him to have the child vaccinated within fourteen days, and do all other things the law requires touching the vaccination; failing which it would be the vaccination officer's duty to report the case in order that proceedings should be taken as the law directs. He had been twice before fined in reference to the vaccination of the same child, who was two years old:—Held, that there was nothing in the Vaccination Act of 1871 (34 & 35 Vict. c. 98), to prevent a repetition of a conviction for breach of s. 31 of the Act of 1867, and that this notice was well adapted to the requirements of that section. *Tebb v. Jones*, 37 L. T. 576.

A parent, having been fined under 30 & 31 Vict. c. 84, s. 31, for disobeying an order to have his child vaccinated, may be proceeded against from time to time as long as the child remains unvaccinated. *Allen v. Worthy*, 5 L. R., Q. B. 163; 39 L. J., M. C. 36.

Where a parent, or person having the care, nurture, or custody of a child, has incurred and paid the penalty for neglecting to have it vaccinated within the time specified by 16 & 17 Vict. c. 100, and 24 & 25 Vict. c. 59, a continuous neglect to have it vaccinated is not a further breach of the statutes. *Pilcher v. Stafford*, 4 B. & S. 775; 33 L. J., M. C. 113; 10 Jur., N. S. 651; 9 L. T. 759; 12 W. R. 407.

## VAGRANT.

**Offences—Desertion of Child.]**—The 5 Geo. 4, c. 83, s. 4, which makes it an act of vagrancy in a parent to desert a child, applies to legitimate, and not illegitimate children. *Reg. v. Maude*, 2 D., N. S. 58; 11 L. J., M. C. 120; 6 Jur. 646.

**—Desertion of Family.]**—A wife who, deserted by her husband, and having no means of maintaining her children, leaves them, so that they become chargeable to the parish, cannot be convicted for absconding and leaving them chargeable, under the Vagrancy Act, 5 Geo. 4, c. 83, s. 4. *Peters v. Cowie*, 2 Q. B. D. 131; 46 L. J., M. C. 177; 36 L. T. 107.

**—Impostures by Palmistry.]**—The imposture of exercising, with intent to deceive, a pretended power of holding intercourse with the invisible world, and of obtaining manifestations and communications from supernatural and invisible spirits, is an attempt to deceive by using "subtle craft, means or device by palmistry or otherwise," within s. 4 of the Vagrancy Act, 5 Geo. 4, c. 83. *Monck v. Hilton*, 2 Ex. D. 268; 46 L. J., M. C. 163; 36 L. T. 66; 25 W. R. 373.

It is not necessary, to constitute a man a rogue and vagabond within this section, that he should lead a wandering and vagabond life. *Ib.*

— **Indictment, Form of.**—A conviction under s. 4 of 5 Geo. 4, c. 83, which stated that the defendant "did use a certain subtle craft, means and device" with intent, &c., is bad for uncertainty in not shewing a conviction for an offence punishable by the statute. *Reg. v. Slade*, 35 L. T. 911.

— **Offender—Duty of Constable.**—A relieving officer of a parish found the husband of a woman who was chargeable removing his goods, and told a constable to take him into his custody:—Held, that this was not the case of a person found offending against the act, and therefore the constable was not bound to take him. *Horley v. Rogers*, 2 El. & El. 674; 29 L. J., M. C. 140; 6 Jur., N. S. 605; 8 W. R. 392.

See also POOR LAW.

— **Encouraging Child to Beg—Age.**—On an information against a person for encouraging a child to beg, the magistrate is justified in disregarding the statement made by the child that he was sixteen years of age, that being the only evidence as to age, if his appearance warrants his belief that he is a child under the age of fourteen, the question of age being one of fact entirely for the magistrate. *Reg. v. Vianani*, 15 L. T. 240.

— **Unlawful Purpose.**—Being in a garden for the purpose of fornication is not being there for an unlawful purpose, within 5 Geo. 4, c. 83, s. 4. *Hayes v. Stephenson or Sterenson*, 9 W. R. 53; 3 L. T. 296.

**Gaming in Public Place.**—See GAMING AND WAGERING.

**Public Place—Highway.**—Under 5 Geo. 4, c. 83, s. 4, a person is well convicted of being a rogue and a vagabond if the conviction states that he, "being a reputed thief, did frequent the public highway," at, &c., "with intent to commit felony." It is not essential to the offence that the highway should lead to any river, canal or navigable stream, dock or basin, quay, wharf or warehouse, or that it should be adjacent to any place of public resort, or avenue thereto. Lord Campbell, C. J., Coleridge and Wightman, JJ.; Patteson, J., dissentiente. *Reg. v. Brown*, 17 Q. B. 833; 21 L. J., M. C. 113.

A public highway is not necessarily a "place of public resort," within the meaning of 5 Geo. 4, c. 83, s. 4. *Timson, Ex parte*, 5 L. R., Ex. 257; 39 L. J., M. C. 129; 22 L. T. 614; 18 W. R. 849.

A man was committed to gaol by justices, under a warrant which stated him to have been convicted, under 5 Geo. 4, c. 83, s. 4, as "a rogue and vagabond, for that he, being a suspected person, did frequent a certain public highway . . . with intent to commit a felony:—Held, that the commitment was bad, for not shewing that the highway led or adjoined to any "river, canal, &c." or to any "place of public resort," or that it was itself a place of public resort. *Id.*

The case of *Jones, In re* (7 Ex. 586; 21 L. J., M. C. 116), adhered to, and *Reg. v. Brown* (17 Q. B. 833) not followed. *Id.*

Held, also, that only the commitment being brought before the court upon the return to a

*habeas corpus*, and that being bad, the prisoner was entitled to his discharge whether there was a good conviction or not. *Id.*

— **Street.**—Where a commitment stated that the prisoner being a suspected person "did frequent a certain street, with intent to commit felony:—Held, that the commitment was bad, for not alleging that the street was leading to a river, canal or place of public resort, or was adjacent to a place of public resort. *Jones, In re*, 7 Ex. 586; 21 L. J., M. C. 116; 16 Jur. 801.

— **Advertised Sale.**—Premises on which a sale, which has been publicly advertised, is going on by public auction, are, for the occasion, a place of public resort, within 5 Geo. 4, c. 83, s. 4. *Swell, Ex parte*, 7 C. B., N. S. 160; 29 L. J., M. C. 50; 6 Jur., N. S. 582; 1 L. T. 37.

— **Thoroughfare.**—Where a warrant of commitment set out a conviction, which alleged that the prisoner, on a certain day, in the city of London, then being a suspected person and reputed thief, frequenting the public streets and places of and in the city, then and there was found in Railway-place, being a public thoroughfare, and one of the places of public resort of and in the city, with intent feloniously to steal the moneys, goods, and chattels of S. S., from her person therein:—Held, sufficient. *Cross, Ex parte*, 1 H. & N. 651; 26 L. J., M. C. 28; 3 Jur., N. S. 320; S. P., 1 C. B., N. S. 573.

— **Railway Platform.**—A conviction alleged that the defendant being a suspected person, at the railway station in a parish, the same being at the time a place of public resort, did frequent the platform of the station with intent to commit felony:—Held, that it sufficiently appeared that the platform was a place of public resort, and that the conviction was, therefore, good. *Daris, Ex parte*, 2 H. & N. 149; 26 L. J., M. C. 178.

**Convictions—Form of.**—A conviction will not be vitiated by the omission of the word "part" before Great Britain in the recital of the statute, as directed in the form given by the 5 Geo. 4, c. 83. *Nixon v. Nanney*, 1 G. & D. 370; 1 Q. B. 747.

In pursuing that form, it is not necessary to state the evidence on which the conviction proceeded. *Id.*

— **Validity of.**—By 5 Geo. 3, c. 83, s. 4, every person pretending or professing to tell fortunes, or using any subtle craft, means or device, by palmistry or otherwise, to deceive and impose on any of her Majesty's subjects, shall be deemed a rogue and a vagabond, within the true intent and meaning of that act, and may be committed by a justice of the peace to prison for three months. S. having been convicted under this statute, the conviction set out that he had used certain craft, &c., which craft was that he wrote words upon a slate, which he pretended to be written by the spirit of a certain person deceased, to deceive L. and D.; but the conviction omitted the words "by palmistry or otherwise," and was quashed by the quarter sessions on that account:—Held, that it was a question for the sessions to determine whether the omis-

sion of the words rendered the conviction bad, and a rule for a mandamus to enter continuances was discharged. *Reg. v. Middlesex (Justices), Stade, In re*, 2 Q. B. D. 516; 46 L. J., M. C. 225; 36 L. T. 402; 25 W. R. 610.

An information charged that the appellants were found in the dwelling-house of the respondent "for an unlawful purpose, to wit, for the purpose of feloniously stealing and converting to their own use certain provisions" of the respondent's. The facts were, that the appellants had been admitted into the house of the respondent by night, and without his knowledge, by his servants, and there entertained by them with the provisions in question. The justices convicted the appellants of the offence charged, upon the ground that they were, under the circumstances proved on the hearing, in the house for an unlawful purpose, within the meaning of the act:—Held, that the conviction was bad, as not amounting to a conviction for felony, the offence charged in the information. *Kirkin v. Jenkins*, 9 Cox, C. C. 311; 32 L. J., M. C. 140; 9 Jur., N. S. 1013; 8 L. T. 243; 11 W. R. 618.

A conviction stated that a party having been brought before a justice upon an information charging him with having unlawfully returned to his parish without a certificate, from which he had been legally removed, confessed himself guilty of the offence:—Held, that the conviction was good on the face of it without stating in it an express act of vagrancy, it being necessary for the party convicted to shew in his defence that he had a sufficient excuse for returning, and that he did not return in a state of pauperism. *Mann v. Danvers*, 3 B. & A. 103.

— **Appeals from Sufficiency of Notice.**—A notice of appeal against a conviction of a party as a rogue and a vagabond, for obscenely exposing his person in a place of public resort, with intent to insult a female, stating, as the ground of such appeal, that the appellant was not guilty of the offence, is sufficient. *Reg. v. Newcastle-upon-Tyne (Justices)*, 1 B. & Ad. 933.

— **Costs—Power of Sessions.**—A person convicted as a rogue and vagabond appealed to the quarter sessions, having given notice of appeal to the convicting justices. No one appearing to support the conviction, it was quashed:—Held, that the sessions were authorized by 12 & 13 Vict. c. 45, s. 5, to award costs against the person who prosecuted the appellant, and could not award them against the convicting justices. *Reg. v. Purdey*, 5 B. & S. 909; 34 L. J., M. C. 4; 11 Jur., N. S. 153; 11 L. T. 309; 13 W. R. 75.

On an appeal to quarter sessions against a conviction by justices, the justices at quarter sessions, on quashing the conviction, may award costs against the original complainant. *Reg. v. Smith*, 29 L. J., M. C. 216; 8 W. R. 589.

— **Proof of Previous Conviction—Record of.**—A previous conviction, under 5 Geo. 4, c. 83, s. 17, can be proved only by proof of the record thereof; and neither oral testimony nor the minute-book of the convicting justices is sufficient. *Giles v. Siney*, 11 L. T., N. S. 310; 13 W. R. 92.

— **Certificate of.**—The certificate of a previous conviction required by 5 Geo. 4, c. 84,

s. 24, is sufficient, by virtue of 8 & 9 Vict. c. 113, s. 1, if it purports to be signed by an officer having the custody of the records, although that officer is therein described as the deputy clerk of the peace of a borough. *Reg. v. Parsons*, 1 L. R., C. C. 24; 35 L. J., M. C. 167; 12 Jur., N. S. 436; 14 L. T. 450; 14 W. R. 662; 10 Cox, C. C. 243.

The certificate need not aver that the quarter sessions at which the prisoner was convicted were held by the recorder. *Ib.*

— **Enforcing Warrant for Apprehension.**—Where a conviction of one as a rogue and a vagabond had been appealed against and confirmed, and the convicting magistrate issued his warrant for the apprehension of the party convicted:—Held, that the magistrate had not the power, and that it belonged to the quarter sessions. *Moore, Ex parte*, W., W. & D. 72; 1 Jur. 135.

— **Process of Execution—Subsequent Court.**—Under 5 Geo. 4, c. 83, s. 14, a subsequent court of quarter sessions has power to give effect to a judgment pronounced at a previous sessions of the same court, by issuing process of execution upon a conviction as awarded at such previous sessions. *Reg. v. Warwickshire (Justices)*, 4 N. & M. 370; 2 A. & E. 768; 1 H. & W. 18.

A mandamus to the court of quarter sessions will go, commanding them to issue such process of execution where there has been no delay in making the application, or the delay has been satisfactorily accounted for. *Ib.*

— **Habeas Corpus.**—If a person is committed to prison as a rogue and vagabond for procuring charitable contributions under a false pretence that he is able to abstain from food for five years and six months, the court will grant a habeas corpus to bring up his body. *Cutranah, In re*, 1 D., N. S. 546; 6 Jur. 220.

## VALUER AND APPRAISER.

### I. IN GENERAL.

#### II. RECOVERY OF PRICE FIXED BY.—See CONTRACT.

#### III. BETWEEN LANDLORD AND TENANT.—See LANDLORD AND TENANT.

#### IV. FOR PAROCHIAL PURPOSES.—See POOR LAW.

### 1. IN GENERAL.

— **Duty of.**—One who holds himself out as a valuer of ecclesiastical property, though he is not bound to possess a precise and an accurate knowledge of the law respecting the valuation of dilapidations as between outgoing and incoming incumbent, is bound to bring to the performance of the duty he undertakes a knowledge of the general rules applicable to the subject, and of the

broad distinction which exists between a valuation as between incoming and outgoing tenant, and a valuation as between incoming and outgoing incumbent. *Jenkins v. Betham*, 15 C. B. 168; 3 C. L. R. 373; 24 L. J., C. P. 94; 1 Jur., N. S. 237.

**Necessity of Licence.]**—To a declaration for work the defendant pleaded, that the work consisted of an appraisement of personal property, which the plaintiff appraised in expectation of reward to be therefor paid by the defendant to him, without being duly licensed according to 46 Geo. 3, c. 43 :—Held, that the plea was sufficient, without stating that the plaintiff did the work as an appraiser, as it followed the words of the statute. *Palk v. Force*, 12 Q. B. 666; 17 L. J., Q. B. 299; 12 Jur. 797.

**Liability to be Sued.]**—The plaintiff purchased the goodwill, stock and effects of a business at a valuation, the amount of which was to be fixed by valuers, one to be appointed on each side for that purpose, and in case of difference by an umpire to be chosen by the valuers. The plaintiff employed the defendant as his valuer, and he and the valuer appointed by the vendor fixed between them the amount of valuation. In an action for negligence in making such valuation, by which the value of the goodwill was fixed too high, the plaintiff applied to administer interrogatories to the defendant to ascertain the basis on which he had agreed with the valuer of the defendant to calculate the valuation :—Held, that the defendant had not acted in the matter as an arbitrator, but as a valuer only, and was therefore liable to his employer for negligence, and the plaintiff accordingly was allowed to administer the interrogatories. *Turner v. Gouldeu*, 9 L. R., C. P. 57; 43 L. J., C. P. 60.

A broker made a contract for the seller as follows :—"Oct. 26, 1869. Sold by order and for account of Mr. P., to my principals, Messrs. S. H. & Son, to arrive, 500 tons black Smyrna raisins, 1869 growth, fair average quality in opinion of selling broker, to be delivered here in London at 22s. per cwt. Shipment November or December, 1869 :"—Held, that the broker was employed as an arbitrator to determine between the parties any difference which might arise as to the quality of the raisins tendered in fulfilment of the contract; and, consequently, that he was not liable to an action for failing to exercise reasonable care and skill in coming to a decision, he having acted bonâ fide, and to the best of his judgment. *Pappa v. Rose*, 7 L. R., C. P. 32; 41 L. J., C. P. 11; 20 W. R. 62. Affirmed, 7 L. R., C. P. 525; 41 L. J., C. P. 187; 27 L. T. 348; 20 W. R. 784—Ex. Ch.

L., exercising the avocation known among the mercantile community as an average adjuster, was employed by A. and B., under the terms of an agreement, to examine into and decide upon a disputed claim between them as to the salvage and loss of cargo upon a wreck. Having pronounced his decision, with which A. was dissatisfied, A. brought an action for damages, imputing that L. had not used due diligence in ascertaining the facts as to the matters submitted to him, and for negligence in the performance of the duty which he had undertaken for reward. To this L. pleaded that he had decided bonâ fide :—Held, that he was, in reference to the question into which he was commissioned by A.

and B. to inquire, in the position of an arbitrator, and that as they must be held to have bound themselves to abide by his award, he in the character that had been imposed upon him by the parties was not liable to an action at the suit of either of them. *Tharsis Sulphur and Copper Company v. Loftus*, 8 L. R., C. P. 1; 42 L. J., C. P. 6; 27 L. T. 549; 21 W. R. 109.

**Valuation—How Made.]**—A valuation of a house taken by a railway company by a surveyor who did not enter the house valued, is not a proper valuation. *Cotter v. Metropolitan Railway Company*, 10 Jur., N. S. 1014; 10 L. T. 777; 12 W. R. 1021.

**Authority of Agent to Ratify.]**—An agent to receive rents and manage property having, without actual authority, agreed that his employer should take the stock of an outgoing tenant, at a valuation, and the valuation including the eatage of the fields in which the employer's cattle were afterwards placed by his servants, with his knowledge :—Held, a ratification of the whole valuation. *Rodmell v. Eden*, 1 F. & F. 542.

**Enforcing by Mandatory Order.]**—When an agreement has been entered into for the sale of a house at a fixed price, and of the fixtures and furniture therein, at a valuation by a person named by both parties, and he undertakes the valuation, if he is refused permission by the vendor to enter the premises for that purpose, the court will make a mandatory order to compel the vendor to allow the entry to enable the valuation to proceed. *Smith v. Peters*, 20 L. R., Eq. 511; 44 L. J., Ch. 613; 23 W. R. 783.

**Surveyor.]**—A surveyor is a competent adviser in the matter of a building lease, and a lessee who has had the assistance and advice of a competent surveyor, cannot complain of surprise. *Haberdashers' Company v. Isaac*, 3 Jur., N. S. 611.

Little reliance is to be placed on the evidence of surveyors in a contest as to value. *Waters v. Thorn*, 22 Beav. 547.

**Fees.]**—On taxation of a bill of costs, the master allowed an item in respect of surveyor's charges, calculated according to "Ryde's scale," by which a commission of from one-half to one per cent. on the amount of the purchase-money, according to the nature of the case, is allowed. A summons to review the taxation in respect of this item was dismissed. *Att.-Gen. v. Drapers' Company*, 9 L. R., Eq. 69; 21 L. T. 651.

**Stamps on Appraisement.]**—See REVENUE.

**Of Goodwill of Business.]**—See GOODWILL.

**By Arbitration.]**—See ARBITRATION AND AWARD.

**For Purposes of Rating.]**—See POOR LAW.

**Of Property in Metropolis.]**—See METROPOLIS.

**Venditioni Exponas.]**—See SHERIFF.

## VENDOR AND PURCHASER.

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### I. PARTIES TO SALE.

#### Contract—Mistake as to Persons making.]—

Where personal considerations enter into a contract, error as to the person with whom the contract is made annuls the contract; not so where the person sought to be bound would have been equally willing to make the same contract with any other person. *Smith v. Wheatcroft*, 9 Ch. D. 223; 47 L. J., Ch. 745; 39 L. T. 103; 27 W. R. 42.

#### Sale by Trustees—Discretionary Powers.]—

When lands are devised to trustees in fee upon trusts or with powers which in their execution require the exercise of judgment and discretion, and the trustees disclaim the devise, so that the legal estate in fee descends to the heir-at-law,

such powers or trust cannot be exercised or carried into execution by the heir, although he holds the estate subject to the trusts of the will. *Robson v. Flight*, 4 De G., J. & S. 608.

— **Trustees when Beneficiaries—Concurrence of Assignee of one of them.]—**On the sale by the court of real estate vested in trustees having a power of sale, and being themselves beneficiaries:—Held, that a good title could not be made by the exercise of the power of sale without the concurrence of the assignee in insolvency of one of the trustees. *Young v. Tregear*, 21 W. R. 215.

— **When a Breach of Trust—Lost Deed.]—**Trustees having power to sell under such special or other conditions or stipulations as they should think fit, sold by auction with a condition limiting the title to commence in 1858 (fourteen years previously). The next convenient root of title was a deed of 1819, from which a good title could be deduced, but the trustees could not find this deed, and had only recitals of its contents. There was also a condition that all recitals and statements in the deeds and particulars should be accepted as conclusive evidence:—Held, that the sale under such conditions was a breach of trust, and an injunction was granted at the suit of a cestui qui trust to restrain completion. *Dance v. Goldingham*, 8 L. R., Ch. 902; 42 L. J., Ch. 777; 29 L. T. 166; 21 W. R. 761. *S. P.*, *Dunn v. Flood*, 49 L. T. 678; 32 W. R. 197.

— **What Amount of Land included.]—**A private act vesting lands in trustees on trust to sell, proceeding on the supposition that the lands are comprised in a settlement, does not bring the lands within that settlement if they were not in it previously. *Howard v. Shrewsbury (Earl)*, 17 L. R., Eq. 378; 43 L. J., Ch. 495; 29 L. T. 862; 22 W. R. 290.

— **Implied Postponement by Gift of Prior Interest.]—**A testator gave to his wife the personal use of a leasehold messuage for her life, she discharging the ground rent, and paying a yearly rent of 50*l.* to his trustees; and he declared that if she should not think fit to reside therein, then the premises should form part of his residuary estate. He then directed the conversion of his real and the residue of his personal estate, and gave a power to postpone such conversion, directing the rents and profits in the meantime to be deemed annual income. Under the trusts of the residue the widow took one-fourth of the income. A railway company, having taken the premises under its compulsory powers while the widow was in occupation, made an agreement with her as to her interest, and a separate agreement with the trustees. The latter declined to assign on the ground that the trust for sale had not arisen, and required the consideration money to be paid into court:—Held, that their contention was right, for though the house, subject to the interest of the widow, was part of the residuary estate, it would not be a proper exercise of the trust to sell during the continuance of the occupation of the widow. *Smith v. Great Northern Railway Company*, 23 W. R. 126.

#### — Under Lands Clauses Consolidation Act.]

—Trustees being trustees of lands for females, covert who were absolutely entitled for their

separate use, are not persons competent to contract with a railway company for the sale of land under the 7th section of the Lands Clauses Act, 1845. *Peters v. Lewes and East Grinstead Railway Company*, 18 Ch. D. 429; 50 L. J., Ch. 839; 45 L. T. 234; 29 W. R. 875—C. A.

— **Existence of Debts.**—Trustees, as vendors, are not bound to state whether there exist any debts which make a sale necessary. *Flux v. Best*, 31 L. T. 645; 23 W. R. 228.

— **When empowered to Sell.**—The doctrine of *Forbes v. Peacock* (13 L. J., Ch. 46; *S. C.*, 15 L. J., Ch. 371; 12 Sim. 528) amounts only to this, that where prior to 22 & 23 Vict. c. 85, and 23 & 24 Vict. c. 145, there is a trust to sell real estate, and pay debts and legacies out of the proceeds, there is also an implied power in the trustees to give receipts for the purchase-money. There is nothing in that case authorizing trustees, by reason merely of such a charge, to sell a settled estate. *Carlyon v. Truscott*, 20 L. R., Eq. 348; 44 L. J., Ch. 186; 32 L. T. 50; 23 W. R. 302.

— **Jurisdiction of Court to Order Sale.**—A testator by his will, dated the 4th September, 1858, devised his real and personal estate to trustees upon trusts to pay debts, and subject thereto upon trust as to a freehold house to allow his wife to reside there during her widowhood, and on her death or second marriage, upon trust for sale. The testator died in the same year. An administration suit was instituted, and the chief clerk found that all the debts were paid. The court afterwards decreed a sale of the estate in question, and the purchaser raised the objection that the widow being still alive, the order was beyond the jurisdiction of the court:—Held, that the court had no power to make the order. *Id.*

— **Concurrence of Beneficiaries to Sale.**—A trustee having a discretionary trust for sale of real estate under a will at such a price as he should think reasonable, with power to postpone the sale, leased the property for thirty years with the concurrence of the beneficiaries. Before the lease expired the property was put up for sale by the lessee and the trustees conjointly, the facts being disclosed by the particulars of sale; and a sale having been effected, the purchase-money was apportioned between the two interests according to the valuation of a skilled valuer:—Held, that the purchaser was not entitled to insist on the concurrence of the beneficiaries on account of the valuation not having been made before the sale, and that the title would be forced upon him. *Morris v. Debenham*, 2 Ch. D. 540; 34 L. T. 205; 24 W. R. 636.

A testator who had entered into a contract with the plaintiff for the sale of lands, died before the completion of the purchase, and devised the legal estate in the hands of the defendant, and two other trustees who disclaimed. The testator gave and bequeathed several annuities, and devised the residue of his estate to the defendant, after payment of the annuities, and declared that the lands included in the contract for sale should, if unsold, remain in the power and under the control of his trustees, in the same manner as the rest of his estate. After the death of the testator, the plaintiff entered

into an agreement with the defendant to take a conveyance of the lands from the defendant and the annuitants, or such of them as were entitled to annuities charged upon the lands. In an action for breach of the last-mentioned agreement:—Held, that the plaintiff was entitled to require the concurrence of the annuitants in the conveyance. *Cumming v. Reid*, 8 Ir. R., C. L. 166.

— **Consent of Tenant for Life.**—The trustees of a settlement of real estate having power to sell the fee at the request of the tenant for life, can, by an exercise of the power upon his request, after he has alienated his particular estate and with the consent of his alienee, made a good title in fee to a purchaser. *Alexander v. Mills*, 6 L. R., Ch. 124; 40 L. J., Ch. 73; 24 L. T. 206; 19 W. R. 310.

— **Consent in Writing of Tenant for Life—Infant Tenant in Tail in Possession.**—Sir T. N. devised his estates to trustees in trust for A. for life, then for B. for life, and then for C. in tail, with a power of sale and enfranchisement with the consent of the person for the time being entitled as beneficial tenant for life; and directed that no repurchase or reinvestment should be made while there should be any person entitled as beneficial tenant for life or tenant in tail in possession, and of the age of twenty-one years, without the previous consent of such person. A. and B. were both dead, and C. was an infant:—Held, that the trustees could during the minority of C. exercise the power of sale and enfranchisement without consent, and make a good title. *Neave and Chapman, In re, or Neave's Trusts, In re*, 49 L. J., Ch. 642; 43 L. T. 152; 28 W. R. 976.

— **When Infants bound by Sale.**—A mortgagee contracted to sell two properties, leasehold and freehold, to the equity of redemption in which the mortgagors were entitled in different shares. The leaseholds had been mortgaged to him by underlease. The purchaser refused to complete, and the vendor filed a bill for specific performance. At the date of filing the bill the mortgagors were willing to concur; but before the decree was made, some of them died, leaving infants interested in the equity of redemption:—Held, that the 23 & 24 Vict. c. 145, s. 15, empowered the vendor to sell the whole of the term of the leaseholds, though they were only demised to him for the residue of the term less one day. *Hatt v. Hillman*, 25 L. T. 55; 19 W. R. 694.

Held, also, that the infants interested in the equity of redemption must be bound by the sale, as it was for their advantage that the two properties should be sold together; and that the vendor could make a good title. *Id.*

Where a breach of trust is committed by trustees for sale, the court will entertain a bill for injunction to restrain such sale in the name of an infant cestui que trust, who has but a small interest, and will not inquire into the motives of the next friend. *Dance v. Goldingham*, 8 L. R., Ch. 902; 42 L. J., Ch. 777; 29 L. T. 166; 21 W. R. 761.

— **Devise to Trustees, — Sale by Devises of surviving Trustee.**—Where real estate is devised to trustees and "their heirs" (omitting

"assigns") in trust for sale, the trust must be considered as annexed, not to the person, but to the fee simple estate taken by the trustees, so that the trust can be executed by the devisees of trust estates of the surviving trustee. *Osborne to Rowlett*, 13 Ch. D. 774; 49 L. J., Ch. 310; 42 L. T. 650; 28 W. R. 365. See *Morton and Hallett*, *In re, infra*.

A testator, by his will, dated in 1845, devised and bequeathed his real and personal estate to his wife for life, subject to the payment of his debts, and from and after her decease to A. and B., "their heirs, executors, and administrators, upon trust to sell and dispose thereof at such times and in such manner as they, my said trustees, shall deem expedient." A. and B. both predeceased the tenant for life, B., the surviving trustee, having devised his trust estates. Upon the death of the tenant for life, B.'s devisees contracted to sell part of the real estate of the original testator:—Held, upon a summons under the Vendor and Purchaser Act, 1874, that B.'s devisees could make a good title, and one which the court would force upon a purchaser. *Id.*

*Cooke v. Crawford* (13 Sim. 91) held to be overruled. *Id.*

S. being seised in fee of a messuage and having other real and personal estate, died, having devised all his real and the residue of his personal estate to W. S. and H. S., their heirs, executors, and administrators, that they, or the survivor of them, or the heirs, executors, or administrators of such survivor, should sell. The testator declared that W. S. and H. S. or the survivor of them, or the executors or administrators of such survivor, should hold the proceeds of the sale in trust to pay debts and invest all the residue of the trust moneys in government or real securities, and pay the dividends equally between the testator's wife and daughter during their lives and wholly to the survivor after the decease of one of them, and after the decease of that survivor to divide the whole equally amongst all the then living children of the testator, or, failing them, according to the Statute of Distributions. The testator also appointed W. S. and H. S. his executors. They acted in the trust, and H. S. the survivor devised all his real and personal trust estates to A. and B., whom he also appointed his executors to hold to them, their heirs, executors, administrators, and assigns upon the same trusts as the testator H. S. held them. After the death of H. S., A. and B. sold the messuage to C., who subsequently contracted with the plaintiff to sell it to him in fee. In an action by the plaintiff to recover the deposit-money paid under this contract on the ground that C. had failed to make out a good title:—Held, that he was entitled to recover, inasmuch as by reason of the omission of "assigns" in the description of the donees of the power of sale, in the devise by S. creating the trust, the title of the devisees of H. S. to convey to C. was too doubtful for a court of equity to compel specific performance of the contract. *Sterens v. Austen*, 3 El. & El. 685; 30 L. J., Q. B. 212; 7 Jur., N. S. 873; 3 L. T. 810.

A testator devised his freehold and copyhold estates to trustees and their heirs "upon trust that they his said trustees or the trustees or trustee for the time being of that his will," should sell the estates. He empowered "his trustees, or the trustees or trustee for the time being of that his

will," to give receipts, and declared that if the trustees thereby appointed, or either of them, or any trustee or trustees to be appointed as thereinafter provided should die, or desire to be discharged, then and so often the said trustees or trustee might appoint a new trustee or new trustees. The trustees having died, the customary heir of the survivor contracted to sell part of the copyholds:—Held, by the Court of Appeal, affirming the decision of Jessel, M. R., that the customary heir was competent to execute the trust for sale. *Morton and Hallett, In re*, 15 Ch. D. 143; 49 L. J., Ch. 559; 42 L. T. 602; 28 W. R. 895—C. A.

Whether *Cooke v. Crawford* (13 Sim. 91) is to be treated as overruled, quære. *Id.*

*Osborne to Rowlett (supra)* doubted. *Id.*

**Tenant for Life only Surviving Trustee.]—**The circumstance of the tenant for life of real estate being the sole surviving trustee in whom the power of sale is vested is no objection to a sale under the power. *Forster v. Abraham*, 17 L. R., Eq. 351; 43 L. J., Ch. 199; 22 W. R. 386.

**Duties of Trustees on Sale.]—**It is the duty of trustees who, having a trust or power to sell the trust property, join with the owner of another property in selling both properties together, first, to see that such a mode of sale is beneficial to their cestuis que trustent; secondly, to see that their share of the purchase-money is apportioned before the completion of the purchase, and to obtain payment of such apportioned share; and thirdly, to apportion the share themselves, taking care to act under proper advice. *Cooper, In re*, 4 Ch. D. 802; 46 L. J., Ch. 133; 35 L. T. 890; 25 W. R. 301.

The proper mode of apportioning the prices of a life estate and reversion when sold together for a lump sum, is to value both interests separately, and not to put a value on one and deduct that from the total price. *Id.*

**Right of Vendor on discovering he is Purchasing from Trustees.]—**To a claim for specific performance of an agreement to sell lands, the defendant pleaded, first, that the agreement was entered into by a house agent, who was not authorized by the defendant to sell; secondly, that since the contract the defendant had notice that the purchasers were trustees of a marriage settlement, and that the property, which was an underlease, might be an improper investment of the trust funds. Interrogatories by the defendant, directed to establish the case that the investment was a breach of trust, were ordered to be struck out as irrelevant. *Manfield v. Childerhouse*, 2 Ch. D. 82; 46 L. J., Ch. 30; 35 L. T. 590; 25 W. R. 68.

Seemle, that an innocent vendor of lands, discovering before completion that the purchasers are trustees, is not concerned to see that the investment is authorized by the trust. *Id.*

**Contract by one Trustee without Authority of Others.]—**A trustee, without the authority of his co-trustees, signed an agreement for the sale of trust property. In an action for specific performance, to which the co-trustees were not parties:—Held, that specific performance could not be ordered either as to the whole or as to the part in which the contracting trustee had a beneficial interest. *Naylor v. Goodall*, 47 L. J., Ch. 53; 37 L. T. 422; 26 W. R. 162.

**Service of Petition for Sale.**—A petition under 25 & 26 Vict. c. 108, s. 2, by trustees having power to sell settled lands with the consent of the tenant for life, for leave to sell the land and minerals separately, need not be served on the remaindermen. *Nagle, In re*, 6 Ch. D. 104.

**Sale of Property by Trustees to Tenant for Life.**—As a tenant for life, though his consent may be requisite to the exercise of a power of sale, stands in no fiduciary position towards the remainderman, and is as free as any one else to buy from the trustees, a sale to him cannot be impeached on the ground of the purposes for which he buys, his motives being immaterial to the trustees, provided they sell on terms advantageous to the estate. *Dicoonson v. Talbot*, 6 L. R., Ch. 32; 24 L. T. 49; 19 W. R. 138.

**Bare Trustee, who is.**—A trustee with a beneficial interest in the trust estate is not a "bare trustee" within the Land Transfer Act, 1875, s. 48. *Morgan v. Swansea Urban Sanitary Authority*, 9 Ch. D. 582; 27 W. R. 283.

Thus a vendor of freeholds who let the purchaser into possession before payment of the purchase-money and execution of the conveyance, was, by reason of his having a lien on the property for his purchase-money and not being bound to convey until payment, held not to be a "bare trustee" within the act, so that upon his death, the money still remaining unpaid and the conveyance unexecuted, the legal estate passed to his heir-at-law. *Id.*

**Sale by Administratrix.**—Where persons have been appointed executors with power to sell real estate for the payment of debts, and they have renounced probate, an administratrix with the will annexed has no power to sell and to give a good title to a purchaser under the statute 22 & 23 Vict. c. 35, s. 16. *Clay and Tetley, In re*, 16 Ch. D. 3; 43 L. T. 402; 29 W. R. 5—C. A.

**Sale of Part of Intestate's Estate to Husband of One of the Administratrices.**—The husband of an administratrix is in a fiduciary position, and cannot purchase from a co-administratrix without the consent of all the cestuis que trustent. *Pepperell, In re, Pepperell v. Chamberlain*, 27 W. R. 410.

Where one of such cestuis que trustent objected to such a purchase, and after a lapse of about fourteen months took legal proceedings to set it aside:—Held, that the purchaser not having been induced to change his position by reason of the plaintiff's delay, the plaintiff was entitled to have such sale set aside, notwithstanding his delay. *Id.*

**Sale by Administrator durante minore ætate.**—A vendor of leasehold property deduced title as administrator durante minore ætate. It did not appear that the sale was necessary for payment of debts. Upon an objection by the purchaser:—Held, that the vendors had not under the circumstances power to sell. *Robinson and Sords, In re*, 3 L. R., Ir. 429.

**Sale of Leaseholds by Executor—Lis pendens.**—In an action by a purchaser of leaseholds against the vendor, who sold as executor, to recover his deposit, on the ground of no title

being made out, it appeared that, prior to the sale, a bill in equity had been filed against the executor, by a legatee, for a general administration of the testator's estate, to which the executor had appeared, but that no decree had been made:—Held, that the executor had power to make a valid sale of any part of the assets pending the suit. *Reeves v. Burrage*, 14 Q. B. 504; 19 L. J., Q. B. 68; 14 Jur. 177.

Held, also, that the rule of equity by which a party is entitled to sell, pending the suit, is not a mere rule of practice, but one of which the court takes judicial cognizance, and that evidence of the invalidity of the sale on that account was not admissible. *Id.*

**Title to Freeholds of Bankrupt when Trustee Disclaims.**—An owner of freehold property, "burdened with onerous covenants" within the meaning of s. 23 of the Bankruptcy Act, 1869, the title deeds of which he had deposited with an equitable mortgagee, became bankrupt. The trustee in bankruptcy executed a disclaimer of the property under the said section. Subsequently he and the bankrupt purported to convey the property to the equitable mortgagee, whose assigns contracted to sell the same to a purchaser. On a summons taken out by the purchaser under the Vendor and Purchaser Act, 1874:—Held, that there had been a complete disclaimer by the trustee of the bankrupt's estate; that the subsequent conveyance was inoperative; and that the legal estate was outstanding and could not be got in under the Trustee Act, 1850. *Mercer and Moore or Beardsworth and Moore, In re*, 14 Ch. D. 287; 49 L. J., Ch. 201; 42 L. T. 311; 28 W. R. 485.

**Assignee of Bankrupt.**—It is no answer to an action for nonpayment of the remainder of the purchase-money, agreed to be paid to the vendor on his executing a bond conditioned to cause the title to be completed, and the premises to be conveyed to the vendee, that the vendor purchased the estate sold at a sale of the property of a bankrupt, whose assignee he was. *Willett v. Clarke*, 10 Price, 207.

**Purchase by Trustees from Trustee.**—H. was surviving executor and trustee for sale of freeholds, part of the proceeds of which were to be held on the trusts of his marriage settlement, his wife being the testator's daughter. The settlement contained a power to invest in land. H. put up the property for sale, and instructed his trustees to purchase five of the lots, and he instructed the auctioneer to put reserved prices on the lots. The lots were fairly valued, one of the lots (lot 3) being valued at 6,000*l.* H., acting as solicitor for the purchasers, instructed an agent to bid as far as 8,000*l.* for lot 3, and to buy the other lots for whatever price they would fetch. The agent bought lot 3 at 7,230*l.*, and the four other lots above the reserved prices, and H. then conveyed them to the trustees of his settlement:—Held, that the sale was unimpeachable. *Hickley v. Hickley*, 2 Ch. D. 190; 45 L. J., Ch. 401; 34 L. T. 441; 24 W. R. 604.

**Settlement of Purchase-Money by Cestui que Trust—Rescission of Purchase barred—Inquiry whether Rescission beneficial not granted.**—On the death of an intestate leaving four sons

and one daughter, the two eldest sons took out administration to his estate. By deed of family arrangement the five children, of whom the youngest son was an infant, mortgaged to trustees their respective interests in their father's estate for 1,084*l.*, that being the amount of the two fifth shares therein of the daughter and the infant son, as shewn by an account set out in a schedule, and based on a valuation made a year previously, in which the figures had been altered to correspond with the increase or decrease in the various items since the valuation, and which shewed a balance giving 542*l.* to each child. Subject to the mortgage, in respect of which certified sums were to be paid by the three eldest brothers, the trustees were to hold the property in trust for the three eldest brothers. The sums to be paid by the latter were to form a sinking fund for the reduction of the principal of the shares. By her subsequent marriage settlement the daughter recited that she was entitled to 542*l.* under the former deed, and settled that on trust for herself for life, then for her husband for life, then for children as she should appoint by deed or will; in default of appointment, for sons at twenty-one, and daughters at twenty-one or marriage; if no children, and she survived her husband, for herself absolutely; or, if she were not the survivor, then as she should appoint by will, or, in default of such appointment, for her next of kin. In an action, commenced more than nine years after the deed of arrangement, by the daughter, her husband and infant children, against her brothers and the trustees of the deed of settlement, to have the deed of family arrangement set aside, except so far as it was a security for 542*l.* on account of her share, on the ground of infancy, undue influence, pressure, and want of legal advice, and to have the settlement rectified:—Held, that the special allegations of impropriety failed on the evidence, but that, inasmuch as the deed of 1871 constituted a purchase by the administrators of the intestate's estate, who were in the position of trustees, from two of their cestuis que trustent, and in such cases the parties must be dealing completely at arm's length, with full disclosure, and with entire absence of influence, the plaintiffs were entitled, immediately after the execution of the deed, to have it set aside on the ground of the unsatisfactory nature of the valuation, and the purchasers not being at arm's length, and that the mere lapse of time was no fatal bar; but held, also, that the subsequent marriage settlement constituted a fatal bar to the deed being set aside, since it was not established that the effect of setting aside the deed would be to benefit the parties interested under the settlement, and the settlement could therefore not be allowed to be varied, and that being so the plaintiffs were not in a position, supposing the result of setting aside the deed were to shew that they had received too much under it, to make good to the defendants the amount so due to them; and held, further, that an inquiry could not be granted in the present action whether it would or would not be for the benefit of the parties entitled under the settlement for the deed to be set aside, and the settlement varied, since the brothers, who were parties to the action, had no interest in the determination of what was for the interest of the parties entitled under the settlement. *Worsam, In re.*

*Hemery v. Worsam*, 51 L. J., Ch. 669; 46 L. T. 584.

**By Mortgagees.**—Under the will of the uncle of A., made in 1818, A. was tenant for life, with remainder to B., his eldest son, in fee, of lands in which the legal estate was outstanding. In 1849 A. mortgaged his equitable life estate, and in 1852 B. mortgaged his remainder in fee to the same persons, with powers of sale. Default was made, and in 1864 the mortgagees in exercise of the powers of sale conveyed a portion of the lands to C., by a deed, which recited (as the fact was) that the purchase-money had been apportioned between the life estate and the remainder according to a valuation, the propriety of which was not disputed. C. devised the purchased lands to D., his nephew, for life, with remainders over. A portion of the purchased lands was afterwards sold:—Held, that the mortgagees' powers of sale were properly exercised. *Cooper, In re*, 4 Ch. D. 802; 46 L. J., Ch. 133; 35 L. T. 890; 25 W. R. 301.

**Conveyance by Legal Personal Representatives of Mortgagees.**—The 4th section of the Vendor and Purchaser Act, 1874, does not apply to a transfer of a mortgage, and therefore the legal personal representative of a mortgagee of a freehold estate cannot, on receiving payment of the mortgage debt, convey the estate to a transferee. *Spradbery's Mortgage, In re*, 14 Ch. D. 514; 49 L. J., Ch. 623; 43 L. T. 82; 28 W. R. 822.

**Joint Authority to Sell.**—A. and B. advertised an estate for sale. The advertisement stated that "to treat and view the property applications are to be made to A. or B.:"—Held, that this did not give A. authority to sell the estate, so as to bind B. without his concurrence. *Godwin v. Brind*, 17 W. R. 29.

**Death of Vendor before Completion.**—By a marriage settlement real estate was limited to such uses as A. and B. (husband and wife) should appoint, and in default of appointment to the use of trustees during the life of B., in trust for her separate use, with remainder to A. in fee. A. entered into a contract to sell the property to C., who had notice of the provisions of the settlement; and in the contract it was stated that A. would procure a proper assurance of the premises to the purchaser to be executed by all necessary parties. The purchase-money was paid by C. to the trustees of the settlement, and by them invested pursuant to the contract; and a draft conveyance in the form of a joint appointment by A. and B. to C. was approved, but before executing it A. died suddenly. B. having after A.'s death refused to convey her life interest:—Held, that C. was entitled to specific performance to the extent of A.'s reversion in fee, with compensation in respect of B.'s life interest, and a lien on the invested purchase-money in the hands of the trustees of the settlement. *Barker v. Cox*, 4 Ch. D. 464; 46 L. J., Ch. 62; 35 L. T. 662; 25 W. R. 138.

**Death of Vendee before Completion.**—A. verbally agreed with B., his solicitor, for the sale of land to B. This agreement, which was never reduced to writing, provided that B. should bear all expenses of making out the title, that possession should be at once given, and that the pur-

chase-money should be paid at a fixed future date, with interest in the meantime. B. entered into possession, but took no further steps in completion of the purchase, and, before the purchase-money became due, died. In a suit by A. for specific performance against the executor of B.:—Held, that B., as A.'s solicitor, ought to have had an agreement in writing prepared, and that the executor was bound to complete the purchase and pay the costs of the suit. *Brayfield v. Scriven*, 22 W. R. 202.

**Agents acting without Authority.**—When a person assumes, without authority, to act as agent for the sale of real estate, and the contract is merely verbal, the person injured by relying on his representations has no remedy in equity against him for damages on the ground of part performance; and there is nothing in the Judicature Acts to alter this rule. *Warr v. Jones*, 24 W. R. 695.

**Condition as to Parties to Conveyance, Effect of.**—A party having agreed to purchase the Kitty Cragg estate under conditions of sale, repudiated the purchase on the ground that John Raine, who refused to join, was a necessary party to the conveyance. The fee simple of this estate was purchased in 1843 by Martha Raine, who shortly afterwards married Edward Hutchinson; no settlement was made at the marriage, but in 1866, Martha Hutchinson, with the written consent of her husband and William Raine, her heir-at-law, made a will, by which she bequeathed all her real and personal property to her husband for life, and afterwards equally amongst her brothers and sisters. She appointed her husband and her two brothers, William Raine and Isaac Raine, trustees of her will, and authorized the two latter, after the death of her husband, if they thought fit, to sell and dispose of her real estate, and divide the proceeds amongst her brothers and sisters. Edward Hutchinson survived his wife, and received the profits of this and his wife's other property until his death in 1858. William Raine then claimed the whole of Martha Hutchinson's estate as heir-at-law, and held it until he died in 1864. By his will he devised this estate to his brother, Isaac Raine, his heirs and assigns for ever, and he gave to his brother, John Raine, for life, an annuity of 5*l.*, and charged the Kitty Cragg estate with its payment, empowering him to enter and distrain for payment in arrear. Isaac, upon the death of his brother William, entered into possession under his will, but the other brothers and sisters commenced a chancery suit to carry into effect the purposes of Martha Hutchinson's will. John Raine was a defendant in that suit, and all interested under Martha Hutchinson's will were parties. The suit was compromised, and the agreement of compromise was signed by the solicitors of every one concerned; a power of sale to Isaac Raine was also signed by all except John Raine, who refused to join in the sale which was agreed to in pursuance of the compromise. One of the conditions of sale was, that the purchaser should not require the persons beneficially interested in the premises or the purchase-money to concur in the sale:—Held, that John Raine was not a necessary party to the conveyance. *Thompson v. Raine*, 28 L. T. 362—Ex. Ch.

**Inability to obtain Concurrence of necessary**

**Parties.**—On the 17th of January, 1867, upon a contract for the sale of a public-house, the vendor agreed to make a proper assignment of the licences on the 5th of February, 1867, the day fixed for the completion of the contract, or as soon thereafter as might be. The business of the house had been carried on under the management, and under a licence granted under 9 Geo. 4, c. 61, in the name of the vendor's son A., as servant to his father. In November, 1866, A. went to America, and had not since been heard of, and since that time, but without any transfer of the licence from A., the business had been continued under the management of B., another son of the vendor:—Held, that the vendor, not being able to obtain the indorsement of the licence by A., was not in a condition to perform his contract, and consequently that the purchaser might recover back his deposit and the expenses which he had incurred in and about the purchase. *Claydon v. Green*, 3 L. R., C. P. 511; 37 L. J., C. P. 226; 18 L. T. 607; 16 W. R. 1126.

A. agreed to assign a lease to B., and to deliver possession by the 3rd May, and undertook that he had lawful right to assign. It was alleged, as a breach, that A. had no lawful title to assign at the time of the agreement, inasmuch as he had covenanted with his lessor not to assign, without his lessor's consent in writing, and had not at that time procured such licence from his landlord:—Held, that this was no breach, for, till the agreement with the intended purchaser was completed, it could not be known in what name the licence should be made out. *Stowell v. Robinson*, 3 Bing. N. C. 928; 5 Scott, 196; 3 Hodges, 197.

It appeared that certain assignments, prior to that of A., had not been registered, at the time of the agreement with B.:—Held, that this did not impeach the validity of A.'s title, as it could be done at any moment before the completion of the purchase. *Id.*

## II. THE CONTRACT AND MATTERS RELATING THERETO.

### 1. CONTRACT IN GENERAL.

**Withdrawal of Acceptance, Effect of.**—An offer to sell property may be withdrawn before acceptance without any formal notice to the person to whom the offer is made. It is sufficient if that person has actual knowledge that the person who made the offer has done some act inconsistent with the continuance of the offer, such as selling the property to a third person. *Dickinson v. Dodds*, 2 Ch. D. 463; 45 L. J., Ch. 777; 34 L. T. 607; 24 W. R. 594—C. A. Reversing 34 L. T. 191.

Semble, that the sale of the property to a third person would of itself amount to a withdrawal of the offer, even although the person to whom the offer was first made had no knowledge of the sale. *Id.*

The owner of property signed a document which purported to be an agreement to sell it at a price fixed. But a postscript was added, which he also signed, "This offer to be left over until Friday, 9 A.M.:"—Held, that the document amounted only to an offer, which might be withdrawn at any time before acceptance, and that a sale to a third person which came to the

knowledge of the person to whom the offer was made was an effectual withdrawal of the offer. *Ib.*

**Acceptance not relating back to Offer.]**—Semble, that the acceptance of an offer to sell constitutes a contract for sale only as from the time of the acceptance. The contract does not relate back to the time when the offer was made. *Ib.*

**"Title to be Approved by our Solicitors."]**—Where a court has to find a contract in a correspondence, and not in one particular note or memorandum formally signed, the whole of that which has passed between the parties must be taken into consideration. *Hussey v. Horne-Payne*, 4 App. Cas. 311; 48 L. J., Ch. 846; 41 L. T. 1; 27 W. R. 585.

Per the Lord Chancellor:—Quære, whether the addition, in a written document, of the words "subject to the title being approved by our solicitor," could affect a contract for the sale of land, otherwise complete in itself. *Ib.*

Quære, whether the proper meaning of such words is more than that the title offered is not to be accepted without investigation, and that objections made on such investigation would be subject to the decision of a legal tribunal. *Ib.*

Per Lord Selborne:—The observation stated in *Jerris v. Berridge*, that "the Statute of Frauds is a weapon of defence, not offence, and does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties," affirmed. *Ib.*

A contract for the purchase of a lease stated that it was made "subject to the approval of the title by the purchaser's solicitor:—"Held, that, in the absence of mala fides on the part of the purchaser or his solicitor, the vendor could not enforce specific performance of the contract if the purchaser's solicitor disapproved of the title. *Hudson v. Buck*, 7 Ch. D. 683; 47 L. J., Ch. 247; 38 L. T. 56; 26 W. R. 190.

Semble, that the absence of approval by the purchaser's solicitor would not be conclusive if the purchaser had himself acted unreasonably, as for instance if he had declined to appoint any solicitor, or if the solicitor whom he had appointed had insisted on utterly unreasonable objections to the title. *Ib.*

A., the defendant, wrote to his solicitor, who was also the solicitor of E., the plaintiff, "You may make Mr. E. an offer of the T. Hotel at 150l. per annum from Lady-day, 1881; tenant to pay all rates and taxes, except property tax, and do internal and external painting and repairs; the roof and walls to be kept in repair by the landlord. Term, ten years; a proper lease to be drawn up with all proper clauses, and to be approved by me and my solicitor." This letter was forwarded to the plaintiff, who at once wrote and accepted the offer. There was some evidence that the defendant knew the plaintiff was a brewer:—Held, that the words "to be approved by me and my solicitor" did not prevent the letters forming a complete contract, and that the defendant was not entitled to insist on the lease containing a covenant against underletting. *Eadie v. Addison*, 52 L. J., Ch. 80; 47 L. T. 543; 31 W. R. 320.

In reply to a telegram from an intending pur-

chaser, offering 1,200l. as the purchase-money of lands, with respect to which negotiations for a sale had been previously pending, the vendor telegraphed, "Accept your offer of 1,200l., subject to letter, and agreement to be sent to your solicitor." A draft contract of sale was subsequently furnished to the purchaser's solicitor; but, owing to differences as to the details, such as the commencement of the title, registry searches, &c., the treaty was broken off by the vendor:—Held, that the vendor's acceptance by telegram, being expressly made subject to a further agreement to be entered into between the parties, did not amount to a concluded contract, specific performance of which the intending purchaser was entitled to enforce. *Brien v. Swainson*, 1 Ir. L. R., Ch. D. 135.

Where a contract is made subject to the approval of the solicitor of one party it is an essential condition of the contract that that approval should be given unless the purchaser has acted unreasonably or the solicitor does not act bona fide, and in an action to enforce a contract the fact that such consent has not been given is a sufficient answer. *Williams v. Edwards*, 2 Sim. 78.

The plaintiff's claim was for commission on the sale of a piece of land by A. to the defendant, one term of the plaintiff's contract being that A.'s title should be approved by the defendant's solicitor. The defendant broke off the sale of his own accord, so that A.'s title was never submitted to the defendant's solicitor:—Held, that the plaintiff could not succeed without proving that the defendant's solicitor had approved A.'s title, or else that such a title was submitted to him as it was unreasonable for him to disapprove. *Clack v. Wood*, 9 Q. B. D. 276; 47 L. T. 144; 30 W. R. 931—C. A.

G. on 25th November signed a letter addressed to B.'s agent, whereby G. agreed to buy the lease of a house of B. for a certain price, the purchase to be completed before Christmas then next, and "a formal contract to be signed" by G. "when prepared" by the solicitors of B., and "when approved" by the solicitors of G. A draft agreement prepared on behalf of B. was materially altered by the solicitors of G., and B.'s solicitors declining to accept such alterations, the bargain went off:—Held, that no action was maintainable upon G.'s letter. *Bartlett v. Greene*, 30 L. T. 553.

**Agreement "subject to a Contract to be Settled."]**—Specific performance of an agreement "subject to a contract to be settled," or "subject to a proper contract," will not be enforced. *Harvey v. Barnard's Inn (Principal)*, 50 L. J., Ch. 750; 45 L. T. 280; 29 W. R. 922.

**Subject to Preparation of Formal Contract.]**—No action lies upon an agreement to buy a lease, and sign a "formal contract" when approved by the purchaser's solicitor, in the event of such solicitor not approving of it, unless the approval is withheld mala fide or unreasonably. *Bartlett v. Greene, supra.*

By a written agreement the defendant agreed with the plaintiff to take a lease of a house for a certain term at a certain rent, "subject to the preparation and approval of a formal contract." No other contract was ever entered into between the parties:—Held, that there was no final agreement of which specific performance could be

enforced against the defendant. *Winn v. Bull*, 7 Ch. D. 29; 47 L. J., Ch. 139; 26 W. R. 230.

A. wrote "to confirm" a previous verbal offer of £5,000. for property. B. accepted the offer in writing, coupled with the words, "I will send draft contract in due course."—Held, there was no contract contained in the writings. *Vale of Neath Colliery Company v. Furness*, 45 L. J., Ch. 276; 34 L. T. 231; 24 W. R. 631.

Where a contract of sale contained in certain letters mentioned only what was the property to be purchased and the price to be given, but left the other terms to be settled by a more formal contract:—Held, that there was no binding agreement. *Donnison v. People's Café Company*, 45 L. T. 187—C. A.

**Deed—Effect of Non-Execution by Purchaser where containing Covenant.**—D. in 1824 agreed with S. for the purchase of an estate, and that the purchase deed should contain a covenant by D. that he, his heirs and assigns, would pay to S., his executors, administrators and assigns, the sum of 6s. for each chaldron of coals gotten out of the estate and shipped for sale. The purchase deed was subsequently executed by S., but not by D. D., however, entered upon the land, and he and his devisees and their assigns enjoyed the property. Coal was also got and shipped for sale:—Held, that the execution by D. of a counterpart of the deed containing the covenant could not be presumed, and that although the persons who had taken and enjoyed the coal with notice of the covenant might be liable, there was no liability in D. or his representative under the covenant. *Witham v. Vanr*, 44 L. T. 718—C. A.

**Conditional or Absolute Acceptance.**—A., the agent of an intending purchaser of leaseholds, wrote to B., the vendor's agent, that he "could give him 50l. for the lease, plant, &c., if accepted at once." B., in reply, asked A. to allow the offer to remain open for twenty-four hours, in order that he might submit it to his employer. On the following day he wrote to A., "I am directed to accept your offer of 50l. for the lease, &c. . . . I shall be here at 11 to 11.30 tomorrow morning to sign contract." A. did not reach B.'s office until twelve o'clock. B. had waited for him until a quarter to twelve, and then sold the property to a third party:—Held, that the letters constituted a binding contract, and specific performance was enforced against the vendor. *Branson v. Stammers*, 41 L. T. 434; 28 W. R. 180.

The owners of land, in answer to a written offer to buy it, wrote saying they had received the offer, and added, "which offer we accept, and now hand you two copies of conditions of sale which we have signed; we will thank you to sign same, and return one of the copies to us."—Held, that this was not an unqualified acceptance, and did not make a contract. *Crossley v. Maycock*, 18 L. R., Eq. 180; 43 L. J., Ch. 379; 22 W. R. 387.

A wrote to B. offering to sell him an estate for 37,500l., or a part of the estate for a less sum, and added a postscript reserving the right to remove the materials of a house. B. replied, "I beg to acknowledge the receipt of your letter stating that you are willing to accept 37,500l. for the whole of your freehold land at N. I hereby

accept your terms as above, and agree to pay you the said sum of 37,500l. for your land."—Held, that this was an acceptance of the terms in A.'s letter, including the postscript. *Hussey v. Payne*, 8 Ch. D. 670; 47 L. J., Ch. 751; 38 L. T. 543; 26 W. R. 703—C. A. *S. C.*, *supra* in *II. L.*

The defendant, intending to take a farm, signed a memorandum of agreement, adding to it, "I refer you to A. B. as to my capabilities and as to my capital." The lessor afterwards sent a draft lease to the defendant, which the defendant refused to execute:—Held, that the agreement, evidenced by the memorandum, was not final, and that sending the draft lease was not an unconditional acceptance. *Warner v. Willington*, 3 Drew. 523; 25 L. J., Ch. 662; 2 Jur., N. S. 433.

A letter, accepting an offer to purchase an estate on the terms stated in an advertisement, added a sum for deposit, and a day for completing the purchase. No reply was given to this letter:—Held, that there was no complete contract on which to sustain a bill for specific performance. *Honeyman v. Marryatt*, 6 H. L. Cas. 112; 26 L. J., Ch. 619; 4 Jur., N. S. 17.

A vendor and purchaser had agreed by parol upon the sale of a house at a specified price. The purchaser, by arrangement, wrote a letter to the vendor confirming his offer, repeating the terms, and requesting a reply. The vendor's solicitor replied, stating that he was instructed to carry out the sale of the house according to the purchaser's letter, but adding, "there are some details to be embodied in a contract of sale which I will prepare and forward for your approval and signature."—Held, that the latter words as to details to be embodied, qualified the otherwise unconditional acceptance of the offer in the purchaser's letter, and that there was not a sufficient memorandum in writing within the 4th section of the Statute of Frauds. *Ball v. Bridges*, 30 L. T. 430; 22 W. R. 552.

Several persons interested in a particular piece of land, authorized, by agreement among themselves, one of their number, W., to dispose of it. The land was divided into lots, and a plan of the lots made, and certain conditions, on which the land might be let or sold, were printed on the plan. M., an intending purchaser, made inquiries of W. as to the sale of certain lots. W. expressly informed him that he must purchase subject to the conditions stated on the plan. One of these conditions required that a purchaser should execute a contract embodying the conditions. M. offered to purchase these lots at a price which he named. W. promised to lay his offer before "the proprietors" (without naming or describing them), and very shortly afterwards wrote to M. that he had done so, and (stating the conditions) that the proprietors had accepted his offer; adding, that in reducing the price they had taken into consideration his intention of soon building on the land, an intention which of course they wished to encourage. W. added that he had instructed the solicitors to forward to M. the agreement for purchase. There was, in fact, nothing in the conditions which bound a purchaser to build, though there were provisions which assumed that he might do so, and which, in such a case, regulated the mode of proceeding. M. wrote back, in answer, that he could not be bound to build at any given time, or at all; that the subject had better be recon-

sidered, unless W. was prepared to leave him to do as he might think best. W. replied that the acceptance of the offer was without condition, and that M. was free to do what he might think best. M. afterwards declined to complete the purchase:—Held, that what had taken place by the correspondence constituted a complete contract between the parties; that under such circumstances the execution of a formal deed was not necessary; that the reference to it in W.'s letter did not suspend or in any way affect the contract; and that M. was bound specifically to perform his contract of purchase. *Rositer v. Miller*, 3 App. Cas. 1124; 48 L. J., Ch. 10; 39 L. T. 173; 26 W. R. 865.

**Contract subject to Vendor's Approval.]**—At a sale by auction on the 10th of August, 1880 (an announcement of which, indorsed on the particulars and conditions, had the auctioneer's name printed at foot), D. signed a memorandum appended to the particulars and conditions, acknowledging that he had "this day purchased from Mr. Stafford, the vendor, by public auction, subject to his approval, the premises mentioned in the annexed particulars, for the sum of 250*l.*, subject to the conditions of sale also annexed hereto;" but there was no signature by the vendor, nor any subsequent adoption of the contract under his hand. At the time of sale D. paid a portion of the purchase-money in cash, and for the balance of the stipulated deposit he gave his I O U. Three days afterwards D. paid a further sum on account of the deposit, and was handed a receipt dated the 13th August, 1880, signed by the auctioneer's clerk, on behalf of "Michael Crooke" (the auctioneer), and acknowledging that he had "received from Mr. Dyas (the purchaser) 30*l.* sterling, which with 20*l.* paid 10th August, makes 50*l.* deposit on his purchase, 84*l.*, Mr. Stafford's property." The vendor's solicitor subsequently wrote to D. recognizing the sale, furnished him with copies of the title-deeds and approved of the draft conveyance to him, which, however, the vendor refused to execute; whereupon D. having brought an action for specific performance:—Held, that there was no agreement enforceable against the defendant, as the contract of the 10th of August having been made expressly "subject to his approval," the memorandum of that date only amounted to a proposal, and did not constitute a note in writing, within the Statute of Frauds; there not being then in fact any contract in existence that subsequent parol approval by the defendant or his agents could not have the effect of altering the character in which his name appeared in the memorandum, so as to convert it into an authentication of a contract; and that the auctioneer's name at foot of the indorsement on the particulars and conditions merely authenticated the announcement of the sale. *Dyas v. Stafford*, 9 L. R., Ir. 520—C. A. Reversing 7 L. R., Ir. 690.

**Subject to Modification of Conditions in Lease.]**

—The defendant placed a leasehold property in the hands of a house agent for sale. The plaintiff wrote to the agent, "In reference to J.'s property in Fleet-street, I think 800*l.* for the lease, fixtures, &c., is about what I should be willing to give. Possession to be given me within fourteen days from date. This offer is made subject to the conditions of the lease being

modified to my solicitor's satisfaction." Shortly afterwards the agent wrote back: "We are instructed to accept your offer of 800*l.* for these premises, and have asked J.'s solicitor to prepare contract." The required modification in the lease was procured:—Held, that, notwithstanding the reference to a future contract, the two letters constituted a complete contract. *Bonnewell v. Jenkins*, 8 Ch. D. 70; 47 L. J., Ch. 758; 38 L. T. 81; 26 W. R. 294—C. A.

**2. CONSTRUCTION.**

**Charge upon Houses for Improvement of Street an "Outgoing."]**—The plaintiffs bought of the defendant three houses, and by the contract of sale the latter agreed to discharge "all rates, taxes, and outgoing" up to the time of completion. The purchase was completed, and afterwards payment was demanded from the plaintiffs of the expenses incurred under a local act in improving the street in which the houses stood. The work had been done some time before the houses belonged to the defendant, and at the time of sale to the plaintiffs neither party was aware of the charge. The plaintiffs, having paid the sum demanded, sued to recover the same from the defendant:—Held, that the charge for improving the street was an "outgoing," which the defendant had bound himself to discharge, and that the plaintiffs were entitled to recover it from him. *Midgley v. Coppock*, 4 Ex. D. 309; 48 L. J., Ex. 674; 40 L. T. 870—C. A.

**Possession — Rents and Profits.]**—Where the vendor of a piece of land, of which he was himself in occupation, contracted to sell the land under conditions of sale, by one of which it was provided that the purchaser should be entitled "to the possession or the receipt of the rents and profits" of the land from a specified date:—Held, that, on the construction of the written agreement, the vendor was bound to give possession to the purchaser on the date specified, and that no effect could be given to the words referring in the alternative to the receipt of the rents and profits; and that evidence was not admissible to prove an alleged contemporary parol agreement by which the vendor was to retain possession of the land to a later date, paying the purchaser in the meantime, by way of rent, interest on his purchase-money. *Anker v. Franklin*, 43 L. T. 317; 44 J. P. 830.

**Sale of Quit Rents including Arrears.]**—A seller covenanted with a purchaser of an estate, that he should enjoy and receive the rents, without any action or interruption by the seller, or those claiming from him, or by, through, or with his or their acts, means or default:—Held, that a breach was well assigned in respect of certain quit rents in arrear before and at the time of the conveyance, though not stated to have accrued while the seller was tenant of the premises. *Hewes v. Brushfield*, 3 East, 491.

**Rights of Third Parties — Renters' Stalls in Theatre burnt.]**—Trustees acting for the shareholders or rentallers of a theatre, called the Queen's Theatre and Opera House, who had obtained a feu right to the site, granted in 1858

a disposition of the ground and buildings to one J. B., subject, *inter alia*, to the real burden of a perpetual annuity of 2l. per share to each rentaller of the said Queen's Theatre and Opera House, and to the successors or assignees of them; and it was further declared that each of the said rentallers, or the assignee or successors of such, should at all times be entitled, *inter alia*, to free admission to the auditorium of the said Queen's Theatre and Opera House; also declaring that J. B. should not convert the said theatre to any other use; and that he should keep it open for performance six months in each year. There was no stipulation as to insurance of the theatre or as to the rebuilding of it in case of destruction by fire or otherwise. In 1865 the theatre was entirely destroyed by fire, and was rebuilt by J. B.'s trustee, and called by another name. In 1875 it was again entirely burnt down, and again rebuilt. From 1865 to 1879 the theatre, under the new name, was twice sold, but in each case the conveyance was granted subject to the "real burdens, conditions, provisions, declarations, and others," specified in the original disposition of 1858, and especially under the burden of payment of the annuities to the rentallers, and of allowing "these parties the privileges to which they are entitled." The privilege of free admission was enjoyed by the rentallers for fourteen years after the destruction of the first theatre. But in 1879 disputes arose as to the validity of the rentallers' right to, *inter alia*, the privilege of free admission. The trustees maintained that the rentallers were entitled under the disposition of 1858 and the succeeding conveyances to the same privileges in the new theatre which they had in the first:—Held, affirming the decision of the court below, that the privileges conferred on the rentallers by the original dispositions—other than the payment of the annuities, which was constituted a real burden—rested only on the personal obligation of the original donee, and were confined to the theatre then in existence, and that the subsequent deeds to which the rentallers were not parties, were not intended to, and did not confer on them any new right. *Scott v. Howard*, 6 App. Cas. 285—H. L. (Sc.).

**General Words—"Yards."**—The parcels in a conveyance were described by reference to coloured parts of a plan. A yard, delineated, but not coloured in the plan, was held to pass under the general word "yards." *Willis v. Watney*, 51 L. J., Ch. 181; 45 L. T. 739; 30 W. R. 424.

**Appurtenances.**—It is settled by the earliest authority, repeated without contradiction to the latest, that land cannot be appurtenant to land, and the word "appurtenances" only includes incorporeal hereditaments attached to the land granted or demised, such as rights of way, of common, piscary, and the like, but it does not include additional lands. *Lister v. Pickford*, 34 Beav. 576.

**"Ingress, Egress, and Regress."**—A grant of a right of "ingress, egress, and regress," is a grant of a right of way from the locus a quo to the locus ad quem, and from the locus ad quem forth to any other spot to which the grantee may lawfully go, or back to the locus a quo. By a deed of conveyance from a railway company of

a close of land the grantee was given a right of free "ingress, egress, and regress," to and from certain private roads which bounded the close and led to the railway station and on to the public highways:—Held, that the grantee was entitled to pass from the close to the private roads, and thence to the public highways, or in the reverse direction, and was not limited to passing from the close to the railway station, or vice versa. *Somerset v. Great Western Railway Company*, 46 L. T. 883.

**Implied Reservation—Easement of Necessity.]**

—Where an easement is in the nature of an easement of necessity, there is no need of an express reservation of such easement in a conveyance of the property to be affected by the easement; and such reservation is a matter of legal presumption to be implied from the nature of the transaction between the grantor and grantee. *Shubbrook v. Tuffnell*, 46 L. T. 886; 46 J. P. 694.

**Title to Approaches.]**—On the sale of a house or stables in a cul de sac, the vendor is not bound to shew a title to the roadway. *Curling v. Austin*, 2 Drew. & Sm. 129.

**Land intended for Highway—No Dedication.]**

—The presumption that the soil of a highway belongs to the owner of the adjoining land, *usque ad medium filum viae*, does not apply to ground which was intended to be used as a highway, but has never been dedicated to the public; and if the owner of the soil of the intended highway disposes of the adjoining land by conveyances in which it is described as bounded by the intended highway, the grantees do not acquire by presumption of law the ownership of the soil of the intended highway. Acts of user committed upon land, which do not interfere and are consistent with the purpose to which the owner intends to devote it, do not amount to a "dispossession" of him, and are not evidence of "discontinuance of possession" by him within the meaning of 3 & 4 Will. 4, c. 27, s. 3. In 1854 L. conveyed to the defendant a plot of land upon the south side of an intended street, upon which the defendant built a factory. In 1857 L. conveyed to certain trustees the plot of land on the north side of the intended street, which in 1872 vested in the defendant. Neither of the conveyances granted in express terms the soil of the intended street, but they described the plots of land as bounded by it. It was never dedicated to the public as a highway. From 1854 the defendant had placed upon the intended street materials used at his factory, so as to block it up except as against foot passengers, and in 1865 he inclosed an oblong portion of it. In 1872 he fenced in the ends of the intended street. The plaintiff was tenant for life of all the land of which L. had died seised, and in 1876 commenced an action to recover the site of the intended street. Within twenty years before action L. had repaired a gate at one end of the intended street:—Held, that the conveyances executed by L. in 1854 and 1857 did not by presumption of law grant the soil of the intended street; and that the title of the plaintiff was not defeated by the Statute of Limitations (3 & 4 Will. 4, c. 27), ss. 2, 3. *Leigh v. Jack*, 5 Ex. D. 264; 49 L. J., Ex. 220; 42 L. T. 463; 28 W. R. 452; 44 J. P. 488—C. A.

**"Rights of Way and Water."**—Where an owner in fee of two adjoining houses, let to A. and B. as yearly tenants, allowed A.'s house to have a waterpipe running into the well of B.'s house, and at a subsequent sale of the houses by auction each tenant purchased his own house, such privilege of water supply does not pass as against B. under an ordinary reservation in the conditions of sale of "rights of way and water and other easements." *Russell v. Harford*, 2 L. R., Eq. 507; 15 L. T. 171; 14 W. R. 982.

**Reservation — Absolute Conveyance.**—In June, 1870, an agreement was entered into by a railway company for the purchase, at a price named, of land for the purpose of carrying a road over the line at an incline, and the agreement contained a proviso that the vendor, &c., should have a right of access to other lands belonging to him by and over any of the slopes which the company might arrange on their intended works, and through, over, and upon any occupation roads which they might form adjacent to the said lands. This agreement was executed by the secretary of the company, but was not under seal. Possession was taken by the company, and a bridge was constructed over the line which was reached by a road carried over the land purchased at a steep incline. In April, 1871, the land, with all ways, rights of pre-emption, and other rights, members, easements, and appurtenances, was, in consideration of the price named in the agreement, which was stated to include the value of the mines and also all right of pre-emption and compensation for damage sustained by vendor in the execution of the works, conveyed to the company without reserving any right of access to the vendor or in any way referring to the proviso contained in the agreement of June, 1870:—Held, in an action by the vendor to restrain the company from obstructing, by fences and retaining walls rendered necessary by a widening of the road, the right of access stipulated for by the proviso in the preliminary agreement, but not claiming a rectification of the subsequent conveyance, that as the vendor by the terms of the conveyance had absolutely conveyed to the company every interest which he possessed in the land, any right of access previously stipulated for was thereby absolutely extinguished. *Teebay v. Manchester, Sheffield and Lincolnshire Railway Company*, 24 Ch. D. 572; 52 L. J., Ch. 613; 48 L. T. 808; 31 W. R. 789. See also *Sumner v. Scholfield*, 43 L. T. 763.

**User.**—If a purchaser buys the fee-simple of a tenement for a valuable consideration, and has it conveyed to him without any reservation, he is not bound to take notice of the manner in which the tenement has, prior to the sale, been used by the vendor for the convenience of the adjoining tenement, on the principle that a grantor cannot derogate from his own grant. *Suffield v. Brown*, 33 L. J., Ch. 249; 10 Jur., N. S. 111; 9 L. T. 627; 12 W. R. 355.

### 3. STATUTE OF FRAUDS.

#### a. What Sales within.

**By Auction.**—A sale of lands, though by auction, is within the statute. *Walker v. Constable*, 1 B. & P. 306; 2 Esp. 659.

#### b. Interests in Land.

**Growing Crops.**—A contract for the sale of a growing crop of lands is within s. 4. *Carrington v. Root*, 2 M. & W. 248; 1 Mur. & H. 14.

The keep, viz., growing grass of fields, is an interest in land. *Shelton v. Livins*, 2 Tyr. 420; 2 C. & J. 411.

A contract with the owner of a close for the purchase of a growing crop of grass there, for the purpose of being mown and made into hay by the vendee, is a contract or sale of an interest in or concerning land, and void if not reduced to writing: and it may be discharged by parol notice from the owner before any part execution of it. *Crosby v. Wadsworth*, 6 East, 602; 2 Smith, 559.

A verbal agreement made on the 25th of September for the sale of the then-growing crop of potatoes, is not a contract or sale of any lands, tenements, or hereditaments, or any interest in or concerning them, within s. 4, but a sale of goods within s. 17. *Evans v. Roberts*, 5 B. & C. 829; 8 D. & R. 611.

A contract by the owner of a close cropped with potatoes, made on the 21st of November, to sell to the defendant the potatoes at so much per sack, the defendant to get them out of the ground immediately, is not a contract for any interest in land, but the same as if the potatoes, which had done growing and were to be taken up immediately, had been sold in a warehouse, whence they were to be removed by the defendant. *Parker v. Staniland*, 11 East, 362.

Where the defendant agreed to sell to the plaintiff (an infant) all the potatoes then growing on three acres, at so much per acre, to be dug up and carried away by the plaintiff, and he paid 40*l.* to the defendant under the agreement, and dug a part and carried away a part of those dug, but was prevented by the defendant from digging and carrying away the residue:—Held, that he was entitled to recover for this breach of the agreement, and that such agreement (being by parol) was not within the statute. *Warwick v. Bruce*, 2 M. & S. 205.

A contract for the sale of potatoes then planted, at a certain sum per sack, to be dug up at the usual time for digging the same, is not a contract for the sale of an interest in land. *Sainsbury v. Matthews*, 4 M. & W. 343.

A contract, by which the defendant was to give 25*l.* for crops of growing corn and potatoes, and the stubble afterwards, and whatever lay grass was in the fields; the defendant to harvest the corn and dig the potatoes, and the plaintiff to have the liberty of turning his own cattle on, and to pay the tithes—is not a contract for the sale of an interest in land; for the growing crops are mere chattels; and, with regard to the grass, as the plaintiff did not part with his possession of the soil, the contract was to be construed as an agistment of the defendant's cattle by the plaintiff. *Jones v. Flint*, 2 P. & D. 594; 10 A. & E. 753.

A sale of growing turnips, no time being stipulated for the removal, and the degree of their maturity not being positively found, is a sale of an interest in land, and must be in writing. *Emmerson v. Heelis*, 2 Taunt. 38. And see *Mayfield v. Wadley*, 3 B. & C. 357; 5 D. & R. 224.

An agreement for the sale of growing fruit and vegetables is an agreement for the sale of

an interest in land. *Rodwell v. Phillips*, 9 M. & W. 501; 1 D., N. S. 885; 11 L. J., Ex. 217.

— **Paid as Rent.**—A. agreed with B. to let him land rent-free, on condition that A. should have a moiety of the crops; such an agreement need not be in writing. *Poulter v. Killingbreck*, 1 B. & P. 397. See *Waddington v. Bristow*, 2 B. & P. 452. And see 2 N. R. 355.

**Agreement for Sale of Crops and Work and Labour.**—In an action upon an account stated, the defendant pleaded, that, before the taking of the account, there was a verbal agreement for the sale of the crops growing upon the plaintiff's land, and for work, labour, and materials done and used in preparing the land for tillage; and that there was a treaty for the plaintiff's letting, and the defendant's taking the land for fourteen years, to which the defendant assented, and that the money to be paid for the crops, and the work, labour, and materials, was the money concerning which the account was stated; and that there was no agreement in writing or any note thereof. To this plea the plaintiff replied, that before the account was stated, the defendant had mown the crops and taken them to his own use, and had received the amount of the work and labour and materials:—Held, that the contract, as appearing on the pleadings, was within the Statute of Frauds, and that the plaintiff could not recover. *Falmouth (Earl) v. Thomas*, 1 C. & M. 89; 3 Tyr. 26.

A declaration stated that the plaintiff was possessed of a farm, upon which were growing crops, and on which the plaintiff had done work and labour, and expended materials in making the land ready for tillage, of which work, labour, and materials he had not derived the benefit; and that, in consideration that the plaintiff would let the farm to the defendant for fourteen years, the defendant undertook to take the crops, and pay for them, and for the work, labour and materials, according to a valuation; that the plaintiff let the farm accordingly, and left the crops upon it; that the defendant took possession of the farm, and had the benefit of the work, labour, and materials; and that the valuation was made, but that the defendant did not pay:—Held, that the contract was for an interest in land, and that the right to the crops, and the benefit of the work and labour, were both of them an interest in land. *Ib.*

**Growing Wood.**—The sale of growing under-wood, to be cut by the purchaser, confers an interest in land under the statute. *Scorell v. Bozall*, 1 Y. & J. 396.

A., being owner of trees growing upon his land, verbally agreed with B. while they were standing, to sell him the timber at so much per foot. B. afterwards offered to sell the butts of the trees to a third person, and said he would convert the tops into building stuff. A. afterwards, by letter, required B. to pay for the timber, which he, B., had bought of him. B. wrote a letter in answer, stating that he had bought the timber, but that he bought it to be sound and good, and that it was not so:—Held, that the contract was not a contract for the sale of lands, tenements, and hereditaments, or any interest in or concerning the same, but that it was a contract for the sale of goods, wares, and merchandize within s. 17.

*Smith v. Surman*, 4 M. & R. 455; 9 B. & C. 561.

A sale of growing timber, to be taken away as soon as possible by the purchaser, is not a contract for sale of land, or any interest therein, within s. 4 of the Statute of Frauds. *Marshall v. Green*, 1 C. P. D. 35; 45 L. J., C. P. 153; 33 L. T. 404; 24 W. R. 175.

The defendant by word of mouth purchased certain growing trees for 26l. of the plaintiff on the terms that he, the defendant, should remove them as soon as possible. The defendant accordingly cut down some of the trees and agreed to sell the tops and stumps to a third person. The plaintiff then countermanded the sale, and prohibited the defendant from cutting down the rest of the trees. The defendant, however, cut down the remainder, and carried the whole away:—Held, that the case was within s. 17 of the Statute of Frauds, and that before the sale was countermanded there was an acceptance and an actual receipt of part of the goods sold within that section. *Ib.*

**Fixtures.**—A short time before the expiration of a lease of a house, the landlord agreed with the tenant to purchase his fixtures at a valuation. The lease expired, and the tenant having quitted possession of the premises without severing the fixtures, sent the key to the landlord. The broker appointed by the latter afterwards appraised the fixtures at more than 10l., and signed the valuation:—Held, that the plaintiff having, at the defendant's request, waived his right to remove the fixtures, the matter bargained for was not an interest in land, and that the amount ascertained by the broker might be recovered in an action for fixtures and effects bargained and sold, without proving a note in writing. *Hallen v. Runder*, 3 Tyr. 959; 1 C., M. & R. 266.

Tenant's fixtures of over 10l. in value having been sold by the tenant's trustee in bankruptcy to the plaintiff, and resold by him to the defendant, who was the landlord of the premises:—Held, that no memorandum of this latter sale was necessary under the Statute of Frauds, it being neither a sale of an interest in land, under s. 4 of the Statute of Frauds, nor of goods and chattels, under s. 17. *Lee v. Gaskell*, 1 Q. B. D. 700; 45 L. J., Q. B. 540; 34 L. T. 759; 24 W. R. 824.

**House and Furniture.**—The plaintiff agreed to let a house to the defendant, and to sell him the furniture and fixtures therein, and to make alterations and improvements in the house; and the defendant agreed to take the house, and to pay for the furniture and fixtures and alterations:—Held, an agreement relating to an interest in land. *Vaughan v. Hancock*, 3 C. B. 766; 16 L. J., C. P. 1; 10 Jur. 926.

And where such an agreement was by parol:—Held, that it could not be severed so as to make the defendant liable to pay the plaintiff the amount expended in repairs. *Ib.*

On the 1st August, 1843, D. became tenant to the plaintiff of a house and furniture, for six months from the 15th July preceding, under a written agreement. On the 8th September, it was, by a memorandum, agreed that the plaintiff had sold the house to D., the purchase-money to be paid on the completion of a good title. On the 23rd January, 1844, the furniture was seized by the sheriff under a fi. fa. issued by the defen-

dant against D. On the 8th February, D. sent to the plaintiff both agreements, and shortly after consented to rescind the contract of sale. The title to the premises was never completed, nor the purchase-money paid:—Held, that the contract for the sale of the house and furniture was entire, and that the purchase of the former not having been completed, no property in the furniture passed to D. *Lanyon v. Toogood*, 13 M. & W. 27; 13 L. J., Ex. 273.

**Furnished Lodgings.**—A contract to let furnished lodgings is a contract for an interest in land. *Edge v. Strafford*, 1 C. & J. 391; 1 Tyr. 293; *S. P., Inman v. Stamp*, 1 Stark. 12.

**Board and Lodging.**—By a parol agreement between the plaintiff, a boarding-house keeper, and the defendant, the defendant agreed to pay the plaintiff for the board and lodging of himself and man, and accommodation for his horse, at the boarding-house, 200*l.* a year from a fixed day; the agreement to be terminable by a quarter's notice on either side. The plaintiff having sued the defendant for a breach of the agreement, in refusing to become an inmate of the boarding-house:—Held, that though the agreement was unwritten, the action was maintainable, for that the contract was not one for any interest in or concerning land. *Wright v. Staver*, 2 El. & El. 721; 29 L. J., Q. B. 161; 6 Jur., N. S. 867; 8 W. R. 413.

**Lessor to Furnish.**—A contract by which A., in consideration of B. hiring a house of him, agrees to send in proper and necessary furniture, is not divisible, and since it relates to an interest in land, must be in writing. *Michelin or Meechen v. Wallace*, 2 N. & P. 224; 7 A. & E. 49.

**Sale of Greenhouse and Assignment of Lease.**—A., lessee for years of premises, under a lease containing a stipulation that all improvements made by him were to belong to the lessor at the end of the lease, except any greenhouse he might erect, bargained with B. to assign the lease to him, and to sell him a greenhouse which he had erected, and which was affixed to the freehold, together with the furniture, crops of fruit, and plants therein. B. was let into possession of the greenhouse and its contents, but owing to a difficulty in obtaining the lessor's consent, no assignment was made to him:—Held, that the contract was an entire one for the assignment of the lease and the sale of the greenhouse, and that, until the lease was assigned, B. could not be sued by A. for the price of the greenhouse. *Sleddon v. Cruikshank*, 16 M. & W. 71; 16 L. J., Ex. 61.

**Brickyard and Plant.**—By an agreement, not in writing, it was agreed that the plaintiff should take possession of a brickyard, which the defendant was occupying as tenant, and take the plant and bricks there at a valuation; and that the defendant should pay up all rent due, and endeavour to induce the landlord to accept the plaintiff as tenant. The plaintiff took possession of the brickyard, and gave the defendant a warrant of attorney as security for payment of the sum at which the bricks and plant were valued. A distress was afterwards put in upon the premises, and the plant and bricks sold for rent due from the defendant before the agreement; and the plaintiff was turned out of possession by the

landlord. In an action by the plaintiff against the defendant, for breach of the agreement to pay up the rent:—Held, that the contract and consideration were each single and entire; that the contract, taken in its entirety, was a contract for the sale of an interest in lands, and, not being in writing, was voidable, and that the plaintiff, therefore, could not sever and sue only upon that part which related to the payment of the rent. *Hodgson v. Johnson*, El. Bl. & El. 685; 28 L. J., Q. B. 88; 5 Jur., N. S. 290.

**Materials of Building—Consideration for Surrender.**—A tenant from year to year of a plot of ground and a cottage built on it, agreed to surrender the premises in consideration of being permitted to pull down the cottage and hold the materials for his own use, or of being paid the value of the materials; upon the faith of which he surrendered the premises to the landlord:—Held, in an action for breach of the agreement, that it required to be in writing under the Statute of Frauds, although the interest in land moved, not to, but from, the tenant. *Ronayne v. Sherrard*, 11 Ir. R., C. L. 146.

**To procure Assignment of Lease.**—A contract to procure for a person the assignment of a lease of a house is a contract of an interest in or concerning land within the Statute of Frauds (29 Car. 2, c. 3), s. 4, and must therefore be in writing, although it is made by one who has not the lease himself, or any interest under it. *Horsey v. Graham*, 5 L. R., C. P. 295; 39 L. J., C. P. 58; 21 L. T. 539; 18 W. R. 141.

**Where Contract Executed.**—An agreement between the plaintiff and the defendant, that if the plaintiff, the tenant of a farm, would surrender her tenancy to the landlord, and would prevail on her landlord to accept the defendant as his tenant in the place of the plaintiff, he (the defendant) would pay the plaintiff 100*l.* as soon as he should become tenant of the land, is a contract relating to an interest in land, and cannot be enforced unless in writing, even where the contract is executed. *Cocking v. Ward*, 1 C. B. 858; 15 L. J., C. P. 246.

But after the contract has been executed, a parol admission by the defendant, that he owes the 100*l.* to the plaintiff, is evidence of money due on an account stated. *Id.*

A tenant having agreed with his landlady that if she would accept another for her tenant in his place (he being restrained from assigning the lease without her consent), he would pay her 40*l.* out of 100*l.*, which he was to receive for the goodwill, if her consent was obtained:—Held, that having received the 100*l.* from the new tenant, who was cognizant of this agreement, he was liable to the landlady for money had and received for her use, the consideration being executed, and therefore the case was taken out of the statute, as a contract for an interest in land. *Griffith v. Young*, 12 East, 513.

The plaintiff and the defendant agreed by word of mouth, that the plaintiff should pay 37*l.* for the interest of the defendant in premises occupied by him as a slaughter-house, and for the fixtures; the defendant to return 10*l.* if the plaintiff was refused a licence to use the premises as a slaughter-house. The premises and fixtures were transferred to the plaintiff and the defendant received the 37*l.* Subsequently an

action was brought to recover 10*l.* on an allegation that the licence to use the premises had been refused to the plaintiff. A nonsuit was directed, on the ground that the contract was for an interest in land, and was void:—Held, that the contract being executed as far as regarded the land, and the promise sued on relating wholly to money, the plaintiff might recover, though the contract was not in writing. *Green v. Saddington*, 7 El. & Bl. 503; 3 Jur., N. S. 717.

A verbal agreement was made between the plaintiff and defendant, that, in consideration of the plaintiff giving up to the defendant immediate possession of a house which the plaintiff held and occupied under an agreement from his landlord for a seven years' lease, and of the fixtures and improvements done by the plaintiff on the premises, the defendant would pay the plaintiff 100*l.* The landlord assented to the change of tenants. The plaintiff gave up possession to the defendant, who came in, and was accepted as tenant, and paid to the plaintiff a portion of the 100*l.* The plaintiff brought an action on the contract to recover the balance:—Held, that this was a contract concerning an interest in land, and that, as it was not in writing, the Statute of Frauds prevented any action being maintainable upon it, though it had been so far performed. *Kelly v. Webster*, 12 C. B. 283; 21 L. J., C. P. 163; 16 Jur. 838.

**Sale of Oral Bargain.**—The plaintiff having orally bargained with E. for the sale of some houses, sold the bargain to the defendant for 40*l.*; and E., at the request of the defendant, conveyed the premises to P., who was not a trustee for the defendant; a verdict having been found for the plaintiff in an action for the recovery of this 40*l.*, the court refused to enter a nonsuit, which was moved for on the grounds, first, that the oral bargain for the interest in the houses could never have been enforced, and therefore could not form the consideration of an assumpsit; and, secondly, that the house had never been conveyed to the defendant. *Seaman v. Price*, 2 Bing. 437; 1 C. & P. 586; 10 Moore, 34.

**To give up Possession.**—Where A., being possessed of a message and premises for the residue of a term of years, agreed with B. to relinquish possession to him, and to suffer him to become tenant of the premises for the residue of the term, in consideration of B.'s paying a sum of money towards completing certain repairs of the premises:—Held, that this was an agreement relating to the sale of an interest in land. *Buttermere v. Hayes*, 5 M. & W. 456; 7 D. P. C. 489.

**Profits of Living.**—A clergyman entered into an agreement to permit the profits of his living to be received by a third person, for the purpose of the surplus (after paying a competent stipend to a curate to serve the church) being applied in liquidation of his debts:—Held, that such an agreement, signed by the creditors only, and not by the debtor, or any person thereunto by him lawfully authorized, does not amount to such a substitution of a new agreement in the place of an old contract as to operate as a bar to an action at the suit of the creditor who has signed it; it being a contract for an interest in or concerning lands, tenements, or hereditaments,

within the statute. *Alchin v. Hopkins*, 4 M. & Scott, 615; 1 Bing. N. C. 99.

**Milk Business.**—A., a yearly tenant of premises, on which he carried on the business of a milkman, agreed with B. to sell such business, and to give up possession of the premises to B., who was to be allowed by A. to occupy the same:—Held, that the agreement related to an interest in land, and was therefore required to be in writing. *Smart v. Harding*, 15 C. B. 652; 24 L. J., C. P. 76; 1 Jur., N. S. 311.

**Shares in Mine.**—A contract for the sale of shares in a mining company, conducted on the cost-book principle, is not a contract for the sale of land or an interest in land. *Watson v. Spratley*, 10 Ex. 222; 24 L. J., Ex. 53; *S. P.*, *Powell v. Jessop*, 18 C. B. 336; 25 L. J., C. P. 199, and *Walker v. Bartlett*, 18 C. B. 845; 2 Jur., N. S. 643—Ex. Ch.

An agreement to become partners in a colliery which was to be demised upon royalties, and the royalties to be divided in certain proportions, is an interest in land, and must be in writing, signed by the parties. *Caddick v. Skidmore*, 3 Jur., N. S. 1185.

C. and W. and M. were partners in working a colliery, of which they were the lessees under an agreement for a lease from the freeholder, and of which P. was the manager, at a salary of 1*l.* a-week. The concern being in want of money, W., M. and P. borrowed of a bank, on their joint note, money to pay the colliers' wages, on which note P. was afterwards sued, and judgment obtained against him, and he was also summoned by the colliers for wages, which he was adjudged by the magistrates to pay. At a meeting subsequently held to consider the best means of forming a limited liability company, at which C. and P. and also W. and M. were present, C. refused to join the company unless P. retired from all connexion with it, when it was agreed, by all present, that 60*l.* should be paid to P. "for any interest he might have, and for his services rendered in working the colliery." P. sued C., together with W. and M., for breach of their promise to pay him the 60*l.*:—Held, first, that the interest of P. in the colliery was not an interest in or concerning land, and that therefore the agreement for a breach of which the claim was brought need not be in writing; and, secondly, that as manager, P. might be liable to be sued by creditors and workmen, and in various ways, and so had an interest the giving up of which formed a good consideration for the promise. *Cheadle v. Proctor*, 19 L. T. 289.

**Railway Shares.**—By a railway act, it was declared that the shares in the undertaking, or the joint stock or funds of the company, should to all intents and purposes be deemed personal estate, and be transmissible as such, and should not be of the nature of real property:—Held, that the shares of individual proprietors were not an interest in land, and, therefore, might be sold by verbal contract. *Beadley v. Holdsworth*, 3 M. & W. 422.

**Loan to be Paid out of Rents.**—A customer, in July, borrowed 200*l.* from his bankers upon the terms of a verbal agreement that the loan should be repaid out of the rent of a farm which

would become due to him at Michaelmas. The money was advanced by the bankers, and the customer then gave them a letter addressed by him to the tenant of the farm, by which he authorized and requested the tenant, when his Michaelmas rent became due, to pay 200*l.* to the bankers. The letter contained no reference to the loan, and did not shew that any consideration had been given for the authority. The bankers sent the letter to the tenant. The customer was adjudicated a bankrupt upon an act of bankruptcy committed in August:—Held, that as the rent was an interest in land, the agreement was one which, by virtue of s. 4 of the Statute of Frauds, could not be proved by parol evidence, and that therefore the letter could alone be looked at. And that the letter amounted only to a revocable authority to pay the rent to the bankers, and that it was revoked by the bankruptcy. *Hall, Ex parte, Whiting, In re*, 10 Ch. D. 615; 48 L. J., Bk. 79; 40 L. T. 179; 27 W. R. 385—C. A.

**Use of Docks.**—A corporation, being the owner of a graving-dock, issued regulations for its use, viz., that the dock would "be let to parties requiring the same for the repair of vessels" at certain rates; that a book would be kept by the borough treasurer for the entering of the names of vessels intended for repair, and that as far as practicable priority would be given to vessels in the order of entry. A sum of three guineas was to be paid to the borough treasurer on entering each vessel, which "entrance money, and the right of turn for the use of the dock," were to be forfeited if the vessel did not take her turn at the specified time; and the corporation was to have a lien for dockage upon the vessel, with a power to detain the vessel for the same. In an action by a ship-owner against the corporation for not allowing his vessel, for which the entrance fee had been paid, to enter such dock in her turn, according to these regulations:—Held, that the contract for the use of the dock did not amount to an interest in land within the 4th section of the Statute of Frauds, and that it did not require to be under seal. *Wells v. Kingston-upon-Hull (Mayor)*, 10 L. R., C. P. 402; 44 L. J., C. P. 257; 32 L. T. 615; 23 W. R. 562.

**Alteration by Parol Agreement.**—The plaintiffs agreed in writing with the defendant to let him a public-house from year to year, with an option for him to call on them to grant him a lease for twenty-eight years, and a stipulation that if he sold such lease for more than 1,200*l.* he should give the plaintiffs half the difference. The plaintiffs subsequently granted him a lease differing from that agreed to be granted in the following particulars:—It was for thirty-two years instead of twenty-eight. The rent was 105*l.* instead of 100*l.* The premium was 800*l.* instead of 1,200*l.* There was no covenant, as had been agreed, against assignment without the lessors' consent, nor binding the lessee to take his beer of the plaintiffs. Some other covenants burthensome on the defendant which had been agreed for were omitted. These alterations were arranged by parol only. The defendant sold the lease for 2,500*l.* The plaintiffs sued upon the agreement for half the difference between that sum and 1,200*l.* The jury found that the stipulation as to dividing the surplus remained in force or was renewed:—Held, that the effect

of the alteration of the original terms agreed upon between the parties was that the old agreement was dissolved, and a new one made incorporating such parts of the old agreement as the parties did not choose to alter; and that as such new agreement related to land, and was not in writing within the 4th section of the Statute of Frauds, it could not be enforced by action. *Sanderson v. Graves*, 10 L. R., Ex. 234; 44 L. J., Ex. 210; 33 L. T. 269; 23 W. R. 797.

**Waiver.**—A. agreed to assign a lease to B., and to deliver possession by the 3rd May; and undertook that he had lawful right to assign. This contract was in writing. Neither party was ready to carry the agreement into effect on the 3rd May, and thereupon it was agreed by parol, that another day should be substituted in its place:—Held, that this parol waiver was void, being in contravention of the Statute of Frauds. *Stowell v. Robinson*, 3 Bing. N. C. 928; 5 Scott, 196; 3 Hodges, 197.

An agreement to grant a lease of lands, that all straw, &c., on the lands on taking possession should be valued by two persons to be respectively named by the contracting parties; that on execution of the lease a counterpart should be executed; and that either of the contracting parties making default in performance should forfeit 300*l.*, is an entire agreement relating to an interest in lands, and necessarily in writing, and a part of it cannot be verbally waived, even supposing such part to have been, if standing by itself, an agreement not required to be in writing. *Harvey v. Graham*, 5 A. & E. 61; 6 N. & M. 154; 2 H. & W. 146.

**Title to Lots.**—A. contracted in writing to sell B. several lots of land, and to make a good title to them, and a deposit was paid. It was afterwards discovered that a good title could not be made to one of the lots, and it was then verbally agreed between the parties that the vendee should waive the title as to that lot. The vendor delivered possession of the whole of the lots to the vendee, which he accepted. In an action brought by the vendor to recover the remainder of the purchase-money, the declaration stated that the defendant agreed to deduce a good title to all the lots except one, and that the vendee discharged and exonerated him from making out a good title to that lot, and waived his right to require the same:—Held, that oral testimony was not admissible to shew the waiver of the vendee's right to a good title as to that lot, inasmuch as the effect of such waiver was to substitute a different contract for the one in writing; and by the Statute of Frauds, in every action brought to charge a person on a contract for the sale of lands, the agreement must be in writing. *Goss v. Nugent (Lord)*, 5 B. & Ad. 58; 2 N. & M. 28.

**Recited Agreement.**—In an action by vendee against vendor, he produced an agreement, made as follows: "Mr. H. having agreed to purchase of Mr. B. two leasehold houses, Mr. B. hereby agrees to paper, &c., Mr. H. to pay, &c., at the time of the conveyance," &c.:—Held, that the agreement to purchase, though recited as an existing agreement, was to be considered as forming part of the agreement produced. *Hall v. Betty*, 4 M. & G. 410; 5 Scott, N. R. 508.

**Breach—Promise to Pay Expenses.]**—Where a plaintiff sued for breach of an agreement, which was void, being for an interest in land, and not being in writing:—Held, that he might recover on the count for an account stated, having proved a distinct promise of the defendant's to pay plaintiff the expenses he had been put to in consequence of the breach of agreement. *Seago v. Deane*, 4 Bing. 459; 1 M. & P. 227; 3 C. & P. 170.

In an action to recover the expenses incurred by the plaintiff in investigating the defendant's title to mortgage lands, upon the ground that his title had turned out to be defective, the declaration stated that, in consideration that the plaintiff would advance 2,000*l.* upon the security of a mortgage of the land, upon the defendant's making out a good title to mortgage the lands to the plaintiff, the defendant promised the plaintiff to pay him the expenses to which he might be subjected in case the loan should go off by reason of the defendant changing his views, or of the defectiveness of the defendant's title:—Held, that this agreement was not within s. 4 of the Statute of Frauds. *Jakes v. White*, 6 Ex. 873; 21 L. J., Ex. 265.

#### c. Sufficiency of Note or Memorandum.

**Description of Subject-Matter.]**—One of three trustees, acting as if absolute owner, entered into a contract to sell the entirety of a freehold property (in one-fifth part of which he had a beneficial interest), describing the property as "The Jolly Sailor, offices," &c. The other trustees, afterwards, refused to concur in the sale. The vendee having brought an action for specific performance of the contract:—Held, that the subject-matter of the contract was sufficiently defined, as the vagueness (if any) about the meaning of the words "Jolly Sailor, offices," &c., might be removed by an inquiry at chambers. *Naylor v. Goodall*, 47 L. J., Ch. 53; 37 L. T. 422; 26 W. R. 162.

Drainage commissioners agreed to sell a property to D. The contract did not refer to any plan, but the agent who signed it for the parties signed at the same time the following memorandum written upon a plan of the property:—"Plan of property sold to and purchased by D. 22nd Oct. 1874. N.B.—The property included in the purchase is edged with red colour:"—Held, that the plan was sufficiently incorporated, and that the description in the contract was controlled by it. *New Valley Drainage Commissioners v. Dunkley*, 4 Ch. D. 1—C. A.

An agreement was in the following words:—"Mr. M. agrees to pay 625*l.* for the cottage and stables,—Mr. G. paying the expenses of the lease held by Mr. S.":—Held, that as the agreement did not describe the subject-matter of the contract with sufficient certainty, the contract was void. *Cox v. Middleton*, 2 Drew. 209; 2 Eq. R. 631; 23 L. J., Ch. 618.

#### —Admission of Parol Evidence to Explain.]

A vendor of leasehold premises wrote a letter to her solicitor stating: "I have closed with Mr. W. for this place:"—Held, a sufficient memorandum in writing within the Statute of Frauds, and that parol evidence was admissible to shew what "this place" was. *Waldron v. Jacob*, 5 Ir. R., Eq. 131.

**—What Documents Incorporated.]**—The plaintiff claimed specific performance of a contract to purchase a house and premises sold by auction. After the sale the auctioneer signed the following memorandum at the foot of the conditions: "The property duly sold to A. Shardlow, butcher, Pinxton, and deposit paid at close of sale," and he also signed this receipt: "Pinxton, March 29th, 1880. Received of A. Shardlow the sum of 21*l.* as deposit on property purchased at 420*l.* at Sun Inn, Pinxton, on the above date. Mr. G. Cotterell, owner." The Statute of Frauds was set up in defence. The conditions contained no description of the property sold, but posters had been put up describing the property to be sold on the 29th of March at the Sun Inn:—Held, that the word "purchased" was enough to connect the receipt with the conditions of sale, though not with the poster; and that the description in the receipt and conditions was sufficient to satisfy the Statute of Frauds. *Shardlow v. Cotterell*, 20 Ch. D. 90; 51 L. J., Ch. 353; 45 L. T. 572; 30 W. R. 143—C. A.

When a memorandum, signed by the parties charged, refers to another document in writing, it may be proved by parol evidence that a certain document is the one referred to. *Morris v. Wilson*, 5 Jur., N. S. 168.

A paper was signed by a duly-authorized agent; it contained an agreement to do a certain thing, but not any explanation of the necessary details; but it referred to another paper, which did contain them:—Held, that the two might be connected together, by parol evidence, so as to constitute an agreement sufficient within the Statute of Frauds. *Ridgway v. Wharton*, 6 H. L. Cas. 238; 24 L. J., Ch. 46.

Upon a sale of lands by auction, a written contract, indorsed on the conditions of sale, was signed by the purchaser only: letters were subsequently written by the vendor to the purchaser's attorney, distinctly referring to the contract, and insisting upon the completion of the purchase:—Held, that this contract and the letters together constituted a sufficient note or memorandum, to enable the vendee to sue the vendor for the expenses of investigating the title, upon such title being found defective. *Dobell v. Hutchinson*, 5 N. & M. 251; 3 A. & E. 355; 1 H. & W. 394.

**—Varying by Conditions of Sale.]**—Conditions of sale, referred to in a proposal for a contract of sale, cannot avail to modify the contract, so far as to vary the very subject-matter of the contract. *Evans v. Robins*, 31 L. J., Ex. 465; 8 Jur., N. S. 846; 6 L. T. 897; 10 W. R. 776.

Therefore, when a handbill announced the sale of freehold ground rents, and referred to certain conditions of sale, by which it appeared that part of the rent offered was a sum in gross paid in consideration of a right of user of a pleasure-ground, one who closed with the offer in the handbill was allowed to rescind the contract, and recover back his deposit. *Id.*

**Duration of Term—Leaseholds.]**—A letter, by the owner of premises, saying, "I agree to let A. the stables in Gore-lane for the same rent, and subject to the same conditions that I hold them myself," though accepted in writing by A., is not a sufficient contract in writing to be binding, as

it does not state the duration of the term for which the premises were let. *Fitzmaurice v. Bayley*, 8 Bl. & Bl. 644; 27 L. J., Q. B. 143; 4 Jur., N. S. 560. Affirmed in Dom. Proc., 9 H. L. Cas. 78; 6 Jur., N. S. 1215; 8 W. R. 750.

An executory agreement for a lease does not satisfy the Statute of Frauds, unless it can be collected from it what day the term is to begin, and there is no inference that the term is to commence from the date of the agreement in the absence of language pointing to that conclusion. *Jaques v. Millar* (6 Ch. D. 153) overruled. *Marshall v. Berridge*, 19 Ch. D. 253; 51 L. J., Ch. 329; 45 L. T. 599; 30 W. R. 93; 46 J. P. 279—C. A.

— **Sale of Medical Practice.**—The plaintiff wishing to sell a medical practice, with the lease of the house where it was carried on, placed it on the books of a medical agent. This led to negotiations with the defendant. The premiums asked for the practice and for the lease were stated in a letter from the agent to the defendant, but no time for completing the purchase was mentioned. The defendant replied in a letter to the agent accepting the terms offered, and adding that he should be ready to pay the deposit-money "on receipt of corrected agreement," and at the same time he wrote to the plaintiff personally, also accepting the terms offered, and adding, "I shall trust to you to give me the best introduction you can, during three months and afterwards, if necessary." The plaintiff replied, thanking the defendant for acceding to his terms, and saying that "it would be his aim as well as his duty to give him an effectual introduction to his patients." A formal agreement was drawn up, but never signed, and after some further correspondence the defendant refused to complete the purchase:—Held, that inasmuch as the time for the commencement of the purchase was left uncertain, and the stipulation as to the three months' introduction was not agreed to, and as the parties contemplated a formal agreement, there was no binding contract between the parties, and the action was dismissed. *May v. Thomson*, 20 Ch. D. 705; 51 L. J., Ch. 917; 47 L. T. 295—C. A.

**Parties—Names or Description.**—In order to satisfy the requirements of the Statute of Frauds, the note or memorandum of an agreement for the sale of real estate must contain either the names of the contracting parties or such a description of them that there cannot be any fair dispute as to their identity. *Potter v. Duffield*, 18 L. R., Eq. 4; 43 L. J., Ch. 472; 22 W. R. 585.

— **"Vendor."**—The term "vendor" is not of itself a sufficient description of one of the contracting parties. *Id.*

Real estate was put up for sale under particulars and conditions of sale which did not disclose the vendor's name, but stated that B. was the auctioneer. The purchaser of one of the lots signed a memorandum acknowledging his purchase; and B. signed at the foot of this memorandum another in these terms, "Confirmed on behalf of the vendor. B.":—Held, that the memorandum did not sufficiently shew who the vendor was. *Id.*

An agreement for the sale of real estate did not disclose the name of the vendors, but it ap-

peared therefrom that the vendors were a company in possession of the property offered for sale, and that they had carried on operations thereon:—Held, that the vendors were sufficiently described to satisfy the Statute of Frauds. *Commins v. Scott*, 20 L. R., Eq. 11; 44 L. J., Ch. 563; 32 L. T. 420; 23 W. R. 498.

T. signed a contract for the purchase of a leasehold shop from "the vendor," subject to particulars and conditions; and the auctioneer signed as "agent for the vendor." T. paid a deposit, and the vendor's solicitor forwarded to his solicitors an abstract of title, and in reply they wrote: "without prejudice to any question which may arise as to the contract of purchase herein, we beg to name Tuesday next to examine abstract of title, with deeds, &c." And after examining the abstract they forwarded requisitions, writing at the foot of them, "The above requisitions are made without prejudice to any question which may arise as to the contract for the purchase of the premises." T. subsequently repudiated the contract, on the ground that the contract did not disclose the name of the vendor, and brought an action to recover the deposit:—Held, without deciding whether the memorandum was insufficient under the Statute of Frauds, that he could not recover, having chosen, knowing that the vendor's name did not appear in the memorandum, to pay the deposit and receive the abstract of title; and that the expression in the correspondence "without prejudice to any question which may arise as to the contract of purchase," could not have been meant or understood as referring to the validity of the contract. *Thomas v. Brown*, 1 Q. B. D. 714; 45 L. J., Q. B. 811; 35 L. T. 237; 24 W. R. 821.

— **"The Proprietor."**—On the sale of real estate by auction the particulars stated that the property was put up for sale by "the proprietor." No further description of the vendor was given in the particulars or conditions. The auctioneer signed a memorandum in his own name, by which he agreed "that the vendor on his part should in all respects fulfil the conditions of sale mentioned in the particulars." On a bill for specific performance by the purchaser:—Held, that on the particulars and memorandum there was a sufficient description of the vendor within the 4th section of the Statute of Frauds. *Sale v. Lambert*, 18 L. R., Eq. 1; 43 L. J., Ch. 470; 22 W. R. 478.

An estate was offered for sale in lots shewn upon a plan on which various conditions were printed, one of which was that each purchaser would be required to sign a contract embodying the conditions, and providing for the completion of the purchase at the expiration of a period of not more than two months from the date of the contract. M. made a verbal offer to W., the agent of the owners, to purchase certain lots for 1,000*l.* W. informed him that he must purchase subject to the conditions, and promised to lay his offer before the proprietors. Shortly afterwards W. wrote to M. saying that the "proprietors" accepted his offer to purchase the specified lots for 1,000*l.*, subject to the conditions on the plan, and that he had requested the solicitors to forward to M. the agreement for purchase. M. replied by letter that his offer had better be reconsidered unless he was left at liberty to build or not as he pleased. W. replied by letter that the acceptance by the proprietors was not condi-

tional, and that M. would be at liberty to build or not. The contract was sent to M., but he refused to sign it, or to proceed with the purchase.—Held, that the word "proprietors" was sufficient to identify the vendors within the Statute of Frauds, and that specific performance must be decreed. *Rossiter v. Miller*, 5 Ch. D. 648; 46 L. J., Ch. 228; 36 L. T. 304; 25 W. R. 890. Affirmed in H. L., 3 App. Cas. 1124; 48 L. J., Ch. 10; 39 L. T. 173; 26 W. R. 865.

— **Vendor described as "Trustee Selling under Trust for Sale."**—A contract for the sale of land in which the vendor is not named, but is stated to be "a trustee selling under a trust for sale," is sufficient within the Statute of Frauds. *Cutling v. King*, 5 Ch. D. 660; 46 L. J., Ch. 384; 36 L. T. 526; 25 W. R. 550—C. A.

— **"Legal Personal Representative."**—In conditions of sale the vendor was described as "legal personal representative of L. D." At the date of the contract the vendor was not L. D.'s legal personal representative; there was no person filling that character. But the vendor was the only person in a position to become "legal personal representative," and he subsequently took out letters of administration to L. D.'s estate. The purchaser objected to the title on this ground.—Held, that the objection failed; that the latent ambiguity being raised by parol evidence could be got rid of by parol evidence, and that there was a valid contract. *Twiss v. Topham*, 37 L. T. 308.

— **Reference to Abstract to Cure Defect in Contract.**—Conditions of sale stated that the vendors were trustees, but did not name or otherwise describe them. The contract of sale was signed by the purchaser's agent, and confirmed by the auctioneers, as agents for the vendors. An abstract was delivered to the purchaser intitled with the names of the vendors, and the purchaser's requisitions were headed with the vendors' names. On an objection that the vendors were not named in the particulars or conditions of sale, or in the contract signed on behalf of the purchaser by his agent.—Held, that the abstract might be referred to for the purpose of curing the defect in the contract. *Bourdillon v. Collins*, 24 L. T. 344; 19 W. R. 556.

— **Correspondence.**—Plaintiff was the lessee of vaults in the city of London under a lease granted by the Mayor and Corporation of London and the Mercers' Company. The defendant company entered into a negotiation for the purchase of the lease. The secretary of the company wrote to the house agents acting for the plaintiff a letter in which he said that the directors thereby offered to purchase the vaults for 2,500*l.* cash, and to take over a mortgage for 3,500*l.* on the lease, these terms to include the lease, goodwill, fixtures, &c. The house agents answered as follows: "In reply to your letter of the 7th inst. we are now instructed to accept the offer therein contained, and will forward contract as soon as we obtain it from the solicitor." Differences subsequently arose respecting the time when possession should be given, and eventually the plaintiff brought an action against the defendants claiming damages for

breach of contract.—Held, that no binding contract had been entered into, because the name of the vendor had not been disclosed or a sufficient description given so as to satisfy the Statute of Frauds. *Donnison v. People's Café Company*, 45 L. T. 187—C. A.

Where a memorandum of agreement did not contain the name of the vendor, but his name was referred to in a subsequent letter written by the purchaser.—Held, that this was a sufficient reference within the Statute of Frauds. *Warner v. Willington*, 3 Drew. 523; 25 L. J., Ch. 662; 2 Jur., N. S. 433.

During parol negotiations for the purchase of an estate, the vendor wrote to the purchaser's solicitor, proposing that the solicitor's client should advance a sum to pay off a mortgage on the property. After further parol negotiations as to the terms, they were agreed upon by parol, and the vendor signed and handed to the purchaser a written statement of the particulars of the property and of the price. On the following day he signed and addressed to the purchaser a letter containing the following passages: "I am about to relet the land at P. for another year, concluding you will agree to it. . . . The Lady-day rents will be mine, and the Michaelmas yours:—"—Held, that the signed statement of particulars was not a sufficient memorandum in writing, the purchaser's name not being mentioned in it, and that the defect was not supplied by the correspondence. *Skelton v. Cole*, 1 De G. & J. 587.

Where it does not appear upon the face of a contract or by reference of whom property is purchased, letters written by persons in the character of vendors may be connected with the contract for the purpose of supplying this defect. *Dobell v. Hutchinson*, 5 N. & M. 251; 3 A. & E. 355; 1 H. & W. 394.

**Signature—By Telegram.**—A., by letter, offered to buy an estate for a given sum. B. answered by telegram, "Your offer for the L. estate is accepted." The instructions for the message were signed by B.; but the telegram received by A. merely contained the names of the sender and the receiver, written by the company's clerk in the usual printed form.—Held, that this was a sufficient signature by B., under the Statute of Frauds, to render him liable to be charged on the contract. *Godwin v. Francis*, 5 L. R., C. P. 295; 39 L. J., C. P. 121; 22 L. T. 338.

— **Illiterate Person making Mark.**—An agreement annexed to conditions of sale by auction, to which D. (an illiterate person) had put his mark, stating that D. had purchased from S., the vendor, for the sum of 250*l.*, the premises mentioned in the annexed particulars, subject to the conditions of sale, is a good memorandum in writing within the 4th section of the Statute of Frauds. *Dyas v. Stafford*, 7 L. R., Ir. 590. Affirmed on this point, 9 L. R., Ir. 520—C. A.

— **Place of.**—An agreement in the handwriting of the party, beginning "I, A. B., agree to sell," though not signed by the vendor, is good within the Statute of Frauds. *Knight v. Crookford*, 1 Esp. 189. See *Hubert v. Turner*, 4 Scott, N. R. 486.

J. R. Bridges, having five freehold houses, but no other property, in Cable-street, Liverpool,

agreed to sell them to J. Bleakley for 248*l.*, and thereupon drew up the following memorandum in his own handwriting: "July 26, 1839. John Bleakley agrees with J. R. Bridges to take the property in Cable-street for 248*l.* 10*s.*:"—Held, that the agreement was sufficiently signed by the vendor. *Bleakley v. Smith*, 11 Sim. 150.

— **Of Party to be Charged.**—A contract of purchase (of leasehold property sold by auction) written on the back of the particulars of sale (which contained the names of the owners of the property), and signed by the purchaser only, is a sufficient note or memorandum of the agreement between the parties; the vendor's signature is not essential. *Laythorp v. Bryant*, 3 Scott, 238; 2 Bing. N. C. 735; 2 Hodges, 25.

**Signature by Agents.**—An agreement to sell property was signed for a company by the secretary, who was alleged to be its authorized agent. The agreement was made subject to conditions of sale, and it was alleged that the vendors therein described referred to the company. The conveyance was prepared for execution when the company was ordered to be wound up, and the liquidator repudiated the contract on the ground that the secretary was not an authorized agent for the purpose of sale:—Held, that the allegations in the bill were sufficient to shew that the secretary was the authorized agent for the purpose of executing the contract, both within the Statute of Frauds and the Companies Act, 1867. *Beer v. London and Paris Hotel Company*, 20 L. R., Eq. 412; 32 L. T. 715.

A contract for the purchase of land made by an agent in his own name, vests the equitable estate in the principal, and may be established by him against the agent and persons claiming under him, although the agent is appointed merely by parol. *Cave v. Mackenzie*, 46 L. J., Ch. 564; 37 L. T. 218.

The plaintiffs appointed by parol W. F. M. as their agent to purchase land on their behalf. W. F. M. entered into a contract for the purchase of the land in his own name, and then assigned the benefit of the contract to J. T. M. for valuable consideration. In an action by the plaintiffs against W. F. M. and J. T. M. to establish the agency, the vendor not being a party:—Held, that the appointment of W. F. M. was an agency within s. 4 of the Statute of Frauds, and not a trust or confidence within s. 7, and therefore was not required to be evidenced by writing. *Id.*

The defendant, an estate agent, contracted to sell land to the plaintiff, who paid a deposit. The defendant signed a receipt in his own name for the deposit, and the plaintiff signed an agreement containing the terms of the purchase. The owner of the land refused to complete the purchase, and the plaintiff sued the defendant for damages for breach of the contract to sell. At the trial the jury found that the defendant sold as principal:—Held, that the defendant was personally liable, and that the agreement and receipt taken together formed a sufficient contract to satisfy the Statute of Frauds, s. 4. *Long v. Millar*, 4 C. P. D. 450; 48 L. J., C. P. 596; 41 L. T. 306; 27 W. R. 720—C. A.

An allegation in a plea that "A. by his writ-

ing sold the aftermath of land to B." is not proved by evidence that at an auction held for the purpose of selling it B. was the purchaser; that B. gave a promissory note for the sum, and that B.'s name was written (by A.'s agent) in the printed catalogue as the buyer. *Symonds v. Ball*, 8 T. R. 151.

When an agent contracts it may be proved by parol evidence who is his principal. *Morris v. Wilson*, 5 Jur., N. S. 168.

Parol evidence cannot be admitted to shew that a party having agreed for the purchase of an estate, in his own name, had in fact purchased it on behalf of another person. *Bartlett v. Pickergill*, 1 Cox, 5; 4 East, 577, n.

— **Recognition.**—The subsequent recognition of an unsigned contract in writing for the sale of lands, by the signature of his lawfully-authorized agent to a notice specifying and adopting the contract, is sufficient to bind the party contracting to be charged therewith. *Norris v. Cooke*, 7 Ir. C. L. R. 37.

— **Auctioneer.**—An auctioneer is an agent lawfully authorized by the buyer to sign a contract for him, whether it is for a purchase of interest in land, or of goods. *Emmerson v. Heelis*, 2 Taunt. 38. But see *Stansfield v. Johnson*, 1 Esp. 101; *Walker v. Constable*, 1 B. & P. 306.

His authority is given by the buyer bidding aloud. *Id.*

And he, by implication, is duly authorized as an agent to sign a contract for the purchase of a real estate on behalf of the highest bidder. *White v. Proctor*, 4 Taunt. 209.

And his writing down the name of the highest bidder in his book is a sufficient signature to satisfy the Statute of Frauds. *Id.*

And if the highest bidder is agent for another, the auctioneer's signature of the bidder's name will bind the principal; at least, if the principal is present, and consulting with the agent during the sale, and makes no objection before the entry is made in the book. *Id.*

Semble, that the name of the auctioneer printed on the back of particulars and conditions of sale is sufficient to bind the vendor. *Dyas v. Stafford*, 9 L. R., Ir. 520.

Semble, that a contract signed by an auctioneer on behalf of an undisclosed proprietor is a valid contract under the Statute of Frauds. *Beer v. London and Paris Hotel Company*, 20 L. R., Eq. 412; 32 L. T. 715.

— **By Clerk as Witness.**—A signature by an auctioneer's clerk, in the character of witness merely, to a contract for the sale of property which is signed by the purchaser alone, is not a sufficient signing of an agreement or memorandum, or note thereof, by an agent of the seller, to satisfy the Statute of Frauds. *Gosbell v. Archer*, 4 N. & M. 485; 2 A. & E. 500; 1 H. & W. 31.

— **Sufficiency of Memorandum on other Points.**

—An intended vendor of freehold property, who had bought under stringent special conditions, instructed her solicitor, in conformity with his own advice, to sell the property subject to the same or similar conditions as or to those under which she had bought. Acting under this limited authority, the solicitor gave the neces-

**Sale subject to Invalid Lease—Vendor not bound to give effect to.**—A. sold to B. an estate in fee simple expressly subject to a lease which purported to have been granted by A.'s predecessor in title. The lease was in fact invalid:—Held, that B. was not bound to give effect to the invalid lease. *Smith v. Widdlake*, 25 W. R. 52—C. A.

**Equitable or Legal Term.**—The plaintiff advertised to be sold by auction lands and houses, stated as "held for the remainder of a term of fifty-four years if C. T. should so long live," and the conditions of sale were similar; the defendant bid and was declared the purchaser, and the auctioneer signed the entry of the sale in his book; but it subsequently appeared that the premises in question had been let by lease for a term of sixty-two years from the 1st of November, 1839 (which would expire on the 1st of November, 1901); that the lessee's interest having become vested in C. T., he, on the 4th of September, 1845, assigned the premises to trustees for the term of fifty-four years (which would expire on the 4th of September, 1899), in trust for himself for life, with remainders over; and that the plaintiffs, deriving under C. T., were mortgagees of the latter term:—Held, in an action for not completing the purchase, that the advertisement and conditions of sale were calculated to mislead the defendant into believing that what was to be sold was, not the residue of an equitable term of fifty-four years, but fifty-four years the residue of a legal term created by lease; that the defendant therefore bid for that which the plaintiff had not to sell, and that, consequently, there was no contract, notwithstanding the signature of the auctioneer, inasmuch as the minds of both parties did not assent to the subject-matter of the contract. *Gardiner v. Tate*, 10 Ir. R., C. L. 460.

**Length of Term.**—A purchaser cannot refuse to perform an agreement for the sale of "the unexpired term of eight years' lease and goodwill," on the ground that only seven years and seven months of the term remained. *Belworth v. Hassell*, 4 Camp. 140.

**Purchaser's Knowledge—Conditions—Compensation.**—Where the particulars of sale of certain leasehold property contained a misstatement, thereby causing the reversion to the full rack rental value of the premises to appear as if it would fall in eight years earlier than actually was the case, of which misstatement the vendors asserted that the purchaser had knowledge at the time of the sale, although the evidence on this point was conflicting; and where the conditions of sale provided that any error or misstatement in the particulars should not annul the sale, but compensation should be made to or by the purchaser, as the case might be:—Held, that, even if the purchaser were aware of the misstatement in the particulars, the vendors were not thereby relieved from the liability to make him compensation, in accordance with the terms of the conditions of sale. *Lett v. Randall*, 49 L. T. 71.

**Freehold or Copyhold.**—Conditions of sale described certain property to be sold as freehold. Subsequently, after the purchaser had paid his consideration-money, but before the final com-

pletion of the conveyance, it turned out to be copyhold:—Held, that the purchaser was entitled to have his contract for purchase rescinded, and the money repaid with interest. *Turner v. West Bromwich Union (Guardians)*, 3 L. T. 662; 9 W. R. 155.

**Freehold Property—Mortgage on.**—A person contracted to purchase a house described as a freehold residence, being lot 2 referred to in the particulars, subject to certain conditions of sale, and paid the deposit. Condition 5. "The abstract of title to lots 1, 2 and 3 (being the freehold portion of the property), will commence with a conveyance of the 17th of April, 1860, and no purchaser shall investigate, or take any objection in respect of the title prior to the commencement of the abstract. 9. If any error or misstatement shall appear to have been made in the particulars of sale, it is not to annul the sale, but shall entitle the purchaser to compensation." The abstract of the deed of April, 1860, recited an indenture of March, 1850, whereby E. assigned to R. in fee, and another deed whereby R. assigned to trustees in fee, and the trustees conveyed to the vendor's testator in fee, subject (so far as the premises were subject) to the covenants and conditions on the part of the grantee, his heirs and assigns, in the indenture of March, 1850. The purchaser refused to complete without further explanation of these covenants and conditions, and the vendor refused any further abstract, relying on the fifth and ninth conditions of sale:—Held, that the property having been sold as freehold, the purchaser was entitled to have an unincumbered freehold title under the deed of April, 1860, and the conditions of sale did not protect the vendor, and the purchaser was entitled to rescind the contract and recover his deposit. *Phillips v. Caldwell*, 4 L. R., Q.-B. 159; 38 L. J., Q. B. 68; 20 L. T. 80; 17 W. R. 575.

**Leaseholds—Omission of Ground Rent.**—Leaseholds in Liverpool were put up for sale under the direction of the court in four lots, under a condition that the purchasers should enter into the usual covenant for paying and observing the rents and covenants of the leases, and indemnifying the vendors therefrom. There was no condition as to the leases being produced, nor that the purchasers should be deemed to have notice of their contents. As to one of the lots, the particulars stated the rents at which the different parts of it were underlet, and the amount of a mortgage on it; but, owing to a slip, did not mention that it was subject to any ground rent. It was, in fact, subject to a ground rent of 43l. The other lots were leaseholds held under the corporation of Liverpool, which usually reserves only a nominal rent on its leases. A purchaser bought this lot for 1,400l., and applied to be discharged from his purchase, both he and his solicitor deposing that they were led by the particulars to believe, and did believe, that the property was not subject to any ground rent:—Held, that the purchaser was entitled to be discharged. *Jones v. Rimmer*, 14 Ch. D. 588; 49 L. J., Ch. 775; 43 L. T. 111; 29 W. R. 165—C. A.

**Ground Rent—Sum in Gross.**—The defendant put up for sale by public auction, property described in the particulars as follows: "Four freehold ground rents of 19l. 4s. each;

viz., 15*l.* ground rent, and 4*l.* 4*s.* garden rent, amounting to 76*l.* 16*s.* a year, arising from four capital residences of the annual value of 384*l.*, held by four leases granted to W. Reynolds for a term of ninety-five years each (wanting ten days) from the 29th of September, 1844, with reversion to the property in about eighty years." The plaintiff became the purchaser, and paid the auctioneer 282*l.*, as a deposit in part payment of the purchase-money. The vendors, in making out their title, produced four counterparts of leases from one Roy to Reynolds. By each of these leases, Roy, in consideration of the yearly rents thereafter reserved, demised to Reynolds a piece of land with a messuage thereon for the term of ninety-five years (wanting ten days) at the yearly rent of 15*l.*; and for the considerations aforesaid, and also in consideration of the further rent thereafter reserved, and of the covenants of Reynolds, Roy covenanted with Reynolds that it should be lawful for him and the tenants of the messuage, at all times during the continuance of the term, to enter upon, and use and enjoy as a pleasure ground or garden, a piece of land particularly described, jointly with Roy, and Roy covenanted that he would at his own expense keep in order the garden. There was also a covenant by Reynolds to pay Roy the yearly rent of 15*l.*, and also the further yearly rent of 4*l.* 4*s.* in respect of the right of user of the garden or pleasure ground, such rent to be payable in the same manner as the rent of 15*l.*.—Held, that the rent of 4*l.* 4*s.* was a sum in gross, payable under a covenant, and not a rent issuing out of the land; and consequently, the plaintiff was entitled to rescind the contract and recover back his deposit. *Robins v. Evans*, or *Evans v. Robins*, 1 H. & C. 302; 31 L. J., Ex. 465. Affirmed, 2 H. & C. 410; 33 L. J., Ex. 68; 10 Jur., N. S. 473; 11 L. T. 211; 12 W. R. 604—Ex. Ch.

—**Rights Under.**—L., having a term of ninety-nine years, with a covenant that he might, within twenty years, purchase the fee, demised to F. for ninety-nine years and a half, at a ground rent, and then acquired the fee. The ground rent was put up for sale described as "a freehold ground rent issuing out of lands on lease, which will expire in December, 1922," being the expiration of the ninety-nine years and a half term.—Held, that the title was too doubtful, in reference to the remedies which the purchaser would have for enforcing the rent, to be forced on an unwilling purchaser. *Langford v. Selmes*, 3 Kay & J. 220; 3 Jur., N. S. 859.

Under such a description the purchaser has a right to expect a power of entry and distress in case of nonpayment. *Ib.*

—**When Not Recoverable.**—A party became the purchaser at a public auction, of a lot comprehending a freehold messuage and a fee farm rent of 21*s.* By the conditions of sale, no evidence was to be required of the receipt or payment or existence of the fee farm rent, other than that disclosed by a certain conveyance; "nor should any objection be taken to the title in consequence of the nonpayment or non-receipt" of the fee farm rent. It was discovered that, in fact, the rent had not been paid or received for twenty years before the sale; and the purchaser contended that it was therefore extin-

guished under 3 & 4 Will. 4, c. 27, s. 34, and had ceased to exist at the time of the sale.—Held, that he was not entitled to repudiate the contract on this ground, but must be considered to have purchased, under the conditions of sale, the chance of the rent being obtainable. *Hanks v. Palling*, 6 El. & Bl. 659; 25 L. J., Q. B. 375; 2 Jur., N. S. 688.

**Extent of Property—Right to Compensation or Rescission.**—After the purchaser of real estate has taken a conveyance, and the purchase-money has been paid, no action can be maintained for damages or compensation on account of errors as to the quantity or quality of the subject-matter of the sale, unless such errors amount to breach of some contract or warranty contained in the conveyance itself, or unless some fraud or deceit has been practised upon the purchaser. *Jolliffe v. Baker*, 11 Q. B. D. 255; 52 L. J., Q. B. 609; 48 L. T. 966; 32 W. R. 59; 47 J. P. 678.

In the conveyance to a purchaser the land sold was described as two parcels, each defined in the most particular manner by metes and bounds, and other details, and each "as containing by estimation one and a half acres or thereabouts." Subsequently to the conveyance the lands were measured, and the two parcels together amounted to only 2a. 1r. 12p.—Held, that this misdescription as to quantity did not amount to a breach of any warranty, so as to entitle a purchaser to maintain an action for damages against the vendor. *Ib.*

It is a question of fact whether the parcels have or have not in truth and in fact been estimated to contain the quantity stated or thereabouts, the answer to which will mainly depend on whether the error is so small as to lead to the assumption that it might have been so estimated, or so great as to make the estimate an irrational or impossible one. *Ib.*

Misdescription of the quantity of land in regard to the acres being statute acres or customary, is not matter of compensation, but a ground for setting aside the sale. *Price v. North*, 2 Y. & C. 620.

Upon the sale of real estate one of the conditions was as follows:—"The admeasurements are presumed to be correct, but if any error be discovered therein, no allowance shall be made or required either way." It was stated in the particulars that the property sold contained an area of 7,683 square yards or thereabouts; but upon admeasurement, the area was found to be 4,350 only. Upon a bill by the purchaser against the vendor for specific performance, with compensation for the deficiency in quantity.—Held, that the purchaser was not entitled to compensation in respect of the mistake as to quantity, and a decree was made for specific performance on payment by the purchaser to the vendor of the full amount of the purchase-money. *Cordingley v. Cheesebrough*, 3 Giff. 496; 31 L. J., Ch. 617; 8 Jur., N. S. 585, 755; 6 L. T. 15, 642.

A person agreed to purchase an estate which, on the written contract, was, by mistake, stated to contain 21,750 acres; it turned out that it contained only 11,814 acres.—Held, that the purchaser was not entitled to specific performance, with a proportionate abatement for the deficiency of acreage, but that he could only enforce the contract on payment of the full price, or rescind the contract. *Durham (Earl)*

v. *Legard*, 34 Beav. 611; 34 L. J., Ch. 589; 11 Jur., N. S. 706.

A farm was put up for sale under the direction of the court by particulars accompanied by a plan, and was described as "a compact small farm containing 41a. 3r. 35p., divided as follows." Among the parcels was "490a, Bottlesey Green, containing 7a. 1r. 27p.," opposite to which, in the column shewing the amounts which made up the 41a. 3r. 35p., was entered 4a. 0r. 38p. The conditions provided that any error, misstatement, or omission in the particulars should not annul the sale, nor should any compensation be allowed except such (if any) as the judge in chambers should direct. G. bought the property in his own name, and was certified as purchaser. He in fact bought as agent for B., who was the owner of immediately adjoining property. On investigating the title it turned out that the vendors were only entitled to four undivided sevenths of 490a, which was a narrow close containing 7a. 1r. 27p., having a long frontage to a highroad and at one end adjoined B.'s property. B. alleged that it was of great importance to the enjoyment of his property that he should have the whole of 490a, and G., by his directions, refused to complete. The vendors then entered into an arrangement with the owner of the other three sevenths to give them up, receiving an equivalent out of another part of the farm having a frontage to another road:—Held, by the Master of the Rolls, that as B. had not been substituted as purchaser, G. must be treated as the real purchaser, and could not take any objection depending on the circumstances of B.'s property, and that, as the arrangement would give the purchaser all he contracted to buy, he must complete without compensation:—But held, on appeal, that G., having only purchased as agent for B., could take any objection which B. had he been the nominal as well as the real purchaser, could have taken; that, for the purpose of resisting completion, the purchaser was entitled to say that he bought the farm as shewn on the plan; that, as the possession of 490a was important to the enjoyment of B.'s property, completion could not be compelled unless he could get the whole of it, and that he was not bound to accept the arrangement by which he would obtain the whole of it by giving up another part of the purchased property; and that he must therefore be discharged from his purchase. *Arnold, In re, Arnold v. Arnold*, 14 Ch. D. 270; 42 L. T. 705; 28 W. R. 635—C. A.

—**Notice in Conditions.**—A contract of sale by auction described the property as "the freehold cottage and copyhold paddock, comprising 1a. 2r. 8p., situate, &c., described in the particulars attached hereto as lot 1." In the annexed particulars, lot 1 was thus described: "The property is freehold (with the exception of the paddock, which is copyhold), and comprises 1a. 2r. 8p., situate, &c. The premises consist of a double cottage, &c., and paddock, in the occupation of Mr. P." The contract contained the usual clause, that the title and conveyance should be completed according to the conditions of sale. The sixth condition was as follows:—The several properties comprised in the foregoing particulars are presumed to be correctly described, and the quantities of the land shall be taken as stated, whether more or less (although the title-deeds and court-rolls state

such quantities to be less), without any equivalent or compensation on either side; and no other evidence of identity shall be required than that furnished by the documents of title; and the statements contained therein shall be deemed conclusive evidence of the identity of the properties." The abstract of title delivered shewed a title only to 3r. 24p. in the whole:—Held, that the purchaser, having distinct notice by the condition that the deeds would shew a less quantity than that mentioned in the particulars and contract of sale, was bound to take the title as offered; and failing to do so, that the vendor was entitled to resell, and to claim the deposit as forfeited. *Nicoll v. Chambers*, 11 C. B. 996; 21 L. J., C. P. 54.

—**Substantial Part Non-existent.**—A condition, "that if any mistake shall be made in the description of the premises, or any other error whatsoever shall appear in the particulars of the property, such mistake or error shall not annul the sale, but a compensation shall be given," does not apply when any substantial part of the property turns out to have no existence, or cannot be found; or where a vendor has *malâ fide* given a very exaggerated description of the property. The purchaser may, in such case, rescind the contract *in toto*. *Robinson v. Musgrove*, 2 M. & Rob. 92; 8 C. & P. 469.

Particulars of sale by auction of a public-house, described the premises as being held for an unexpired term of years, at a rent of 55*l.*, and as comprising, amongst other things, a yard. By the conditions, the contract was to be completed on the 25th June, and any error or mistake in the description of the property was to be matter of compensation, to be fixed by arbitration. In fact, the yard was not held under the lease, but under a tenancy from year to year, at a further rent of 10*l.* The vendors, however, procured a lease for the same term of the yard, at an additional rent of 8*l.*, dated on 23rd June, but not in fact executed until long after the 25th June. The yard was essential to the enjoyment of the premises:—Held, that this defect was not matter of compensation under the terms of the condition, but such a defect in the title as justified the vendee in vacating the contract. *Dobell v. Hutchinson*, 5 N. & M. 251; 3 A. & E. 355; 1 H. & W. 394.

A purchaser who has contracted for the entirety of an estate will not be compelled to take six undivided seventh parts of it. *Dalby v. Pullen*, 3 Sim. 29.

—**Position.**—At the auction mart in London, B. purchased a house at Brighton, simply described as "Lot 1, No. 39, Regency-square." He afterwards discovered that the house was not actually in the square, but in a side street communicating with the square, but it was always named 39, Regency-square:—Held, that there was no misdescription. *White v. Bradshaw*, 16 Jur. 738.

It is a misdescription in particulars of sale to describe a house as No. 58, Pall Mall, opposite Marlborough House; where the house was, in fact, not in Pall Mall, but was situate behind No. 57, Pall Mall, having an entrance with a door, which for many years bore the designation of No. 58, and a separate passage, about sixty-five feet long and three feet eight inches wide, across the ground floor of No. 57, between the basement

and upper storeys of No. 57 :—Held, that, the particulars having indicated no peculiarity in the access to the house, and the objection on this point having been taken as soon as it was known, the purchaser was entitled to have the contract rescinded. *Stanton v. Tattersall*, 1 Sm. & G. 529 ; 17 Jur. 967.

A provision in conditions of sale, that any misstatement in the particulars shall not vitiate the sale, does not extend to a misdescription of the situation, wilfully introduced to increase its apparent value. *Norfolk (Duke) v. Worthy*, 1 Camp. 340.

**Restrictive Covenant.**—Upon delivery of the abstract by a vendor who had contracted to deduce a good title in fee simple, it appeared that one of his predecessors had covenanted in his purchase deed not to use the property (which was a semi-detached villa standing on an eighth of an acre in a residential neighbourhood), or any part of it, for the purpose of gasworks or a public-house :—Held, that this was such a restriction upon the user and enjoyment of the property as to constitute a fatal objection to the title. *Higgins and Hitehman's Contract, In re*, 21 Ch. D. 95 ; 51 L. J., Ch. 772 ; 30 W. R. 700 ; 46 J. P. 805.

**Sufficiency of Notice.**—M. was owner of two adjacent houses in Dublin, held respectively under renewed leases of December, 1879, and January, 1880, which provided that the lessee should be at liberty to carry on the business of a grocer and wine and spirit dealer, but not for consumption on the premises ; and that he should not exercise (among other trades) that of a publican or vintner, without the landlord's consent, under pain of an additional rent of 100*l.* per month. The original leases, dated in 1844 and 1852, and made to M.'s father, contained exactly similar provisions, notwithstanding which one of the houses had, since 1860, been continuously used as an ordinary public-house, without any objection on the part of the landlord, or demand of the penal rent. M. having put the entire premises up for sale in March, 1880, the plaintiff, an intending purchaser, accompanied by K. (who was a local commission agent for the sale of public-houses, and aware of the restrictive clauses in the leases), went to M.'s solicitor, and saw the particulars and conditions of sale, the sixth of which latter was as follows :—"Each of the said leases contains expressly permission to the lessee, his executors, administrators and assigns, to exercise and carry on the business of a grocer and wine and spirit dealer upon the premises ; and the purchaser shall not object by reason of any covenants, conditions or penal rents, expressed or reserved, in restriction of the carrying on of certain other trades or businesses ; nor by reason of any restriction as to consumption on the premises, but shall be satisfied with the notorious fact that the late (defendant's father) continued without hindrance to carry on his trade and business as it was carried on up to the time of his death, on the 21st day of May, 1879, and the present proprietor has done so since ; and such fact can be verified, if required, by statutable declaration." The plaintiff, who was himself also a publican, having hurriedly read this document, thereupon signed an agreement to purchase for 3,800*l.*, and paid a deposit of 500*l.*, without any independent professional advice.

The abstract of title having been shortly afterwards furnished, the plaintiff objected to the prohibiting clauses in the leases, alleging that he had not been previously aware of them ; that K. had not informed him of them ; and that he (the plaintiff) had been misled by the terms of the sixth condition of sale ; and on his refusing to complete, M. resold the premises for 3,000*l.* The plaintiff having then brought an action against M., to set aside his agreement and recover his deposit, and M. having filed a counterclaim in respect of his loss of 300*l.* on the resale :—Held, by the vice-chancellor, that K. was not agent for the vendor, but acted in the transaction rather as agent for the purchaser ; that the sixth clause of the conditions of sale was not a suppression of the existence of the restrictive covenant, but was rather suggestive of inquiry as to the restriction to which it pointed ; that upon the evidence there were no grounds for holding that the plaintiff had been surprised or hurried into the contract, and that, therefore, the plaintiff's action failed ; that the deposit was forfeited ; and that the defendant M. was entitled to an inquiry as to damages for the plaintiff's failure to carry out his contract :—But held, on appeal (reversing the decision of Chatterton, V.-C., dissentient Deasy, L. J.), that the sixth condition was misleading and (on the facts) designedly so, and had misled the plaintiff ; that K. was not the plaintiff's agent in the transaction, and that, therefore, his knowledge could not be imputed to the plaintiff, and, accordingly, that the claim should be allowed and the counterclaim dismissed. *Stanley v. McGauran*, 11 L. R., Ir. 314—C. A.

In the conditions of sale of a lease of a public-house, it was described as "a free public-house," the lease containing a covenant that the lessee and his assigns should take their beer from a particular brewer ; this lease was all read over by the auctioneer at the time of the sale, who said mistakenly that it was a free public-house, and the covenant about the beer had been decided to be bad :—Held, that a purchaser who heard the lease read over was not bound under these circumstances to complete the purchase, but was entitled to recover back the deposit. *Jones v. Edney*, 3 Camp. 285.

The particulars of sale of leasehold premises stated that, under the original lease, "no offensive trade was to be carried on, and that the premises could not be let to a coffee-house keeper or working hatter." The original lease, when produced, appeared to prohibit the businesses of brewer, baker, sugar-baker, vintner, victualler, butcher, tripe seller, poultryer, fishmonger, cheese seller, fruiterer, herb seller, coffee-house keeper, working hatter, and many others, and the sale of potatoes, or any provisions :—Held, that there was such a discrepancy between the particulars and the lease, as to entitle a purchaser to rescind his contract. *Flight v. Booth*, 1 Scott, 190 ; 1 Bing. N. C. 370.

Where an original lessee of land, subject to a covenant against certain obnoxious trades, with a proviso for re-entry for a breach of such covenant, granted underleases of houses erected on the land, not containing a similar covenant and proviso :—Held, that a purchaser by auction of houses erected on part of this land, and of the improved ground rents of the houses so underlet, might recover back his deposit money from the auctioneer, the omission of the proviso in the

underleases not having been specified in the conditions or mentioned at the time of the sale. *Waring v. Hoggart*, R. & M. 39.

**Amount of Rent.**—The particulars of sale described a farm, forming about a third of the estate sold, as late in the occupation of A. at the rent of 290*l.* A. had occupied the farm, which contained a good deal of grass land, as yearly tenant at 290*l.*, but went in at Midsummer, paying only 1*l.* for the first quarter, and quitted at Michaelmas in the next year, thus paying 291*l.* for a year and a quarter. Since this the plaintiff had agreed to let the farm at 225*l.*; but the agreement had been rescinded before taking possession, and the farm would not let for nearly so much as 290*l.*:—Held, that there was such substantial misrepresentation as entitled the purchaser to be discharged. *Dimmock v. Hallett*, 2 L. R., Ch. 21; 36 L. J., Ch. 146; 12 Jur., N. S. 953; 15 L. T. 374; 15 W. R. 93.

**Profits of Manor.**—Trustees for sale of a manor described it in advertisements and particulars and conditions of sale as a manor in which the fines were arbitrary; adding that the clear profits, on an average of the last eight years, had been 150*l.* a year; and it was one of the conditions, that if there should be any error or misstatement in the particulars, the vendors or purchaser, as the case might happen, should pay or allow a proportionate value, according to the average of the whole purchase-money, as a compensation either way. After the sale, it was found that, by the custom of the manor, arbitrary fines were payable only on alienation, and that, on the death of a tenant, his customary heir paid upon admittance a small fixed sum, and the widow was admitted to her freebench without any payment. The clear profits exceeded 200*l.* a year:—Held, that there was no such misdescription of the property as would entitle the purchaser to compensation, inasmuch as the annual profits, which constituted the substantial value, far exceeded the amount stated. *White v. Cuddon or Cutton*, 8 C. & F. 766; 6 Jur. 471.

**Covenants by Lessees—Of Leaseholds.**—A leasehold public-house was sold subject to a condition that the production of the last receipt for rent paid should be taken as conclusive evidence of the due performance of the lessee's covenants or the waiver of any breaches up to the time of completion, whether the lessor should be cognizant of such breaches or not. The lease contained a covenant to use the premises for the business of a public-house only, and not to permit any other trade to be carried on on any part of the premises without the lessor's written consent. The particulars on which the contract of purchase was indorsed, shewed that parts of the premises were underlet to persons who carried on other trades there. From the answers to objections to title, it appeared that the lessors had received rent with knowledge of the underlettings, and the last receipt for rent was produced. Specific performance of the contract having been decreed, and a reference as to title directed by an order which was not appealed from:—Held, that whether the breach of covenant was or was not a continuing breach such as to render the purchaser liable to be ejected after the completion of the purchase, and whether this would or would not have furnished a valid reason for not

decreeing specific performance, the vendor had made a good title in accordance with the contract which the purchaser was bound to accept, the decree for specific performance having been made and not appealed from. *Lawrie v. Lees*, 7 App. Cas. 19; 51 L. J., Ch. 209; 46 L. T. 210; 30 W. R. 185—H. L. (E.).

**State of Repair.**—Upon an open contract for the sale of a lease of a house, the vendor, in answer to a requisition by the purchaser as to the performance of repairing covenants in the lease, produced a receipt for rent down to a year previously, but could not produce the last receipt, the lessor having refused to receive his rent on the ground of alleged breaches of covenant. The lessor had commenced an action of ejectment on the same ground against the vendor, but the action had been stayed on account of the plaintiff having failed to comply with an order for delivery of particulars of claim. The vendor deposed that to the best of his knowledge and belief the whole of the covenants in the lease had been duly performed, and proved the execution of various specific repairs, and the purchaser, though he had had an opportunity given him of inspecting the premises, offered no evidence to shew that anything was wanting to the complete performance of the covenants:—Held, that, notwithstanding the failure to produce the receipt for rent, there was such *prima facie* evidence of the performance of the covenants as to constitute a sufficient answer to the requisition in that behalf. *Ringer to Thompson*, 51 L. J., Ch. 42; 45 L. T. 580.

An auctioneer selling a lease, must state the notice given by the landlord of his intention to enter unless the premises are put in repair within three months, or the vendee may recover his deposit from the auctioneer, although he knew of the ruinous state of the buildings. *Sterens v. Adamson*, 2 Stark. 422.

Where leasehold premises are sold by auction, and the lease containing the usual covenant to repair is produced and read to the bidders, if any of the buildings demised and described in the lease have been pulled down before the sale, the purchaser is not bound to complete the purchase, and may recover back his deposit, although the building pulled down is not described in the particulars of sale. *Granger v. Worms*, 4 Camp. 83.

**Condition, Position, and Occupation.**—The particulars of sale described two houses as Nos. 3 and 4, and stated that the taxes of No. 3 were paid by the tenant. The houses ought to have been described as Nos. 2 and 3, but the names of the occupiers were correct, and it should have been stated that the taxes of No. 3 were farmed by the landlord. The houses Nos. 2 and 4 were of the same rate, but No. 4 was in the best state of repair:—Held, that these misdescriptions were not cured by a condition which provided that if any error or misstatement should be found in the particulars, it should not vitiate the sale, but an allowance should be made on account of it. *Leach v. Mullett*, 3 C. & P. 115.

**Supply of Water.**—A property situate in a town, and comprising a warehouse with a small steam-engine, was described in the particulars of sale under a decree as "well supplied with water." The property was well supplied with water, but only from the water-works of the borough, and

by payment of water-rates, there being no natural supply. The manufactories in the town were generally supplied with water from wells upon the properties themselves, though small steam-engines in warehouses frequently were not:—Held, that there was a misdescription, and that a purchaser who purchased on the faith of the description in the particulars, without knowing the real state of the case, could not be compelled to complete his purchase without compensation. *Leyland v. Illingworth*, 2 De G., F. & J. 248.

A. purchased at a sale by auction a house, which was described in the particulars as "Lot 1 in the sale plan." Upon one of the lots not purchased by A. was a well; upon another a reservoir; and, on the sale plan annexed to the particulars, a line, denoting a stone drain, was drawn from the well to the reservoir; and from the reservoir to the kitchen of the house another line was drawn, representing a leaden pipe. The vendor conveyed the other lots to the respective purchasers, without reserving to A. any right of water. On a bill filed by A. against the vendor for specific performance of the contract, with a compensation for the loss of water:—Held, that the vendor merely undertook to sell part of the property to A., as it stood at the time of the sale, with notice that the rest of it would no longer remain in his hands; and, therefore, that A. was not entitled to compensation. *Fewster v. Turner*, 6 Jur. 144.

**Right of Way.**—In August, 1878, the defendant Berridge offered for sale by public auction a lease of a public-house at Hampstead. By the conditions of sale it was provided that "the lease to be granted shall contain the covenants, clauses, and provisions, and be in the form or to the effect set forth in the draft lease which will be produced on the sale and may be seen at the office of the auctioneers for seven days previous to the day of sale," and that "the property is presumed to be correctly described; but, as the premises may be viewed and the draft lease inspected at the office of the auctioneers, the purchaser shall be deemed to have bought with full knowledge of the contents thereof; and no error, misdescription, or omission in the particulars shall annul the sale, and no compensation shall be required for any such error, misdescription, or omission." There was no reference either in the conditions of sale or in the draft lease to the existence of any right of way from the garden of the public-house to Hampstead Heath; but, at the time of the sale, the auctioneer *bonâ fide*, but without any authority from Berridge, and acting entirely upon an inference drawn by himself from the appearance of the premises, and believing that there was a right of way through the same and over the private road and so to Hampstead Heath, stated publicly that there was such a way, and spoke of it as enhancing the value of the premises:—Held, that the evidence of what passed at the time of the sale was admissible as against the vendor; but that no action could, after the completion of the purchase, be maintained against him to recover compensation for this innocent misrepresentation by the auctioneer. *Brett v. Clouser*, 5 C. P. D. 376.

By particulars of sale, lot 13 was described as building-ground and the adjoining lot 12 as a villa, subject to liberty for the purchaser of lot 1 to come on the premises to repair drains, &c., as reserved in lot 7. The reservation in lot 7 re-

ferred to a lease which gave the occupier of that and several adjoining lots composing a row of houses, a carriage-way in common in front of the lots, and a footway at the back, and also a footway over lot 13. The particulars contained plans which disclosed the carriage-way in front, and the footway at the back of the houses, but not the footway over lot 13. But they stated that the lease of lot 7 might be seen at the vendor's office, and would be produced at the sale. A party having purchased lots 12 and 13 by one contract, in ignorance of the footway over lot 13:—Held, that the misdescription was such as to entitle him to rescind the contract as to both. *Dykes v. Blake*, 4 Bing. N. C. 463; 6 Scott, 320; 1 Arn. 209.

**Leaseholds Renewable by Custom.**—Premises sold at auction were described in the particulars as being customary leaseholds, renewable every twenty-one years, at the customary rent of 10s., on payment of the customary fine. The fourth condition of sale, after fixing a time for the delivery of the abstract and objections to the title, stipulated, that if there were any objections which the vendor should be unable or unwilling to remove, he might vacate the sale on repayment of the deposit money, without interest or costs. The fifth condition stipulated that the production of the lease by the vendor should be accepted as sufficient evidence of the lessor's title. The sixth condition stipulated that errors of description, or any errors inserted in the particulars, should not vacate the sale, but should be subject of abatement or compensation. It turned out, on the investigation of the title, what was previously unknown to all the parties interested, that there was no custom to renew, but that the premises were held for an absolute term of twenty-one years:—Held, first, that the fact of the property being sold as leaseholds renewable by custom, when there was no such custom, was an error of description, not a defect of title. *Newby v. Paynter*, 22 L. J., Ch. 871; 17 Jur. 483.

Held, secondly, that whatever might have been the decree in the absence of the condition of sale, providing that errors of description should not vitiate the sale, but that the same should be concluded, with compensation, the purchaser was, under that condition, entitled to specific performance, with a deduction from the price. *Id.*

**Refusal of Necessary Parties to Concur.**—A vendor entitled to an underlease for a term of twenty-four years, less three days, put up the property for sale, as held under a lease for twenty-four years, relying on the promise of the persons entitled to the three days to concur. They afterwards refused to concur:—Held, that the vendor could not be considered to have made a misrepresentation, so as to disentitle him to the benefit of a condition that if the purchaser makes any requisition that the vendor is unable or unwilling to comply with, the vendor may annul the sale. *Duddell v. Simpson*, 2 L. R., Ch. 102; 36 L. J., Ch. 70; 15 L. T. 305; 15 W. R. 115.

**Liability to Compulsory Alienation.**—A vendee of land, on discovering that at the time of the contract of sale it was and continued liable to be taken, under a private act of parliament, for the use of a company, is entitled to rescind the contract and to recover back the deposit. *Ballard v. Way*, 1 M. & W. 529; 2 Galt, 61.

## b. Title.

**Condition that Purchaser shall admit a Defective Title.]**—A contract for sale of superfluous land of a railway company, which had been conveyed by the company to the vendor, contained a stipulation that the purchaser should assume and admit that everything (if anything was necessary) was done by the company to enable them to sell the land as surplus land, and should not call for or require production of any evidence to that effect; and a further stipulation that if the purchaser should fail to comply with the terms of the agreement the deposit should be forfeited to the vendor. The land was not situate in a town or used for building purposes. In the course of the investigation of the title the purchaser discovered that the prior owners had not waived their right of pre-emption; and as the vendor refused to remedy the defect, the purchaser brought an action claiming a return of the deposit and damages. The vendor then sold the land to one of the prior owners:—Held, that the purchaser was bound by the stipulations to admit the title of the company to sell to the vendor; and that as he had refused to abide by that stipulation he had broken the contract, and could not maintain the action, or claim a return of his deposit. *Best v. Hamand*, 12 Ch. D. 1; 48 L. J., Ch. 503; 40 L. T. 769; 27 W. R. 742—C. A.

Where a condition of sale was that the vendors, being trustees, should not be required to obtain the concurrence of anyone interested in the proceeds of the sale, semble, that the abstract, if a true abstract of such title as the vendors had, sufficiently indicating points calling upon the purchaser to make further requisitions, was an abstract of their title within the meaning of the condition, although the title was not such as the purchaser was bound to accept. *Want v. Stallibrass*, 9 L. R., Ex. 175; 42 L. J., Ex. 108; 29 L. T. 293; 21 W. R. 685.

Conditions of sale, after stating that the estate was by settlement limited to Mrs. C. for life, with remainder to trustees in trust to sell for the benefit of her children, proceeded as follows: "And there being three such children only, all of whom have attained the age of twenty-one, such children or their trustees shall, if required, join in the conveyance to the purchaser, but no objection to the title of the vendors shall be made on account of the sale taking place during the life of Mrs. C." Two of the children of Mrs. C. were married women, having children, who were minors, and they had settled their portion of the money to arise from the sale of the estate in trust for themselves for life, with remainder to their children:—Held, that neither the children of Mrs. C. nor the trustees had legal capacity to join in a conveyance, and therefore a purchaser was entitled to recover his deposit. *Moseley v. Hyde*, 17 Q. B. 183; 20 L. J., Q. B. 539; 15 Jur. 899.

A., an owner of copyhold property, mortgaged it, and covenanted to surrender it into the hands of the dean and chapter of W., the lords of the manor, to the use of the defendant, who was to be a trustee to sell it in the event of default being made in payment of the mortgage money. A. made no surrender, but died, after devising all his real property to trustees. Subsequently to his death, the lords of the manor, at the nomination of the defendant, granted the property to certain persons upon the trusts mentioned in the

deed of mortgage. A. surrendered other property to the lords of the manor by way of mortgage to C., in consideration of a loan, and by a deed of even date covenanted to repay the money borrowed, and also gave the mortgagee a power of sale in case of default in payment. The defendant sold the whole of the property under the following conditions of sale: That he should deduce a good title to the premises for the lives by which they were held under the dean and chapter, but that no earlier or other title should be deduced, nor any deed or document produced anterior to the last copy of court-roll, by which the premises were granted:—Held, that the defendant shewed no title in himself, as no surrender of the premises had been made to his use by A., and that the vendee was not precluded by the conditions from taking his objection to the title. *Sellick v. Trorer*, 11 M. & W. 722; 12 L. J., Ex. 401.

**Condition limiting Length of Title—Objection to prior Title disclosed by Vendor.]**—Freehold property was sold in 1877 subject to a condition that the title should commence with a deed dated the 30th of December, 1867, and that no earlier or other title should be required or inquired into by the purchaser:—Held, that this condition did not preclude the purchaser from insisting on an objection to the prior title, which was not discovered through any inquiry made by him, but was accidentally disclosed by the vendor. *Smith v. Robinson*, 13 Ch. D. 148; 49 L. J., Ch. 20; 41 L. T. 405; 28 W. R. 37.

But held, that, in an action by the vendor for the specific performance of the contract, the purchaser was only entitled to an inquiry whether the vendor could make a good holding title to the property. *Id.*

**Condition excluding known Defect.]**—At a sale of the fee simple of a farm under the order of the court there was a condition that a declaration by the tenant should be produced to the purchaser that the farm was taken by him from E. in October, 1835, and had since been held by him of her and those claiming under her in succession. The condition provided that the purchaser should be satisfied with the title so made, without the production of any document previous to the will of E. in 1860, who should be assumed to have been seised of the property in fee simple in possession, free from incumbrances, in October, 1835, and up to and at her death. The condition further stated that it was not accurately known, and could not be satisfactorily explained, how she acquired the property, and it was expressly stipulated that no other title than as above should be required or inquired into. The purchaser, after an abstract of title in accordance with the condition had been furnished to him, discovered that E. was a mortgagee in possession, and had no title against the mortgagor except under the Statute of Limitations by adverse possession commencing in 1844; and that her executor in 1861 had paid legacy duty on the mortgage debt, and not succession duty on the estate. These facts were well known to the vendor:—Held, that the condition of sale was a misleading condition, and that the purchaser was entitled to have a good holding title notwithstanding the condition, or else to rescind his contract. *Banister, In re, Broad v. Munton*,

12 Ch. D. 131; 48 L. J., Ch. 837; 40 L. T. 828; 27 W. R. 826—C. A.

**Conditions purporting to give Good Holding Title only.]**—Where the conditions on the face of them purport to give only a good holding title, the purchaser on being relieved from them is not entitled to have more than a good holding title. *Id.*

**Notice of Trust—Recitals in Deed.]**—In 1840 property was mortgaged to W. in fee, there being nothing in the mortgage-deed to shew that he was not the beneficial owner of the mortgage-money. He died in 1842, having by his will devised and bequeathed his real and personal estate to three trustees (of whom his wife was one), on trusts for the benefit of his wife and children, and having appointed the same three persons executors. He also devised and bequeathed his trust and mortgaged estates to the same three persons, subject to the trusts and equities affecting the same respectively. The widow alone proved the will, and alone acted as trustee. The other two trustees disclaimed the trusts. In 1854 the widow obtained a decree absolute foreclosing the mortgage. In 1865 she, by a deed indorsed on the mortgage-deed, conveyed the property, without receiving any pecuniary consideration for it, to K., C. and B., in fee, as joint tenants at law and in equity. The conveyance contained a recital that the testator held the mortgage-money on an account under which K., C. and B. were then solely entitled thereto, as was thereby acknowledged, whereby the widow, as trustee under the testator's will, was trustee only of the property for K., C. and B., and they had requested her to convey it to them. On a subsequent sale of the property by persons who had purchased it from K., C. and B., the purchasers required evidence of the truth of the recital in the deed of 1865 that K., C. and B. were entitled to the mortgage-money. And, assuming that the testator was a trustee of the mortgage-money, the purchasers required the vendors to shew that the property sold was comprised in the trust; that K., C. and B. were duly appointed to succeed the testator in the trust; and that they had an effectual power of sale and of giving a receipt for the purchase-money:—Held, that it would be contrary to the practice of the court to go behind a recital evidently framed for the purpose of keeping notice of trusts off the conveyance; that the requisitions need not be answered; and that a good title had been shewn by the vendors. *Harman and Uxbridge and Rickmanworth Railway Company, In re*, 24 Ch. D. 720; 52 L. J., Ch. 808; 49 L. T. 130; 31 W. R. 857.

**Conditions of Sale.]**—Where a mortgagee offered premises for sale by auction and the conditions stated that he sold as mortgagee, and that as he had only an equitable interest in one plot, the purchaser should accept such title as he was able to deduce and convey—a purchaser refused to complete, on the ground that the legal estate in the second plot was outstanding, and might be used adversely to him; and having brought an action to recover his deposit:—Held, that there was no failure of consideration, as by the express terms of the conditions the vendor contracted with reference to the one plot to sell an equitable interest only. *Ashworth v. Mounsey*, 9 Ex. 175; 23 L. J., Ex. 73.

**Title commencing with Deed—Competency of Party to it.]**—Though a condition of sale that the title shall commence with a certain indenture leaves it open to the purchaser to shew aliunde that the parties purporting to convey were not competent to do so, yet if this is not shewn, their competency to convey must be assumed, and this where the conveyance was by a corporation only having power to convey under certain circumstances not shewn to exist. *Osborn v. Osborn*, 18 W. R. 421.

**Prior Defect.]**—A sale was made by the Court of Chancery under conditions which precluded the purchaser from objecting to the title prior to the document chosen as the root of the title, and made recitals in deeds more than twenty years old conclusive. A recital covered by this condition was so framed as to conceal a defect of title prior to the date fixed for the commencement of the title. The purchaser inquired into the prior title, and refused to complete on the ground that the prior title was bad; and the court being of opinion that such objection was well-founded:—Held, that, the sale being by the court the purchaser was not precluded by the conditions from raising the objection, and ought to be discharged from his purchase. *Elise v. Elise*, 13 L. R., Eq. 196; 41 L. J., Ch. 213; 25 L. T. 527; 20 W. R. 286.

Leasehold premises were put up for sale by auction on the following conditions:—"The abstract of title shall commence with an indenture of underlease dated the 1st of May, 1869, being a lease from W. S. to W. B. S. for a term of fourteen years less two days, from Lady-day, 1869, and it shall form no objection to the title that such indenture is an underlease; and no requisition or inquiry shall be made respecting the title of the lessor or his superior landlord, or his right to grant such underlease." A person having agreed to purchase the premises, discovered that W. S. had, previously to the 1st of May, 1869, mortgaged the premises. The purchaser objected that the legal estate being outstanding, W. S. had no power to grant the lease of the 1st of May:—Held, that he was not precluded by the condition from taking the objection; and that he was not bound to complete the purchase. *Waddell v. Wolfe*, 9 L. R., Q. B. 515; 43 L. J., Q. B. 138; 23 W. R. 44.

Where there is a condition of sale that no title to the property sold shall be shewn before a certain date, semble, that s. 24 of 22 & 23 Vict. c. 35, does not apply to the concealment of an incumbrance prior to that date. *Smith v. Robinson*, 13 Ch. D. 148; 49 L. J., Ch. 20; 41 L. T. 405; 28 W. R. 37.

**Limited Title—Voluntary Deed.]**—A contract entered into in 1882 for the sale of freehold estate provided that the title should commence "with an indenture dated the 18th of October, 1845," and made between persons whose names were mentioned, and that the earlier title should not be investigated or objected to. From the abstract of title delivered by the vendors to the purchaser it appeared that the deed of 1845 was a conveyance, by a person who purported to be the absolute owner, of freehold and leasehold property to trustees, on trust for himself for life, and after his death on trust to sell the property, and to hold the proceeds of sale on the trusts declared by a deed of even date. An ex-

press power was reserved to the grantor to revoke the trusts. The deed was a voluntary one, except for the consideration which resulted from the liability assumed by the trustees in respect to the leaseholds:—Held, by Fry, J., and by the Court of Appeal, that, inasmuch as the fact that the deed of 1845 was a voluntary one would influence the purchaser in determining whether he would agree to accept a title commencing within forty years, the vendors ought to have stated in the condition of sale the nature of the deed; that the omission to state this rendered the condition a misleading one; and that the purchaser was not bound by the contract to accept a title commencing with that deed. *Marsh and Granville (Earl), In re*, 24 Ch. D. 11; 53 L. J. Ch. 81; 48 L. T. 947; 31 W. R. 845—C. A. Affirming 52 L. J., Ch. 189; 47 L. T. 471; 31 W. R. 239.

#### Condition as to Forged Deed—Verdict of Jury.]

—The conditions of sale represented that a deed under which C. claimed an interest in the estate was a forgery, and that the vendor had made his affidavit to that effect, and, therefore, that the purchaser should not take any objection to the title by reason of that deed. The purchaser afterwards refused to complete the purchase, brought an action for his deposit, and obtained a verdict, the jury declaring the deed to be genuine. In this state of circumstances it was held by a court of law that the purchaser was precluded from rescinding the contract on the ground that the statement of the vendor turned out to be untrue; and, by a court of equity, that the vendor, in case he could make a good title in other respects, was entitled to a decree for the specific performance of the contract, with costs. *Cuttell v. Corral*, 3 W. & C. 413; *S. C., Corral v. Cuttell*, 4 M. & W. 734.

**Condition as to Title held not to preclude Inquiries.]**—Upon the sale of a property, one of the terms of the contract was that the purchaser should assume that A. was at the time of his death seised in fee simple of a certain lot, and should not require the production of or investigate or make any objection in respect of the prior title to the lot. Before completion of the contract, the purchaser discovered from documents supplied by the vendor, not to him, but to a sub-purchaser from him, that the lot was in fact the purchaser's own property, and he thereupon declined to complete, although he had accepted the vendor's title. In a suit for specific performance by the vendor:—Held, that the purchaser was not precluded by the condition from raising the objection, and an inquiry was directed as to the title to the lot at the date of the contract. *Jones v. Clifford*, 3 Ch. D. 779; 45 L. J., Ch. 809; 35 L. T. 937; 24 W. R. 979.

By the conditions of sale of leasehold premises, the vendors stipulated that they should deliver an abstract of the lease and of the subsequent title under which the leasehold lots were held, but should not produce the lessor's title. The defendant became the purchaser, and on investigating the title for himself, it appeared to be defective, and he refused to complete the purchase:—Held, that the purchaser was not precluded from inquiring aliunde into the lessor's title, by the stipulation that the vendors should not be obliged to produce it. *Shepherd v. Keatley*, 4 Tyr. 571; 1 C., M. & R. 117.

**Sale by First Mortgagees—Results of Inquiry.]**—On a sale by auction of lands, one of the conditions of sale was, "that the sale was made by the first mortgagees under a power of sale contained in a mortgage deed made to them, and that no purchaser should be entitled to require any abstract or evidence of the incumbrances subsequent to that deed; although notice of such incumbrances might appear in the title to be shewn." The stipulations of the power of sale contained in the deed were, that if the sum lent should not be paid by a day certain, and if the mortgagees should give notice in writing to the mortgagor to pay it, and if he should neglect to do so for three months afterwards, the mortgagees might sell, by such contracts and upon such terms and conditions as they should think fit; and that all such contracts and conditions made by the mortgagees might be made without the concurrence of the mortgagor, and that they should be binding on the mortgagor though made without his assent; and that the receipts of the mortgagees for the moneys to arise by the sale should effectually discharge the purchaser from being obliged to inquire into the necessity or propriety of the sale, or to be satisfied whether the terms upon which the sale was to be made were complied with. A sale was made without any notice having been given by the mortgagees to the mortgagor, but he had waived the notice; and before the waiver, he had mortgaged the land to several subsequent mortgagees, who, however, had executed a deed purporting to ratify the sale to the purchaser:—Held, that the contract on the part of the vendors with the purchaser was, that the title to be given to him was a clear and simple title, depending only upon the result of an inquiry into the compliance by them with the stipulations of the mortgage deed; and that, inasmuch as the title offered by them did not depend merely upon the result of that inquiry, but upon the result of an inquiry into the validity of the waiver by the mortgagor, under the circumstances of the notice to be given to him, and of the circumstances and validity of the proposed ratification by the subsequent mortgagees, the result of which inquiries was doubtful in law, the purchaser was entitled to rescind his contract with the mortgagees, and to recover from the vendors the deposit which he had paid to them. *Foster v. Hoggart*, 15 Q. B. 155; 19 L. J., Q. B. 340; 14 Jur. 757.

**Sale by Trustees.]**—Conditions of sale stipulated that the vendors would deliver an abstract of title, commencing with a conveyance in 1800 from D., who died in 1800, having devised the property to his wife during life or widowhood, and that he appeared to have made no devise of the reversion, and the property had been since dealt with on that supposition; that the vendors would enter into a qualified covenant to produce the deeds retained by them; but as the vendors purchased the property with money in which they had no beneficial interest, no other covenant, except as last aforesaid, should be required than the usual covenant that they had not incumbered, and no objection should be taken on the ground of want of covenants, or to the right of the vendors to hold, sell or convey the property now sold. The abstract traced the title from D. through his heirs in gavelkind. D. had made a will, by which he devised the property in question to his wife for life or widowhood, and

with the rest, residue and remainder of the produce of the sale of certain other property directed to be sold, after payment of legacies, he directed the same to be placed at interest, and he gave the whole of such interest to his wife for life or widowhood; and after her decease or second marriage, to his three sons and his daughter Ann, equally to be divided between them, share and share alike; but if the share of his daughter should not be legally claimed within three years after his wife's decease, then to his three sons equally, or the survivors. Upon objection taken to the title deduced, that the daughter took a part with her brothers:—Held, that the vendee was debarred from the objection by the condition as to the right of the vendors to hold and sell, and that the title was rightly deduced through the sons only, for inasmuch as the daughter had not claimed within three years, no question as to her right could afterwards be raised; but if it could, seemble, that the testator died intestate as to the reversion after his wife's death in the property left to her for life or widowhood. *Lethbridge v. Kirkman*, 25 L. J., Q. B. 89; 2 Jur., N. S. 372.

**Condition as to Payment.**—In an action by a vendor against a purchaser of an estate, for non-payment of the residue of the purchase-money, the declaration stated, that in consideration of 90*l.* paid to the plaintiff by the defendant, and of the further sum of 820*l.* to be paid to the plaintiff on the 1st November, the plaintiff agreed to sell, and the defendant agreed to buy, a messuage, and to pay the plaintiff the residue of the purchase-money on the 1st November; and that thereupon a conveyance of the premises, and the freehold and inheritance thereof, should be made to the defendant by all proper parties, at the expense of the plaintiff, provided that the plaintiff should not be liable to pay the expenses of any attorney whom the plaintiff should employ to investigate the title; and the plaintiff agreed to deduce a good marketable title to the premises, but the defendant was to be satisfied with the usual conveyance of the freehold of the premises from the lords of the manor; that it was agreed between the plaintiff and the defendant, that if the completion of the purchase should, from any cause on the part of the plaintiff, be delayed beyond the 1st November, the defendant should pay interest on the unpaid portion of the purchase-money, at the rate of 10 per cent., and if the delay should be caused by the defendant, at the rate of 5 per cent., from the 1st November until payment, the defendant being entitled to the rents and profits, and to the possession of the premises, on and from the 1st November:—Held, that according to the true construction of the agreement, the defendant was not bound to pay the residue of the purchase-money until a good title to the premises was made out by the plaintiff, and he was ready to convey to the defendant. *Manly v. Cremonini*, 6 Ex. 808; 2 L. M. & P. 550; 21 L. J., Ex. 288.

A., having sold leasehold premises to B., assigned them by indenture, containing a proviso that B. should not assign over until the whole of the purchase-money should have been paid, and B. and C. covenanted for the payment of the money; the premises, having been taken in execution for a debt of B., who had not paid the purchase-money, were sold by the sheriff to D.,

who paid down a deposit, and agreed to complete the purchase on having a good title:—Held, that the nonpayment of the purchase-money by B. was a sufficient objection to the title, and that D. might recover back his deposit. *Elliott v. Edwards*, 3 B. & P. 181.

**Condition as to Derogation—Prior acknowledgment of Encroachment.**—By a covenant in a conveyance in fee, from A. to B., of a house and premises, "together with all rights, liberties, privileges, easements and appurtenances to the premises belonging or in anywise appertaining or actually held or enjoyed therewith, or deemed or taken to be part, parcel, or member thereof," A. covenanted that, notwithstanding any act, deed, matter or thing whatsoever made, done or permitted by him or any person claiming through him, he hath now good title to convey the messuage and premises with the appurtenances. Nearly twenty years before, A., being owner in fee and occupier of the same house and premises in the same condition, entered into a written agreement with the owner of adjoining premises acknowledging that the cornice and spouts, and three windows of A.'s house, overlooking the adjoining premises, were encroachments; that he had paid five shillings as an acknowledgment, and would pay five shillings a year so long as he should be allowed to use the cornice, spouts, and windows. At the time of entering into that agreement, A. had acquired no easement in respect of the cornice, spouts and windows by twenty years' user, and the owner of the adjoining premises could have prevented him from acquiring any easement in respect thereof:—Held, that there was no breach of the covenant, for that A. had neither done nor permitted any act, deed, matter, or thing, to the contrary of his right to convey all that he was ever entitled to convey, and that he had not derogated from any estate which he had ever possessed by an agreement, the effect of which was simply to keep matters in statu quo. *Thackeray v. Wood*, 5 B. & S. 325; 33 L. J., Q. B. 275; 10 Jur., N. S. 877. Affirmed, 6 B. & S. 766; 34 L. J., Q. B. 226; 13 W. R. 996—Ex. Ch.

**Opportunity of Inspection—Document affecting Title.**—A condition of sale which refers to a document as affecting the title and offers an opportunity of inspecting it, is not misleading, unless it so states the document as to lead to the belief that all that is material in it is disclosed. *Blenkorn v. Penrose*, 43 L. T. 668; 29 W. R. 237.

**Title of Bankrupt.**—Assignees put up to sale the bankrupt's interest in an estate "as he lately held the same, an abstract of which may be seen at the office of T. & Co.":—Held, that the vendee could not insist upon any other title than such as the bankrupt had. *Freme v. Wright*, 4 Madd. 364.

**As to Title Deeds—Covenants for Production.**—By conditions of a sale of land, it was stipulated that the vendors should within ten days deliver an abstract of title, and should not be required to produce any deeds not in their possession, and that all deeds of covenant for production of any deed or document, whether referred to in an abstract or not, which the purchaser should require for verifying the abstract,

or for any other purpose; and other evidence, which, but for the condition, might be required to prove anything whatsoever; also all searches and inquiries for the purpose of ascertaining where such deed, or document, or evidence was to be found, and expenses incidental thereto, should "be respectively paid, made, searched for and obtained by and at the expense of the purchaser requiring the same."—Held, that the vendors were not bound to procure covenants for production from parties holding deeds referred to in the abstract, and not in the hands of the vendors. *Gabriel v. Smith*, 16 Q. B. 847; 20 L. J., Q. B. 386; 15 Jur. 1124.

**Waiver of Objection.—By Possession.**—If a contract for the sale of land is silent as to the title which is to be shewn by the vendor, the legal implication that the purchaser is entitled to a good title may be rebutted by evidence that, before the execution of the contract, the purchaser had notice of defects in the vendor's title. But, if the contract expressly provides that a good title shall be shewn, the purchaser is entitled to insist on a good title, notwithstanding that before the execution of the contract he had notice of defects in the vendor's title. If the contract contains no stipulation as to possession being taken by the purchaser before completion, and he takes possession with knowledge that there are defects in the title which the vendor cannot remove, the taking possession amounts to a waiver of the purchaser's right to require the removal of those defects, or to repudiate his contract. If, on the other hand, the defects are removable by the vendor, the taking of possession does not amount to such a waiver. *Gloag and Miller's Contract, In re*, 23 Ch. D. 320; 52 L. J., Ch. 654; 48 L. T. 629; 31 W. R. 601.

— **When Verbal.**—A purchaser, who in his written contract stipulates for a good title, cannot be required to complete the purchase upon a defective title on the ground of a verbal waiver of the stipulation for a good title. *Goss v. Nugent (Lord)*, 2 N. & M. 28; 5 B. & Ad. 58.

### c. Time.

**Delay in Delivery of Abstract.**—When a contract for sale is entered into by which it is stipulated that the abstract is to be delivered on a particular day, and it is not delivered within a reasonable time after that day, the purchaser is at liberty to repudiate the contract. *Tenn v. Cuttill*, 27 L. T. 469.

The conditions of sale under which a purchase was made, provided that the abstracts should be delivered within twenty-one days from the day of sale. When seventy-eight days had expired without any abstract having been delivered, the purchaser gave notice to the vendor that he declined to complete. After one hundred and eighteen days had elapsed, abstracts of the title to some of the lots were delivered to the purchaser, and the abstract of the remaining lot was delivered a fortnight later, but were returned by the purchaser on the same days on which they were delivered:—Held, that as the vendor had failed to deliver the abstracts within a reasonable time after the day named, he could not enforce the contract against the purchaser. *Id.*

An estate was put up to sale by auction on the 22nd July. By the conditions of sale, an abstract of title was to be furnished within seven days from the day of sale, on the application of the purchaser for the same; all objections were to be taken within eight days of such delivery, or to be considered as waived; the purchase to be completed on the 8th of August. The purchaser's solicitor called for the abstract on the 24th of July, two days after the sale. The estate was in mortgage; and the mortgagee being abroad, the abstract could not be made in time, but the same was delivered on the 3rd of August. The purchaser thereupon claimed to rescind the contract, and brought an action for the deposit:—Held, that time in the delivery of the abstract was not of the essence of the contract, the importance of stipulations as to time being differently regarded in courts of law and equity. *Roberts v. Berry*, 3 De G., M. & G. 284; 22 L. J., Ch. 398.

**Completion of Purchase.**—Upon the sale by auction of a contingent reversionary interest in railway stock, the conditions of sale were, that the purchaser should pay to the auctioneers a deposit as part of the purchase-money and sign agreements for payment of the remainder on or before August 17th, when the purchases were to be completed; should the completion of the purchases be delayed from any cause whatever beyond that period the purchasers were to pay interest on the balance of the purchase-money from that date until the completion of the purchase:—Held, that as by the conditions of sale a possible postponement of the purchase was contemplated, time was not of the essence of the contract. *Patrick v. Milner*, 2 C. P. D. 342; 46 L. J., C. P. 537; 36 L. T. 738; 25 W. R. 790.

If it is of the essence of the contract that an act should be completed by a fixed date, an extension of the time does not operate as an absolute waiver of that condition, but only substitutes the extended time for the original time. *Barclay v. Meekenger*, 43 L. J., Ch. 449; 30 L. T. 350; 22 W. R. 522.

M. & W., entitled to a lease under a building agreement, defeasible by notice in case they did not complete buildings by the 1st of January, 1874, in July, 1873, entered into an agreement to sell their interest for 2,000l., 200l. of which was paid on signing the agreement, 800l. and 1,000l. to be paid at the times specified in the 5th clause, which was as follows:—"If the purchaser shall fail to pay either the 800l. on the 14th of July, 1873, or the 1,000l. on the 31st of July, 1873, or as to the 1,000l. upon such deferred date as the parties might agree upon, all money paid previously to such default being made shall be absolutely forfeited and this contract become null and void." The 800l. was duly paid. The time for payment of the 1,000l. was extended to the 26th of August, 1873. The purchaser made default in payment at that date. The vendors gave notice to determine the agreement, and a suit for specific performance was instituted by the purchasers:—Held, that by the 5th clause time was made of the essence of the contract; that the extension of the time to the 26th of August did not operate as an absolute waiver of that condition, but merely substituted the 26th of August for the original date. *Id.*

If the vendor of an estate by auction does not

shew a clear title by the day specified, the purchaser may recover back his deposit and rescind the contract, without waiting to see whether the vendor may ultimately be able to establish a good title or not. *Wilde v. Fort*, 4 Taunt. 334.

And if the vendor contracts to make out a good title by a certain day, the vendee is not bound to apply to the vendor respecting it before that day. *Berry v. Young*, 2 Esp. 640, n.

— **Notice to Determine Contract.**—A purchaser cannot, owing merely to the delay of the vendor in complying with his requisitions, determine the contract without notice, or bring an action for his deposit before the termination of his notice, where time was not originally of the essence of the contract. Whether he can do so after the expiration of the notice, where time has not been made of the essence of the contract, or, being of the essence of the contract, has been waived, depends upon the conduct of the vendor after notice. *Wood v. Machu*, 5 Hare, 158; 16 L. J., Ch. 21.

**Notice to make Time of Essence of Contract.]**

—When, after a contract for the sale of land has been entered into, a notice is given to make time of the essence of the contract, the question whether the notice is reasonable or not must be judged of as at the date when it is given. The plaintiff held a lease from the defendant which gave him an option of purchasing the demised property at any time during the term, on giving the lessor three months' previous notice in writing. On the 24th of March, 1877, the plaintiff gave the defendant notice of his intention to exercise the option. There were some difficulties in completing the defendant's title to the property, and an abstract of title was not delivered to the plaintiff's solicitor till the 17th of June, 1878. The plaintiff's solicitor not having acknowledged the receipt of the abstract, and having neglected to answer several letters from the defendant's solicitors, they, on the 16th of September, wrote to the plaintiff himself, asking whether he intended to complete the purchase. The plaintiff replied the next day that he would write at once to his solicitor. On the 24th of September, 1878, no further communication having been received from the plaintiff or his solicitor, the defendant gave the plaintiff a notice in writing, requiring him to complete the purchase, and stating that, unless he completed it on or before the 31st of October, 1878, the defendant would treat the contract as rescinded, and that in that respect time should be deemed of the essence of the contract. On the 26th of September, 1878, the plaintiff acknowledged the receipt of the notice, and said that he had seen his solicitor, who had promised to proceed as soon as possible. On the 1st of November, 1878, no further communications having been received from the plaintiff or his solicitor, the defendant's solicitors wrote to the plaintiff, that the defendant, in pursuance of his notice, declared the contract at an end, and they requested the return of the abstract, and demanded payment of rent for the property. The plaintiff had been in possession of the property ever since his notice to purchase, but had refused to pay any rent after the 24th of June, 1877. On the 21st of November, 1878, the plaintiff commenced his action for the specific performance of the contract to purchase:—Held, that

the notice of the 24th of September fixed an unreasonably short time for the completion of the purchase, and was therefore invalid. Specific performance was decreed, and the defendant was ordered to pay the costs of the action up to and including the trial. *Crauford v. Toogood*, 13 Ch. D. 153; 49 L. J., Ch. 108; 41 L. T. 549; 28 W. R. 248.

When time is not originally made of the essence of a contract for the sale of land, one of the parties is not entitled afterwards by notice to make it of the essence, unless there has been some default or unreasonable delay by the other party. After a delay of two years on the part of a vendor, he gave notice to the purchaser to complete his contract within three weeks, and that, if he did not do so, the vendor would treat the contract as at an end:—Held, that the time limited for completion was, under the circumstances, unreasonably short, and the notice therefore of no effect. *Green v. Serin*, 13 Ch. D. 589; 49 L. J., Ch. 166; 41 L. T. 724; 44 J. P. 282.

— **Waiver of Notice.**—Where upon a sale of an interest in a house on the terms of the fixtures being taken at a valuation, and the deposit forfeited if the purchase, through default of the purchaser, is not completed on a certain day, the vendor's agent is informed on that day that the purchase will not be completed until the following day, and no objection is made—the vendor cannot, on an action being brought by the purchaser for the deposit, insist that there was a forfeiture on the second day. *Carpenter v. Blandford*, 3 M. & R. 93; 8 B. & C. 575.

**Delay in Taking Objections.]**—A. agreed to sell and B. to purchase a piece of land, and to pay part of the purchase-money down, and the remainder on a future day, and that B. should have immediate possession, and that A. should furnish B. with a full and sufficient abstract of title to the land, and upon payment of the balance of the purchase-money, a conveyance of the fee simple should be made; that all objections to and requisitions in support of the title, not delivered in writing in a month after the delivery of the abstract, should be deemed to be waived. B. paid the deposit and took possession of the land. The vendor in due time delivered an abstract containing a statement of all the deeds in his custody, power or knowledge, but tracing the title for a period less than sixty years, and shewing it to be in a trustee. No objection was made within the month. Afterwards, the trustee died intestate, and it not appearing in whom the legal estate vested, B. gave notice that he rescinded the contract, and brought an action to recover the deposit, and declared specially on the agreement, and assigned as a breach the non-delivery of a full and sufficient abstract of the vendor's title to the land, which was traversed by a plea:—Held, that no objection having been made within the month, the issue was satisfied by the abstract delivered, it having been a full and fair statement of all the muniments which the vendor had in his possession, power or knowledge, and a fair statement of the deduction of his title, though it did not go back sixty years. *Blackburn v. Smith*, 2 Ex. 783; 18 L. J., Ex. 187.

Held, also, that B. could not rescind the contract and recover the deposit, inasmuch as,

having taken possession of the land, the parties could not be placed in statu quo. *Id.* See also *Rosenberg v. Cook*, 8 Q. B. D. 162; 51 L. J., Q. B. 170; 30 W. R. 344—C. A.

Land was put up for sale by auction, subject to conditions that "the vendors should within seven days of the sale deliver to the purchaser an abstract of their title, all objections and requisitions not delivered to the vendors within fourteen days after the delivery of the abstract to be considered as waived, and in this respect time to be of the essence of the contract;" that "the vendors being trustees should not be required to obtain the concurrence of any one interested in the proceeds of the sale;" and that "if the purchaser should fail to comply with the conditions his deposit should be forfeited." An abstract was delivered to the purchaser within seven days, shewing that the property had been devised to trustees (of whom the vendor was the survivor) upon trust to pay the income to S. for life, and after his death to sell and divide the proceeds among his children; and that S. was still alive. The abstract did not state whether he had children living, though there were in fact eight all of age:—Held, that the vendor having thus no title to sell the property, the purchaser was entitled to recover back his deposit, although he had made no requisition within the fourteen days—the court being of opinion that the conditions as to waiver and forfeiture referred only to the waiver of requisitions for further information or security in the case of a defective title capable of being made good on the defects being supplied, but not to the case of a title wholly bad. *Went v. Stallibrass*, 8 L. R., Ex. 175; 42 L. J., Ex. 108; 29 L. T. 293; 21 W. R. 685.

If a vendor does not deliver the abstract of title within the time specified in the conditions, he cannot hold the purchaser bound to send in his objections within the time limited for that purpose, even though it was stipulated in the condition for sending in the objections that time in that respect should be of the essence of the contract. In such a case, the time within which objections will be considered as waived will depend upon the general principles of the court and the conduct of the parties. *Upperton v. Nicholson*, 6 L. R., Ch. 436; 40 L. J., Ch. 401; 25 L. T. 4; 19 W. R. 733.

Land was described in a contract for sale as freehold, but it was shewn by the abstract that it was formerly copyhold, and had been enfranchised. A decree was afterwards made at the suit of the vendor for specific performance, and a general inquiry directed as to title; in the course of which the purchaser for the first time objected that the minerals were reserved to the lord of the manor under the enfranchisement:—Held, that the objection was fatal to the title; but as the purchaser had taken the objection so late, he was not allowed his costs. *Id.*

Where executors with a charge of debts on the testator's real estate sold it under conditions of sale, by one of which it was stipulated that the "purchaser shall send his objections and requisitions (if any) in respect of the title, and all matters appearing on the abstract . . . within ten days from the delivery of the abstract, and in this respect time shall be of the essence of the contract, and in default of such requisitions and objections (if none), and subject only to such (if any), the purchaser shall be deemed to have accepted the title:"—Held, that, although the ten

days had expired, the purchaser was entitled to raise the objection, by summons under the Vendor and Purchaser Act, 1870, that the vendors had no power to sell, on the ground that the will did not create a charge. *Tangueray-Willame and Landau, In re*, 20 Ch. D. 465; 51 L. J., Ch. 434; 46 L. T. 542; 30 W. R. 801—C. A.

Circumstances of delay held not to amount to a waiver of requisitions of title. *Cooch v. Warden*, 46 L. J., Ch. 639.

—**Construction of Objections.**—Where all objections not taken by a certain day were to be considered as waived, and, before the day named, the purchaser's solicitor wrote to the vendor's solicitor objecting to the title on one ground, but inclosing an opinion upon the title in which a further objection was disclosed:—Held, that the letter and the opinion must be read together and sufficiently stated the latter ground of objection. *Meneley v. Hyde*, 17 Q. B. 183; 20 L. J., Q. B. 539; 15 Jur. 809.

**Rescission of Contract—Reasonable Time—Question for Jury.**—By a memorandum of the 19th of August, 1862, the defendants contracted to sell freehold premises to the plaintiffs for 2,850*l.*, 285*l.* to be paid at once to the vendor's solicitor as a deposit, and the residue on the 29th of October: and it was agreed that the vendors should deliver an abstract, and that the purchasers should, within twenty-one days after the delivery of the abstract, deliver in writing to the vendors' solicitor their objections, if any, to, or requisitions on, the title. In case any objection or requisition should be so delivered, and the vendors should be unable or unwilling to comply therewith or remove the same, they were to be at liberty, by notice, to rescind their contract and return the deposit money without interest or other compensation, notwithstanding any attempt made to remove or comply with such objection or requisition. An abstract was delivered to the purchasers' solicitor on the 6th of September. On the 22nd of September objections and requisitions were delivered to the vendors' solicitor. On the 4th of November (which was six days after the time mentioned in the contract for completion), the vendors' solicitor forwarded to the purchasers' solicitor replies to the requisitions on title. Nothing further was done until the 29th of November, when the plaintiffs issued a writ against the vendors' solicitor to recover back the 285*l.* deposited with him. The deposit was thereupon returned: and on the 11th of December the vendors gave notice to rescind the contract. In an action by the purchasers on the 16th of December, to recover interest on the deposit, and their costs of investigating the title:—Held, that the vendors were not bound to exercise their option to rescind immediately on receiving the objections and requisitions, or before the day named for the completion of the contract; but that, time not being of the essence of the contract, they might do so within a reasonable time, and that, under the circumstances (which the court was to deal with as a jury ought), their notice was given within a reasonable time. *S. Leonard's, Sherditch (Vestry) v. Hughes*, 17 C. B., N. S. 137; 33 L. J., C. P. 349; 10 L. T. 723; 12 W. R. 1106; *S. P., Ker v. Creece*, 7 Ir. R., C. L. 181.

**— Waiver of Condition to Rescind—Expenses.**—On July 30, 1861, an auctioneer put up land for sale by auction, subject to the following conditions:—4. That within twenty-one days from the day of sale the vendors shall have ready for delivery to the purchasers an abstract of the title. 7. If any purchaser make any 'objections or requisitions in respect of the title within thirty-five days from the day of sale, the vendors shall be at liberty, at their election, either to answer such objections and comply with such requisitions, or to rescind the contract for sale on repaying the deposit alone and without interest for the same, and without incurring any liability to pay any expenses for investigating the title. 8. That such right of the vendors to hold the purchaser to have waived all objections and requisitions not made within the time specified, and such right of the vendors to rescind the contract, shall not be deemed to be waived, or in any manner affected or prejudiced, by any negotiation as to any objections or requisitions, or attempt to obviate or comply with the same. A. became the purchaser, and paid a deposit of 100*l*. The abstract of title was not delivered until the 2nd of November. On the 8th of November the vendee's solicitor wrote to the vendors' solicitor stating that the vendors, who were trustees, had no power to sell, and that it was not worth while going on further. On the 28th of November the vendee's solicitor again wrote desiring to know whether the vendors would rescind the contract and return the deposit, or insist on specific performance. On the 30th of November, the vendors' solicitor replied that he was satisfied they had power to sell, and that his clients would expect the vendee to complete the purchase. The vendee thereupon incurred expense in investigating the title, and it turned out that the vendors had no power to sell. Some further correspondence took place, and ultimately the vendors' solicitor stated his willingness to pay back the deposit without interest and costs:—Held, that there was no negotiation or attempt to obviate objections or comply with requisitions within the meaning of the eighth condition, and the vendors having elected to insist on a specific performance could not rescind under the seventh condition, and were liable to pay the vendee interest on his deposit, and the expenses of investigating the title. *Gordon v. Lee*, 3 H. & C. 651; 34 L. J., Ex. 113; 11 Jur., N. S. 393; 12 L. T. 430; 13 W. R. 719.

**Pleadings.**—By the conditions of a sale which took place September 18th, the purchaser was immediately to pay a deposit in part of the purchase-money, and to sign an agreement for payment of the remainder by the 28th November; the vendor was to deliver an abstract within fourteen days from the sale, and to deduce a good title; objections to the title were to be taken within twenty-one days after the delivery of the abstract; and the purchaser was to prepare the deeds of conveyance by the 10th of November:—Held, that no precise time was fixed within which the vendor was to deduce a good title, and that therefore a declaration against him for failing to do so ought to aver that he had been allowed a reasonable time. *Sancom v. Rhodes*, 6 Bing. N. C. 261; 8 Scott, 544.

Where a vendor covenants to deduce a good title at A., B. or C., on or before a certain day,

a plea that he was ready to deduce a good title at that time, without averring notice to the covenantee at which place he would be ready to deduce such title, is insufficient. *Rippingall v. Lloyd*, 2 N. & M. 410; 5 B. & Ad. 742.

So a plea, that, by a subsequent agreement, not under seal, made before breach, the time for deducing such title had been enlarged, and that the defendant was ready to deduce such title within the enlarged time. *Ib*.

So a plea, that, in consideration that the defendant would deduce a good title and convey (after breach), the plaintiff agreed to accept such title and conveyance at a later day. *Ib*.

#### d. Other Matters.

**As to Want of Jurisdiction—Sale by Order of Court.**—A reversionary legacy, in which infants were interested, was sold by an order of the court in an administration suit. The particulars of sale stated that infants were interested in the property, and there was a special condition that the purchaser should make no objection on the ground of want of jurisdiction:—Held, that the condition of sale was fair and reasonable, and that the purchaser was bound by it. *Nunn v. Hancock*, 6 L. R., Ch. 850; 40 L. J., Ch. 700; 25 L. T. 469; 19 W. R. 1041. Affirming 24 L. T. 569; 19 W. R. 843.

Semble, that the court had jurisdiction to make the order for sale, and that the infants and all other parties were bound by it. *Ib*.

**Power to Rescind—In what Cases Applicable.**—In a contract for sale of lands containing valuable quarries, there was a clause reserving to the vendors power to rescind if any objection should be persisted in, and another providing that compensation should be given for any error in the description of the property or of the vendor's interest therein. The purchaser alleging that the right to the quarries was in a third party, under an exception of mines and minerals, in one of the title deeds, asked for compensation, which the vendors, insisting that they could make a title to the quarries under a custom or by adverse user, refused to make, and upon the purchaser persisting in his demand they exercised their power of rescinding:—Held, that the question between the parties was one of title, and that the rescission was therefore justifiable. *Mawson v. Fletcher*, 10 L. R., Eq. 212; 39 L. J., Ch. 583; 23 L. T. 277; 18 W. R. 798. Affirmed, 6 L. R., Ch. 91; 40 L. J., Ch. 131; 23 L. T. 545; 19 W. R. 141.

Real property was sold on the condition that the vendors should deliver an abstract of the title, and the purchaser should make his objections and requisitions in respect of the title within twenty-one days from the delivery of the abstract; and all objections and requisitions which should not be made within the time specified should be taken to be waived; and in case any purchaser should make any objection to or requisition on the title which the vendors should be unwilling or unable to answer or comply with, the vendors reserved to themselves the option at any time to rescind the contract. The vendors having delivered an abstract, the purchaser within the twenty-one days made a frivolous objection to the title as disclosed in the abstract, and as he insisted on it the vendors filed a bill for specific performance. The purchaser

having meanwhile discovered the existence of certain deeds which materially affected the title, and which were omitted from the abstract, raised an objection on this ground for the first time in his answer to the bill. This omission was made intentionally, but *bonâ fide* and under the advice of counsel, as it was supposed that the deeds did not affect the title. The vendors, however, had, under a previous contract to sell this property, disclosed these deeds on the abstract then delivered, and had abandoned such contract when an objection founded on these deeds was raised to the title. Several months after filing the answer, the vendors gave the purchaser notice that they rescinded the contract, and the bill was eventually dismissed on the purchaser's motion without costs. The purchaser having brought an action against the vendors for breach of contract in not deducing a good title:—Held, that the objection founded on the omission of the deeds was an "objection to the title" within the meaning of the condition, and entitled the vendors to rescind, and that the action was not maintainable. *Gray v. Fowler*, 8 L. R., Ex. 249; 42 L. J., Ex. 161; 29 L. T. 297; 21 W. R. 916—Ex. Ch.

Part of property sold was in the occupation of a tenant under a lease, by which the vendor agreed to repair. The repairs not being done, the tenant instituted a suit against both vendor and purchaser. The purchaser sent in an objection and requisition in respect of the repairs not being done:—Held, that such an objection was not an objection to title in respect of which the vendor was entitled to rescind the contract under a condition applying to objections to the abstract. *Sale v. Lambert*, 18 L. R., Eq. 1; 43 L. J., Ch. 470; 22 W. R. 478.

Particulars stated that property was to be sold pursuant to a decree of the court, and one of the conditions was that if the purchaser should make any objection the vendor should be unable or unwilling to comply with, the latter should be entitled to rescind, and the deposit should be returned without interest or costs. The sale took place, and the deposit was paid and invested. It afterwards appeared that the sale took place before the chief clerk had made his certificate, and the court had decided in a suit between the vendor and the purchaser of another lot, that the purchaser was entitled to be discharged:—Held, that the condition did not apply, and that the purchaser was entitled to the return of his deposit and to be indemnified against all expenses he had been put to, and to the bank annuities on which the deposit had been invested, and the dividends which had accrued thereon. *Powell v. Powell*, 19 L. R., Eq. 422; 44 L. J., Ch. 311; 32 L. T. 148; 23 W. R. 482.

A person contracted to sell property, and shewed only an equitable title, and the purchaser required the vendor to get in the legal estate:—Held, that such requisition was as to a matter of conveyance only, and the vendor could not rescind the contract under a condition empowering him to rescind if any objection to the title were made which he was unable or unwilling to remove. *Kitchen v. Palmer*, 46 L. J., Ch. 611.

Where an agreement was made subject to a condition that if the purchaser should insist on any requisition which the vendor should be unable to remove, the vendor should be at liberty

to annul the sale:—Held, that a notice to annul the sale must be served within a reasonable time. *Ker v. Crowe*, 7 Ir. C. L. 181.

Where an incumbrance on property sold was discovered after requisitions had been made and replied to, the vendor was required to pay off the same. On his refusal so to do:—Held, that he was not entitled to repudiate the contract under a condition to that effect. *Jackson and Oakshott, In re*, 14 Ch. D. 851; 49 L. J., Ch. 523; 41 L. T. 719; 28 W. R. 794.

—**Notice.**—Where a sale takes place under a condition providing that if the purchaser makes any requisition which the vendor is unable or unwilling to comply with, the vendor may, by notice in writing, annul the sale, the vendor may, if the purchaser insists upon a requisition, after being informed that the vendor is unable to comply with it, rescind the sale by notice, and such notice need not give the purchaser a time within which to waive his requisition. *Duddell v. Simpson*, 2 L. R., Ch. 102; 36 L. J., Ch. 70; 15 L. T. 305; 15 W. R. 115.

—**Must answer Requisitions.**—A condition of sale, which provides that if the purchaser insists upon any requisitions which the vendor shall be unable or unwilling to comply with, the vendor may annul the sale, does not entitle the vendor to annul the sale without answering the requisitions, upon the ground that he is unable to comply with them. *Turpin v. Chambers*, 29 Beav. 104; 30 L. J., Ch. 470; 7 Jur., N. S. 459; 9 W. R. 363.

—**Costs and Damages.**—A condition, that if any objection or requisition should be made which the vendor should be unable or unwilling to remove, it should be lawful for him to rescind the contract, and that in that case the purchaser should be entitled to a return of his deposit without interest, but should not be entitled to any costs or damages, does not entitle the vendor, after making numerous fruitless attempts to remove an objection made by a purchaser desirous of being discharged, to return him his deposit only, but the vendor must then pay interest upon the deposit and the costs of the purchaser. *McCulloch v. Gregory*, 1 Kay & J. 286; 24 L. J., Ch. 246.

At a sale of land by auction one of the conditions was, that an abstract of title should be delivered within ten days; and another condition was, that if any requisition should be made with which the vendor should be unwilling to comply, he should be at liberty to rescind the contract. A. purchased two lots of the property, and within ten days an abstract of the title was sent to him. Some time afterwards the abstract of a deed, which had been overlooked, was also sent. A. then objected that the deed, which was a release by the executors of a deceased partner to the surviving partners, the vendors, had no *ad valorem* stamp, and stated no consideration, and he required that the executors should join in the conveyance. The vendors not being able to get the executors to join, then elected to rescind the contract:—Held, that the stamp was sufficient, and that the vendors were entitled to rescind the contract; but that as they failed in giving a full and fair abstract within ten days, A. was entitled to damages, though only of nominal amount. *Steer v. Crowley*, 14 C. B.,

N. S. 337; 32 L. J., C. P. 191; 9 Jur., N. S. 1292; 11 W. R. 861. See *Gordon v. Lee*, col. 341, and *Powell v. Powell*, col. 343, *ante*.

—**Time for Enforcing Condition.**—See *ante*, col. 336, *et seq.*

**Does not apply when Vendor no Title at all.]**

—A condition in a contract of sale that, if the purchaser shall make any objection or requisition which the vendor shall be unwilling on the ground of expense or otherwise to comply with, the vendor may annul the sale, does not enable the vendor to rescind the contract in a case where he fails to shew any title at all. *Bowman v. Hyland*, 8 Ch. D. 588; 47 L. J., Ch. 581; 39 L. T. 90; 26 W. R. 876.

**Conditions, when Depreciatory—Sale by Trustees.**—

—A testator devised real estate to trustees upon trust at their discretion, to sell the same and invest and deal with the proceeds in manner mentioned in his will. The real estate was put up for sale in lots by public auction in November, 1882, and F. was the highest bidder and declared to be the purchaser of part. The sale was made subject to certain conditions of sale and "general conditions." The conditions of sale provided that the abstract of title to the property purchased by F. should commence with the conveyance to the testator, dated the 2nd of October, 1872, and that every recital or statement in any abstracted document should be deemed conclusive evidence of the fact or matter recited or stated therein, or to be assumed or implied therefrom. F. refused to complete his purchase, and the trustees commenced an action for specific performance:—Held, that the conditions of sale were depreciatory, and rendered the sale liable to be impeached by the cestui que trust, and that the plaintiffs were therefore not entitled to a decree for specific performance. *Dance v. Goldingham*, *infra*, followed. *Dunn v. Flood*, 49 L. T. 670; 32 W. R. 197.

Trustees having power to sell under such special and other conditions as they should think fit, sold by auction with a condition limiting the title to commence in 1858, fourteen years previously. The next convenient root of title was a deed of 1819, from which a good title could be deduced, but the trustees could not find this deed, and had only recitals of its contents. There was also a condition of sale to the effect that all recitals and statements in the deeds and particulars should be accepted as conclusive evidence:—Held, that the sale under such conditions was a breach of trust, and an injunction was granted at the suit of a cestui que trust to restrain completion. *Dance v. Goldingham*, 8 L. R., Ch. 902; 42 L. J., Ch. 777; 29 L. T. 166; 21 W. R. 761.

—**As to Expenses and Requisitions.**—M. contracted to purchase of W. the lease, &c. of a public-house, by a memorandum in the following form:—"Received of Mr. Moeser 800*l.*, being the deposit on account of 800*l.*, the purchase-money for the Wheat Sheaf Tavern, the contract for which is now being prepared, to be signed by the vendor and purchaser when completed and ready for signature. B. Wisker." The contract tendered to M. for signature contained stipulations that the purchaser should pay the expenses of the investigation of the vendor's title, and

that, if the purchaser should insist on any objection or requisition as to title which the vendor should be unable or unwilling to remove or comply with, the vendor might annul the sale, and return the deposit, but without any interest or costs of investigating the title; and that if the purchaser should fail to comply with the conditions, his deposit should thereupon be forfeited to the vendor, who should be at liberty to resell the property. M. refused to sign this contract, on the ground that it contained unreasonable terms, and W. resold the property:—Held, that M. was entitled to recover back his deposit. *Moeser v. Wisker*, 6 L. R., C. P. 120; 40 L. J., C. P. 120; 24 L. T. 134; 19 W. R. 351.

**5. SUFFICIENCY OF TITLE.**

(See 45 & 46 Vict. c. 39.)

**For Conditions as to.**—See *ante*, col. 327.

**Recitals in Conveyances.**—Under the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 2, a recital in a conveyance more than twenty years old, that the vendor was seised in fee-simple, is sufficient evidence of that fact, and no prior abstract of title can be demanded except so far as the recital shall be proved to be inaccurate; and in such cases a forty years' title is not required. *Bolton v. London School Board*, 7 Ch. D. 766; 47 L. J., Ch. 461; 38 L. T. 277; 26 W. R. 549.

By a deed executed in 1858 (after the death of the settlor), the trustees conveyed certain property to a purchaser for value. This deed contained a recital of a deed of 1845, and a recital that the trustees "in pursuance of the trust for sale conferred on them" by that deed had caused the property to be put up for sale:—Held, that by virtue of s. 2 of the Vendor and Purchaser Act, 1874, this recital, not being shewn to be inaccurate, was conclusive evidence that the deed of 1845 had not been revoked either by an exercise by the settlor of the power of revocation, or by a sale of the property by him for value during his lifetime. *Marsh and Granville (Earl), In re*, 24 Ch. D. 11; 53 L. J., Ch. 81; 48 L. T. 947; 31 W. R. 845.

**Strengthening Defective Title.**—If a purchaser on the completion of his purchase acquires a defective title, that defective title cannot afterwards be strengthened either by his own fraud or the fraud of any other person. *Heath v. Crealock*, 10 L. R., Ch. 22; 44 L. J., Ch. 157; 31 L. T. 650; 23 W. R. 95.

Where a party sells an estate or any interest therein, and at the time has no title, or not such as he sells, if he nevertheless obtains such estate or interest before he is called upon to complete the purchase, it is sufficient; and if an action is brought, shewing that the party had never been called upon, and had at that time a good title, it is a sufficient answer. *Thompson v. Miles*, 1 Esp. 184.

**Obtaining Legal Title.**—A person who has bona fide paid money without notice of any other title, may afterwards, even pendente lite, get a legal title if he can, and may hold it, though during the interval between the payment and the getting in of the legal title he may have had notice of some prior dealing incon-

sistent with the good faith of the dealing with himself. *Blackwood v. London Chartered Bank of Australia*, 5 L. R. P. C. 92; 43 L. J., P. C. 25; 30 L. T. 45; 22 W. R. 419.

— **Vendor held Bound to Pay Expenses of.]**—In an agreement for sale of copyhold property the vendors contracted to give such title as they possessed at the time of the agreement, "to extend over twenty years." The vendors were assignees of an unadmitted devisee, and had a complete equitable title, but refused to get in the legal estate on the ground that they were not bound to do so under the contract. A second term of the agreement was that "purchaser was to prepare his own conveyance and surrender at his own expense."—Held, that the purchaser was entitled to a surrender of the legal estate, and that vendors must pay all fines necessary to enable them to make such a surrender. *Whiteley v. Taylor*, 35 L. T. 187.—C. A.

**Declaration of Title.]**—When, upon a petition presented under the Declaration of Title Act (25 & 26 Vict. c. 67), s. 6, the petitioner proves such possession and states such title as, if established, would entitle him to a declaration, a reference will be ordered to chambers to establish the title. *Roberts, In re*, 22 L. T. 262.

The court, after investigation, being satisfied with the title of a petitioner to a house in London, ordered, under the act, that the declaration establishing the title should be made at the end of three months, and the security required by s. 9 should be 40*l.*, and that notice of the order should be advertised three times, at three days' interval, in three London newspapers. *Roberts, In re*, 10 L. R., Eq. 402; 39 L. J., Ch. 888; 22 L. T. 699.

**Title by Adverse Possession.]**—The purchaser of a house in London having taken various objections to the title, the vendor filed a bill for specific performance, and obtained a reference as to title. The objections were overruled; but before the certificate had been signed the purchaser discovered in a long blank wall, which formed one side of the house and fronted on a street, a stone with an inscription, dated in 1776, stating that the wall had been built by and belonged to the East India Company, who had thrown the adjoining ground into the street. It turned out that the wall had been rebuilt in 1831 by the tenant of the house, and the stone set up again; but under what circumstances did not appear. No rent had from that time been paid to the company, nor any acknowledgment of their title given; but their successors in title, on being applied to, claimed the wall as theirs, and the vendor obtained a release from them.—Held, that the vendor had not a good title when the bill was filed, for that there was no ground for holding a title to have been gained by possession adversely to the East India Company. *Phillipson v. Gibbon*, 6 L. R., Ch. 428; 40 L. J., Ch. 406; 24 L. T. 602; 19 W. R. 661.

**Covenant against Incumbrances restricting Covenant for Quiet Enjoyment.]**—A father—seised of lands under a lease for three lives—by a deed reciting that he was seised in fee, or of some other sufficient estate of inheritance, conveyed them, upon the marriage of his son, in strict settlement, by words applicable to lands held in fee-simple;

and the father and son covenanted that the lands should continue, remain, and be for ever thereafter to the uses of the settlement, and that free from all former gifts, grants, titles, and incumbrances made or suffered by the father and son, or either of them.—Held, that these two covenants—for quiet enjoyment and freedom from incumbrances—were so connected, grammatically, that the general words of the former were limited and contracted by the restrictive expressions in the latter, and that in the absence of evidence of fraudulent intention on the part of the settlor, the error in the recital did not amount to such misrepresentation as would entitle the eldest son of the marriage to compensation out of his grandfather's assets. *Thompson v. Thompson*, 6 Ir. R., Eq. 113.

**Implied Undertaking for.]**—A simple sale of land implies a covenant that the vendor has a good title to the land; but it does not support a count stating a warranty that he had a good title free from all liabilities whatsoever. *Ballard v. Way*, 1 M. & W. 520; 2 Gale, 61.

If a vendor of newly-inclosed lands undertakes to convey them to a vendee, it is an undertaking to convey the legal estate; and the vendor having only an equitable interest previously to the assignment by the commissioners, the vendee is entitled to recover his deposit. *Carr v. Baldwin*, 1 Stark. 65.

**Nature of Abstract.]**—Where an abstract of title shews a good equitable title in the vendor, with power to get in the legal estate under the Trustee Acts or otherwise, it is unnecessary for the abstract to shew the devolution of the legal estate. *Camberwell and South London Building Society v. Holloway*, 13 Ch. D. 754; 49 L. J., Ch. 361; 41 L. T. 752; 28 W. R. 222.

A perfect abstract of title is one which shews such a title as enables the purchaser to complete his purchase. *Blackburn v. Smith*, 2 C. & K. 561.

A purchaser is not entitled to be furnished with an abstract of the title beyond the time he has dispensed with the proof of it. *Poppleton v. Buchanan*, 4 C. B., N. S. 20; 27 L. J., C. P. 210; 4 Jur., N. S. 414.

The delivery of an abstract is the furnishing by a vendor of a document which contains with sufficient fullness the effect of every instrument which constitutes part of his title. *Oakden v. Pike*, 34 L. J., Ch. 620; 11 Jur., N. S. 666; 12 L. T. 527; 13 W. R. 673.

— **Doubtful Matters should be Included in.]**

—A legatee of a reversionary interest under a will, which had been paid into court in an administration suit, presented a petition for liquidation in March, 1873, and a trustee was appointed. In July he assigned his interest in the legacy to J., who obtained a stop order on the fund in court. In November, 1876, he assigned his interest to E., without notice of the liquidation, who also obtained a stop order on the fund. Afterwards the trustee in liquidation obtained a stop order. The plaintiffs purchased the interest of the trustee in liquidation, and of J., and contracted to sell the legacy to the defendant. The defendant required E.'s mortgage to be abstracted as an incumbrance on the estate.—Held, that the question of the priority of E.'s incumbrance was too doubtful to justify

the vendor in omitting it from the abstract. *Palmer v. Locke*, 18 Ch. D. 381; 51 L. J., Ch. 124; 45 L. T. 229; 30 W. R. 419—C. A.

**Inquiry as to Incumbrances.**—A purchaser made the following requisition, "Is there to the knowledge of the vendors or their solicitors any settlement, deed, fact, omission, or any incumbrance affecting the property not disclosed by the abstract?"—Held, on appeal, that neither the vendors nor their solicitors were bound under the Vendor and Purchaser Act, 1874, to answer any part of the requisition. *Ford and Hill, In re*, 12 Ch. D. 365; 48 L. J., Ch. 327; 40 L. T. 41; 27 W. R. 371—C. A.

Even before 22 & 23 Vict. c. 35, s. 24, and 23 & 24 Vict. c. 38, s. 8, a vendor was not justified in suppressing an equitable incumbrance, although it might have been subsequently discharged. *Drummond v. Tracy*, Johns. 608; 29 L. J., Ch. 304; 6 Jur., N. S. 369; 8 W. R. 207.

**Accidental Disclosure.**—Freehold property was sold in 1877 subject to a condition that the title should commence with a deed dated the 30th of December, 1867, and that no earlier or other title should be required or inquired into by the purchaser:—Held, that this condition did not preclude the purchaser from insisting on an objection to the prior title which was not discovered through any inquiry made by him, but was accidentally disclosed by the vendor. *Smith v. Robinson*, 13 Ch. D. 148; 49 L. J., Ch. 20; 41 L. T. 405; 28 W. R. 37.

But held, that, in an action by the vendor for the specific performance of the contract, the purchaser was only intitled to an inquiry whether the vendor could make a good holding title to the property. *Id.*

Where there is a condition of sale that no title to the property sold shall be shown before a certain date, semble, that s. 24 of 22 & 23 Vict. c. 35, does not apply to the concealment of an incumbrance prior to that date. *Id.*

At a sale by auction of leasehold property by a mortgagee under a power, one condition of sale was that within the time limited from the delivery of the abstract the purchaser should send to the vendor's solicitors his requisitions on the title or evidence, and in default of any he should be deemed to have accepted the title, and for the purpose of requisitions the abstract was to be deemed to be perfect if it supplied the information suggesting the same, and if the purchaser should insist on any requisition which the vendor should be unable or should decline to comply with, he should be at liberty to rescind the contract. An abstract was delivered, but it did not shew the real state of the title. After requisitions were sent and replies received, the purchaser's solicitors were informed by mortgagees that the property had been mortgaged by deposit of an underlease to them. The vendor, who was not aware of the mortgage, was required to pay the amount due to the mortgagee, but his reply was that he was unable and unwilling to satisfy the claim, and that he would rescind the contract. The purchaser insisted on the mortgage being discharged, and upon a summons under the Vendor and Purchaser Act, 1874, a declaration was made that the vendor was not entitled under the condition and circumstances

to rescind. *Jackson and Oakshott, In re*, 14 Ch. D. 851; 49 L. J., Ch. 523; 41 L. T. 719; 28 W. R. 794.

**Title at Common Law.**—In a court of law, every title which is not bad is marketable. *Romilly v. James*, 6 Taunt. 263; 1 Marsh. 592.

A court of law will adjudge a title to be either good or bad, having no middle term for it. *Maberly v. Robins*, 5 Taunt. 625; 1 Marsh. 258.

In an action to recover back the deposit on a purchase, upon the vendor's failure to make a good title, the courts of law will collaterally inquire whether the title is good in equity; for a contract to make a good title means a title good both at law and in equity. *Id.*

A. bought a house at an auction, and deposited part of the purchase-money, the remainder to be paid upon the vendor's making a good title. It turned out that the vendor's title was good in law but bad in equity:—Held, that A. was entitled to recover back the deposit. *Id.*

In an action to recover money deposited upon a purchase, upon an allegation that the vendor has failed to make a proper title, the court will not consider whether the title is of a doubtful description, such as a court of equity would not compel an unwilling purchaser to take, but simply whether the vendor has or has not a legal title to convey. *Boylan v. Gutch*, 7 Bing. 379; 5 M. & P. 222.

A purchaser is not obliged to accept a conveyance when the title is doubtful. *Hartley v. Peckall*, Peake, 131; *S. P., Wilde v. Fort*, 4 Taunt. 334.

In an action to recover back a deposit on a sale, on the ground of a defect of title, the party bringing the action must prove the title bad; and it will not be sufficient to shew that the title has been deemed insufficient by conveyancers who have been employed to advise upon it. *Cumfield v. Gilbert*, 4 Esp. 221.

Where the ability of the vendor to make a good title to a portion of the premises sold depends upon a doubtful question of fact or of law, the title will not be deemed a good or sufficient title as between vendor and purchaser. *Simmons v. Heselbine*, 5 C. B., N. S. 554; 28 L. J., C. P. 129; 5 Jur., N. S. 270.

#### **Forcing the Acceptance of a Doubtful Title.]**

—The bare possibility that another judge might think a title open to question is not a sufficient reason for refusing to compel a purchaser to complete, where the court itself entertains a strong opinion in favour of the title; but where there is an actual adverse decision, the court, though thinking the question free from doubt, will not compel a purchaser to take the title. *Mulhings v. Trinder*, 10 L. R., Eq. 449; 39 L. J., Ch. 833; 23 L. T. 580; 18 W. R. 1183.

The principles laid down in *Pyrie v. Waddingham* (10 Hare, 1) approved of; but the decision disapproved of, and not followed under precisely similar circumstances. *Id.*

A purchaser is not bound to take a doubtful title. Therefore, where the vendors derived title under an assignment made by a party for the benefit of his creditors, in itself an act of bankruptcy:—Held, that they could not compel the purchaser to accept the title, without proof that there was no creditor in a situation to sue out a commission against the assignor. *Pott v. Turner*, 4 M. & P. 551.

A father gave his estates to trustees to pay the rents to his two daughters (both then unmarried) in equal shares during their lives, "independently of the control of any husband or husbands with whom they or either of them might happen to intermarry;" and after their respective decease to convey the estates "unto and equally between the husbands of them, my daughters, to hold to them, and their respective heirs and assigns;" with a proviso that if either of his daughters should depart this life unmarried, her share should go to the survivor for her life, and on her decease the whole should be conveyed to the husband of the surviving daughter. Both daughters married. One died in the lifetime of her husband. Then the husband of the other died, having devised his interest in the estate to his wife absolutely:—Held, that the surviving daughter could make a good title to a moiety of the estate; for that a gift to an unmarried woman for life, with remainder in fee to her husband, gives an indefeasible vested remainder in fee to her first husband. And that, as the question turned on a general rule of construction, unaffected by any special context in the will, the title would be forced on a purchaser. *Radford v. Willis*, 7 L. R., Ch. 7; 41 L. J., Ch. 19; 25 L. T. 720; 20 W. R. 132. Reversing 12 L. R., Eq. 105; 40 L. J., Ch. 484; 24 L. T. 574; 19 W. R. 845.

— **Where previous Voluntary Conveyance.** ]

—When it appears from the abstract of title delivered to a purchaser in pursuance of conditions of sale, that the vendor has previously executed a conveyance—on the face of it voluntary—comprising the lands in question, but without evidence of its being void as against a purchaser for value, the purchaser may refuse to accept the title, seeing that its validity depends on a doubtful state of facts, and may recover back his deposit, although he might have made the title good by acceptance. *Clarke v. Willott*, 7 L. R., Ex. 313; 41 L. J., Ex. 197; 21 W. R. 73.

On a bill by vendor for specific performance, the purchaser set up a voluntary settlement as an objection to the title, but said he was willing to complete the purchase on having a good title. He had been let into possession as purchaser, and paid part of his purchase-money, and had paid off a mortgage and got a conveyance of the legal estate and possession of the title-deeds:—Held, that notwithstanding the voluntary settlement, the vendor was entitled to a decree for completing the purchase. *Pter v. Nicolls*, 11 L. R., Eq. 391; 24 L. T. 381; 19 W. R. 618.

Seemle, that the principle of *Smith v. Garland* (2 Mer. 120) does not apply to a defendant who says he is willing to complete on having a good title. *Id.*

— **Duty of Court.** ]—When a question of title involves a question of general law applicable to all similar cases, the Court of Appeal is bound to say one way or another what the law is, and cannot escape from that duty by saying that the decision of the court below in taking one view makes the other view, if held by the Court of Appeal, so doubtful that the latter will not force such a title on a purchaser. *Alexander v. Mills*, 6 L. R., Ch. 124; 40 L. J., Ch. 73; 24 L. T. 206; 19 W. R. 310.

It is the duty of the court to decide doubtful questions of title, and when so decided they can no longer be considered as doubtful, so as to entitle purchasers to resist specific performance. *Bell v. Holtby*, 15 L. R., Eq. 178; 42 L. J., Ch. 266; 28 L. T. 9; 21 W. R. 321.

— **Presumption as to Incumbrance.** ]—A purchaser is not compellable to accept a title to premises, formerly subject to an incumbrance, the discharge of which is shown only by presumption. A leasehold was sold, subject to a ground rent, which was said to be apportioned out of a larger rent, but the apportionment was not evidenced by any existing deed, but only by the acceptance of a mesne landlord, and presumption:—Held, that the purchaser was not bound to accept the title. *Barnwell v. Harris*, 1 Taunt. 430.

It is no objection to a title upon sale by auction, that a memorandum appears amongst the title deeds, shewing that a former owner of the property (under whom the vendor derives title) had raised money thereon by way of equitable mortgage, and that there is no evidence that such charge has been released, other than that afforded by the vendor's possession of the deeds and memorandum. *Nicholl v. Chambers*, 11 C. B. 996; 21 L. J., C. P. 54.

— **Good Title.** ]—When in a suit between vendor and purchaser a decree has been made for specific performance of a contract, subject to the usual reference as to whether a good title can be made, the words "good title" mean not an absolutely good title, but a good title having regard to the terms of the contract, although the latter words are not inserted in the decree. *Upperton v. Nicholson*, 6 L. R., Ch. 436; 40 L. J., Ch. 401; 25 L. T. 4; 19 W. R. 733.

Properties held partly by an absolute owner and partly by several sets of trustees under several trusts and for different persons were, by the vendors as a single body, agreed to be sold together in one lot for one undivided sum—which the absolute owner, and the trustees and their several sets of cestuis que trustent afterwards apportioned by agreement amongst themselves, but not, as it appeared on any sufficient data—and with special conditions limiting the title, without however properly defining the portions of the properties affected by the limitations. The purchaser refused to complete the purchase, and the vendors filed a bill for specific performance of the contract:—Held, that the case was too doubtful to entitle them to relief. *Rede v. Oakes*, 4 De G., J. & S. 505.

A purchaser is not obliged to accept a conveyance when the title is doubtful even in equity. *Cooper v. Dene*, 4 Bro. C. C. 80; 1 Ves. jun. 565; *Roake v. Kidd*, 5 Ves. 647.

A purchaser was not compelled to take a title depending upon the words of a will which were too doubtful ever to be settled without litigation. *Sharp v. Adcock*, 4 Russ. 374.

The court will not compel a purchaser to take a title depending upon matter of fact, if the fact does not admit of satisfactory proof, or is not well proved. *Smith v. Death*, 5 Madd. 371.

In the absence of special circumstances, a court of equity will not enforce specific performance of a contract for the purchase of land which is silent as to the means of access to it,

when it is reasonably uncertain whether any means of entering on the land at all times can be conferred on the purchaser. *Denne v. Light*, 8 De G., M. & G. 774.

**Title to Leaseholds—Lease—Underlease.]**—Although, according to the decided cases, a vendor who contracts for the sale of leasehold property described as held under a lease cannot, if nothing further is said, make a good title unless it is held under an original lease, yet in a case where the particulars and conditions of sale of property so described contained enough to give notice to a purchaser that the property was held under a derivative lease:—Held, that the purchaser could not on that account refuse to complete, or claim compensation on the ground of misdescription. *Camberwell and South London Building Society v. Holloway*, 13 Ch. D. 754; 49 L. J., Ch. 361; 41 L. T. 752; 28 W. R. 222.

**— Knowledge of Vendor.]**—A purchaser of a lease who knows at the date of the contract that the vendor's interest is only an underlease, is bound, although the interest is described in the contract as a lease. *Flood v. Pritchard*, 40 L. T. 873.

**— Subject to Ground Rent.]**—Where leaseholds were sold under particulars and conditions of sale which made no mention of ground rents, and the purchaser and his solicitor deposed that they were led by the particulars to believe, and did believe, that they were not so subject:—Held, that the purchaser was entitled to be discharged. *Jones v. Rimmer*, 14 Ch. D. 588; 49 L. J., Ch. 775; 43 L. T. 111; 29 W. R. 165—C. A.

**— New Lease instead of Residue of Old Term.]**—Under a contract for the purchase of the residue of an old term a purchaser is not bound to accept a similar new lease, the residue of an old term being in many respects more advantageous. *Mason v. Corder*, 7 Taunt. 9.

**— Lessor's Title—Lease more than Sixty Years old.]**—In the case of a contract for the sale of leaseholds, where the lease is more than sixty years old, it is not enough for the vendor to shew an assignment or a series of assignments reciting the parcels, words of demise, and reddendum of the lease only, and not purporting to recite the whole lease, though accompanied by sixty years' possession consistent with those assignments; in the absence of a condition that the purchaser shall be satisfied with the recital of the lease, the vendor is bound to produce the lease or a copy of it, or prove its loss and that no complete copy of it exists. *Frend v. Buckley*, 5 L. R., Q. B. 213; 39 L. J., Q. B. 90; 23 L. T. 170; 18 W. R. 680; 10 B. & S. 973—Ex. Ch.

A. entered into a contract with B. for the purchase of two farms, one freehold, the other leasehold, and B. stipulated that he would deduce a good and marketable title, and deliver an abstract of title to the purchaser. The abstract delivered by the vendor commenced with an indenture dated 13th September, 1800, which recited a lease of the 20th January, 1606, by three lessors for 1,000 years, from the Feast of St. Michael the Archangel, 1599, at the rent of 1*l.* payable on that feast day, only if demanded. The recital

set out the parcels, the words of demise and reddendum, but did not purport to set out the whole lease. The abstract shewed that the larger portion of the property had passed by assignment to a third person. The remaining portion, which was the subject of the contract, had by various assignments passed to the vendor. The purchaser required an attested copy of the lease of the 20th January, 1606, and a covenant for its production by its legal possessor:—Held, that upon the refusal of the vendor to comply with that requisition the purchaser was entitled to rescind his contract. *Ib.* See 45 & 46 Vict. c. 39.

**— Agreement to Dispense with Production.]**—The vendor of a leasehold interest is bound to shew the lessor's title to demise, unless it is otherwise stipulated in the contract of sale. *Souter v. Drake*, 3 N. & M. 40; 5 B. & Ad. 992.

No agreement to dispense with the production of the lessor's title will be implied from the circumstances of the term being nearly expired, the small value of the property, and the absence of any premium. *Ib.*

A. agreed to sell to B. the two leases and goodwill in trade of a public-house and shop adjoining for 4,250*l.*, as he held the same, for terms of twenty-eight years from Midsummer then next ensuing, at the annual rent therein mentioned, and B. agreed to accept a proper assignment of the leases and premises as above described, without requiring the lessor's title; and, upon payment of the purchase-money, A. agreed to execute an effectual assignment of the leases, and deliver up possession of all the premises:—Held, that the true meaning of this agreement was, that the vendee was to purchase the two leases without inquiring into the title of the lessor, and could not refuse to complete his purchase on account of an objection to that title. *Spratt v. Jeffery*, 10 B. & C. 249.

**— Implied Undertakings.]**—A contract for the sale of an agreement for a lease does not imply an undertaking that the proposed lessor has title to grant the lease, and, in the absence of any express stipulation, it is no defence to an action upon such contract that the lessor has no title. *Kintrea v. Preston*, 1 H. & N. 357; 25 L. J., Ex. 287.

In every contract for the sale of leaseholds, there is, in the absence of an express stipulation to the contrary, an implied undertaking on the vendor's part to make out the lessor's title to demise. *Hall v. Betty*, 5 Scott, N. R. 508; 4 M. & G. 410.

**— Covenant that Lease for Lives Subsisting.]**—By a deed of July, 1853, after reciting a lease of the 10th of March, 1847, from F. to the defendant, for the lives of A., B. and C., and the survivors or survivor of them, the defendant conveyed the premises to the plaintiff, to hold for the lives of A., B. and C., and the survivors or survivor of them, and covenanted "that the lease of the 10th of March, 1847, is a good, valid, and subsisting lease in the law, for the lives of A., B. and C., and the survivors or survivor of them, and is not forfeited, surrendered, or become void or voidable." B. having died before July, 1853, the plaintiff sued the defendant for a breach of the covenant:—Held, that the mention of the

three lives was matter of description only, and that the covenant only amounted to a covenant that the lease was still subsisting, and not to an implied covenant that the three lives were still in existence. *Coates v. Collins*, 7 L. R., Q. B. 144; 41 L. J., Q. B. 90; 26 L. T. 134; 20 W. R. 187—Ex. Ch.

—**Breach of Covenants.**—A sale was made under condition that the last receipt for rent should be taken as conclusive evidence of the due performance of all covenants. Certain breaches of covenant had taken place which the lessors had apparently waived, and the last receipt for rent was produced. Specific performance of the contract having been decreed, and a reference as to title directed by an order which was not appealed from:—Held, that whether or not the breach of covenant was or was not a continuing breach, the vendor had made a good title in accordance with the contract which the purchaser was bound to accept, the decree for specific performance having been made and not appealed from. *Laurie v. Lees*, 7 App. Cas. 19; 51 L. J., Ch. 209; 46 L. T. 210; 30 W. R. 285—H. L. (E.).

A person who contracts to sell an agreement for a lease must, in the absence of anything to shew a contrary intention at the time of the contract, shew that the agreement is valid. A contract was entered into for the sale of an agreement for a lease. The agreement was at that time voidable at the will of a third person, as also subsequently, when the purchaser, on discovering that to be the case, repudiated the contract. The third person had not avoided the agreement, but offered to renew it conditionally on the vendor's doing a certain thing:—Held, that the purchaser was entitled to repudiate the contract, and was not obliged to wait and see whether the condition would be performed. *Breuer v. Broadwood*, 22 Ch. D. 105; 47 L. T. 508; 31 W. R. 115.

A. paid a deposit upon a contract for the purchase of a lease of a public-house. It being afterwards discovered that the house was comprised with another in an original lease, under which the lessor had a right to re-enter for a breach of covenants in respect of either houses:—Held, that A. was not bound to accept the title with an indemnity, but might recover back the deposit, with the expenses incurred in investigating the title. *Blake v. Phinn*, 3 C. B. 976; 16 L. J., C. P. 159.

—**Covenant to Insure.**—A purchaser of a leasehold may object to the vendor's title, on the ground that he has incurred a forfeiture by omitting for the space of one month to pay the annual premium of insurance pursuant to his covenant, although it does not appear that the lessor has taken advantage of the forfeiture. *Wilson v. Wilson*, 14 C. B. 616; 2 C. L. R. 818; 23 L. J., C. P. 137; 1 Jur. 581.

Owners of leaseholds holding under a covenant to insure, with forfeiture in default, entered into a contract to sell, naming the day for completion of the purchase, and providing that up to that day all outgoing should be paid by the vendors. The title was approved of before that day, but some delay took place in completion. The insurance would expire three weeks before the day appointed for completion, and the vendors renewed the insurance for one month, but never mentioned

the subject to the purchaser. The insurance had expired before completion; the vendors offered to obtain a waiver of the forfeiture, but the purchaser refused to complete:—Held, that the insurance ought to have been continued at the expense of the purchaser, and that it was not the duty of the vendors to inform the purchaser of the expiration of the insurance. *Dowson v. Solomon*, 6 Jur., N. S. 33.

The vendors of an interest in a leasehold house, subject to a covenant to insure it against fire, contracted for the sale of the house to a purchaser within a given time. The contract was not completed by the specified time. There was no default on the part of the purchaser, but the vendors did not keep up the insurance after the time at which the contract should have been completed:—Held, that the purchaser ought to be discharged from his contract. *Palmer v. Goren*, 25 L. J., Ch. 841.

Leaseholds were sold under special conditions of sale, which provided that possession under the lease should be conclusive evidence of performance or of waiver of any breach of covenant up to the completion of the sale; there had been an omission to keep up the policy against fire before the sale, and the policy existing at the sale was allowed after the sale to drop for a few days:—Held, that the conditions of sale were notice that breaches of covenant might then exist, and that they must be considered as waived. *Howell v. Kightley*, 25 L. J., Ch. 864; 2 Jur., N. S. 455.

Held, also, that the breach of covenant after the sale was not provided for by the condition, and that a purchaser was not bound to take the title. *Id.*

If a lessee, having incurred forfeitures by not insuring the premises according to his covenant (though the lessor has taken no step to enforce them), contracts to sell his term, the purchaser, on becoming acquainted with them, may refuse to complete his contract, and may reclaim his deposit. *Pennall v. Harborne*, 11 Q. B. 368; 17 L. J., Q. B. 94; 12 Jur. 159.

A purchaser of a leasehold may object to a vendor's title, on the ground that he has incurred a forfeiture by omitting for the space of a month to pay the annual premium of insurance, pursuant to his covenant, although it does not appear that the lessor has taken advantage of the forfeiture. *Wilson v. Wilson*, 14 C. B. 616; 23 L. J., C. P. 137; 18 Jur. 581.

—**Mortgage—Purchaser from Mortgagee with Power of Sale.**—When the registered owner of land has granted a first mortgage with the statutory power of sale, and has also granted subsequent mortgages, a purchaser from the first mortgagee is entitled to be registered with an indefeasible title, just as if the subsequent mortgages had not been granted, and he had purchased from the mortgagor and mortgagee together. *Richardson, In re*, 12 L. R., Eq. 398; 40 L. J., Ch. 616; 25 L. T. 12; 19 W. R. 1048.

—**Implied Contract.**—A vendor who contracts to make out a good title to mortgage lands, undertakes to make out such a title as the Court of Chancery would adopt as a sufficient ground for compelling specific performance, and as would be a good answer to an ejectment by a claimant. *Jeakes v. White*, 6 Ex. 873; 21 L. J., Ex. 265.

— **Subject to Leases.**—A mortgagor, after parting with his legal interest in an estate by mortgage, demised it to a lessee for a term of years, and afterwards, with the concurrence of the mortgagees, who were willing to join in making a title, sold the reversion, describing the property as under lease for a term of years. The purchaser having objected to the title, on the ground that the lease was not binding upon the lessee:—Held, that the title was sufficient, as by conveyance by the mortgagees of all their interest to the mortgagor, and by him afterwards to the purchaser, such an interest would be conveyed to the purchaser as would estop the lessee from denying the lease. *Webb v. Austin*, 8 Scott, N. R. 419; 7 M. & G. 701; 13 L. J., C. P. 203.

T., being possessed of a plot of land for a term of years, by a deed of the 24th April, 1845, assigned it by way of mortgage to S. as a security for 300*l.* and interest, with a power of sale on default in payment on a certain day. By a memorandum of the same date, T. undertook to deposit with S. a lease, when the same was executed, of another plot of land, as a further and collateral security for the 300*l.* and interest. A mill and other buildings stood partly on one plot and partly on the other plot. On the 18th December, 1845, the lease mentioned in the memorandum was granted and deposited with S. By a deed of the 2nd March, 1847, T. assigned a moiety of the entire premises to A., and on the 20th September, 1847, executed an assignment of all his estate and effects for the benefit of his creditors. By a deed of the 31st August, 1848, S. assigned both plots of land, mill and buildings to the defendant, subject to the equity of redemption, and with such power of sale as S. possessed. In April, 1852, the defendant offered the premises for sale by auction, and the conditions stated, that he sold as mortgagee, and that, as he had only an equitable interest in the second plot, the purchaser should accept such title as he was able to deduce and convey. A purchaser refused to complete, on the ground that the legal estate in the second plot was outstanding, and might be used adversely to him; and having brought an action to recover his deposit:—Held, that there was no failure of consideration, inasmuch as, first, the assignment of T. of the legal estate in the one plot, and the memorandum of deposit of the future lease of the other plot, were one and the same transaction and security, and the lease, when deposited, was subject to the same conditions, including the power of sale, as were contained in the assignment, and, consequently, that T. would not be entitled in a court of equity to redeem the second plot. *Ashworth v. Mounsey*, 9 Ex. 175; 23 L. J., Ex. 73.

Held, secondly, that by the express terms of the conditions, the vendor contracted, with reference to that plot, to sell an equitable interest only. *Id.*

**Sale of Right of Entry—Vendor out of Possession.**—32 Hen. 8, c. 9, s. 2.]—Although 32 Hen. 8, c. 9, s. 2, cannot be said to have been repealed by 8 & 9 Vict. c. 106, s. 6, nevertheless since the passing of the latter statute a grant of lands to which the grantor has a title existing in fact, but of which he has never been in possession, and on which he is entitled only to a right of entry, will be valid, even although at the time of the grant a litigation is pending as to the title to the lands. A sought to recover by ejectment

certain lands; the person in possession, amongst other defences, alleged that one-fourth share thereof belonged to B., who had never been in possession. Thereupon A., for the sum of 10*l.*, took from B. a conveyance dated the 4th of July, 1877, of his share, containing covenants for title and quiet enjoyment. The actual value of B.'s share was 500*l.* A. then recovered possession of the lands. Before the date of the conveyance B. had been bankrupt, and after A. had recovered possession of the lands, B.'s trustees in bankruptcy recovered possession from A. of the one-fourth share which had been conveyed by B. to A. In an action by A. against B. for damages for breach of the covenants for title and quiet enjoyment:—Held, that the conveyance to A. from B. was not rendered void by 32 Hen. 8, c. 9, s. 2. *Jenkins v. Jones*, 9 Q. B. D. 128; 51 L. J., Q. B. 438; 46 L. T. 795; 30 W. R. 668—C. A.

Held, also, that A. was entitled to recover from B. the sum of 500*l.* as damages. *Id.*

**Several or Separate Lots.**—Where several lots are knocked down to a bidder at an auction, and his name marked against them in the catalogue, a distinct contract arises for each lot. *Roots v. Dormer (Lord)*, 4 B. & Ad. 77; 1 N. & M. 667.

— **Title.**—A person who purchases two lots is not justified in refusing to perform his contract for the purchase of one lot, because a good title is not shewn to the other lot. *Levin v. Guest*, 1 Russ. 325.

It was at one time held that where a man purchases at an auction two distinct lots which adjoin, and which would be more conveniently occupied together, he was not obliged to go on with the purchase of either, unless the seller could make a good title to both. *Gibson v. Spurrier*, Peake's Add. Cas. 49.

And where a party became the purchaser of several lots at an auction, it was to be deemed an entire contract; and, if the seller failed in making a title to any one of them, the purchaser might rescind the contract, and refuse to take the others. *Chambers v. Griffiths*, 1 Esp. 150.

— **Deeds.**—On a sale by auction of land in lots the purchaser of the lot largest in value, in the absence of any condition respecting them, is entitled to the custody of the title deeds relating to all the property; but if there is a condition that the purchaser of the largest lot shall have them, that must mean largest in superficial area. *Griffiths v. Hatchard*, 1 Kay & J. 17; 23 L. J., Ch. 957; 18 Jur. 649.

— **Leasehold.**—When leasehold property which is sold in separate lots is held under one lease, it is incumbent on the vendor to state that fact in plain and distinct terms. *Sherad v. Venables*, 36 L. J., Ch. 922; 17 L. T. 10; 15 W. R. 1166.

## 6. DECISION OF JUDGE ON DISPUTED MATTERS.

**In what Cases.**—The tenant for life of lands, of which the tenant in tail in remainder was an infant, was desirous of making a voluntary grant of part thereof as a site for a church. An application was made to the court under the Vendor

and Purchaser Act, 1874, s. 9, for an opinion whether it was necessary, under the Places of Worship Sites Act, 1873, s. 1, to appoint a guardian to concur in the grant on behalf of the infant:—Held, that the Vendor and Purchaser Act, 1874, did not apply to a voluntary grant, but that this defect might be cured by the admission of a contract for a nominal consideration. *Salisbury (Marquis), In re*, 20 L. R., Eq. 527; 44 L. J., Ch. 541; 23 W. R. 824. *See S. C. in C. A.*, 2 Ch. D. 29; 45 L. J., Ch. 250; 34 L. T. 5.

On a summons under the Vendor and Purchaser Act, 1874, s. 9, heard in chambers, judgment ought to be given in court if the purchaser desires it. *Coleman v. Jarrom*, 25 W. R. 137; *S. C.*, 35 L. T. 614.

On a summons under s. 9 of the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), the parties are placed in the same position, and the court has exactly the same powers as in the case of a reference to chambers as to title in a suit for specific performance, and the same evidence is admissible as could be received on such a reference. *Burroughes, In re*, 5 Ch. D. 601; 46 L. J., Ch. 528; 36 L. T. 778; 25 W. R. 520—C. A.

Evidence, therefore, by affidavit and cross-examination thereon, is admissible as to the vendor's title, and it is open to the purchaser to shew that the vendor has no title. *Id.*

The summary jurisdiction created by s. 9 of the Vendor and Purchaser Act, 1874, is not intended to apply to cases where there are questions of controverted fact, but is intended for the settlement of short points of law or construction. *Popple, In re*, 25 W. R. 248—C. A.

Observations as to the duty of the court to decide doubtful questions of title as between vendor and purchaser. *Osborne to Rowlett*, 13 Ch. D. 774; 49 L. J., Ch. 310; 42 L. T. 650; 28 W. R. 368.

#### **Action for Specific Performance not necessary.]**

—A purchaser who has availed himself of the provisions of the Vendor and Purchaser Act, 1874, and has thereby obtained an order on summons which has disposed of every objection which he thought fit to raise, and under which the vendor has been ordered to make compensation, is not entitled to bring an action for specific performance of the contract for sale and damages. If a vendor does not comply with the order made on the vendor and purchaser summons, the purchaser should apply in chambers to get it enforced. —Action dismissed without prejudice to any proceedings plaintiff (the purchaser) might adopt under the Vendor and Purchaser Act, 1874. *Thompson v. Ringer*, 44 L. T. 507; 29 W. R. 520.

**Power to have Covenant inserted in Conveyance.]**—On a summons under the Vendor and Purchaser Act, 1874, the court has power to direct a covenant to be inserted in a conveyance, and to settle the terms of the covenant. But, semble, the court has no power in such a summons to determine a preliminary question of fact. *Gray and Metropolitan Railway Company, In re*, 44 L. T. 567.

**Time for Appealing.]**—The time within which an appeal can be brought from an order under the Vendor and Purchaser Act, 1874, s. 9, is twenty-one days. *Blyth and Young, In re*, 13 Ch. D. 416; 41 L. T. 746; 28 W. R. 266—C. A.

**Extension of Time, Grounds for.]**—The grounds for allowing an extension of time for appeal considered. *Id.*

**Costs.]**—A requisition as to the competency of a married woman to give a discharge for a legacy, on the sale of land charged with the legacy, having been brought before the judge in chambers under the Vendor and Purchaser Act, 1874, s. 9, and afterwards adjourned into court, the judge decided the point, and, being of opinion that to make the unsuccessful party pay the costs would be to interfere with the beneficial operation of the act, ordered each party to pay his own costs. *Coward, In re*, 20 L. R., Eq. 179; 44 L. J., Ch. 384; 32 L. T. 682; 23 W. R. 605.

The question of costs as between vendor and purchaser where the title is disputed considered. *Osborne to Rowlett, supra.*

### 7. NOTICE.

**What Amounts to.]**—Notice of an incumbrance to a conveyancer who peruses a title on behalf of one party, is not notice to another purchaser on whose behalf the same conveyancer afterwards prepares a conveyance. *Brine v. Featherstone*, 4 Taunt. 869.

**Small Lot—Notice through Solicitor.]**—One of the sub-purchasers, who bought a small lot for 42l., allowed the purchasers, at their suggestion, to employ their own solicitor to prepare the conveyance to him. He did not in any other way employ a solicitor in the matter, and he made no inquiries about the title or the deeds, nor did he search the register:—Held, that under these circumstances it was not the duty of the solicitor to communicate the existence of the lien to the sub-purchaser, and that consequently notice of it could not be imputed to him through the solicitor. *Kettlewell v. Watson*, 21 Ch. D. 685; 51 L. J., Ch. 281; 46 L. T. 83; 30 W. R. 402.

Held, also, that having regard to all the circumstances, and especially to the smallness of the purchase-money, and the expense which a regular investigation of the title would have occasioned, it could not be said that the sub-purchaser had wilfully abstained from making inquiries with the view of not receiving notice of any prior charge, and that, consequently, he could not be fixed with constructive notice of the original vendor's lien, but was entitled to hold his plot free from it. *Id.*

#### **Effect of Employment of Vendors by Vendee.]**

—Another sub-purchaser employed no solicitor in the matter, and made no inquiries himself, but, as he said, left it to the original purchasers "to manage the business," and they prepared the conveyance to him, charging him for it:—Held, that he had made them his general agents in the matter, and that it was their duty as such to communicate the lien to him; that, consequently, it must be assumed that they did so, and that notice of the lien must be imputed to him. *Id.*

#### **Of Assignment of Incomplete Contract.]**

Notice to a vendor of an assignment by the purchaser of an uncompleted contract does not constitute the vendor a trustee for the assignee

of the contract. *McCreight v. Foster*, 5 L. R., Ch. 604; 39 L. J., Ch. 792; 23 L. T. 224; 18 W. R. 905.

Notice to a person under contract to sell an estate that his vendee has agreed to make a valid assignment of the contract, if so requested, does not put the vendor upon inquiry whether his vendee has been requested to make, or has made, such valid assignment. *Shaw v. Foster*, 5 L. R., H. L. 321; 42 L. J., Ch. 49; 27 L. T. 281; 20 W. R. 907.

**Knowledge of Invalidity of Title—Compelling Conveyance.**—When a husband and wife agreed to sell her estate in fee simple, the purchaser being aware that the estate belonged to the wife, and she afterwards refused to convey:—Held, that the purchaser could not compel the husband to convey his interest and accept an abated price. *Castle v. Wilkinson*, 5 L. R., Ch. 534; 39 L. J., Ch. 843; 18 W. R. 586.

**Effect of—Compelling Performance of Sub-Contract.**—P., in 1867, agreed to sell to M. a plot of land, the purchase to be completed in five years or earlier at M.'s option. P. had previously agreed to sell an adjoining plot to M. The plaintiff was employed by M. to build on the first plot, and M. became indebted to him on that account. M. then agreed to sell the first plot to the plaintiff. P. then told the plaintiff that both contracts must be completed together, and no offer having been made by the plaintiff to complete both contracts, P. and M. sold and conveyed both plots to H.:—Held, that the plaintiff had no equity to have his sub-contract performed. *Crabtree v. Poole*, 12 L. R., Eq. 13; 40 L. J., Ch. 468; 24 L. T. 895.

**Purchase by Person without Notice—Legal Estate subsequently acquired under Deed—Notice of Contents.**—A purchaser for valuable consideration without notice of any prior equity, having accidentally acquired the legal estate under a deed of which he had no notice at the time of the purchase, is not affected with notice of anything contained in such deed. *Pilcher v. Rawlins*, *Joyce v. Rawlins*, 7 L. R., Ch. 259; 41 L. J., Ch. 485; 25 L. T. 921; 20 W. R. 281. Reversing 11 L. R., Eq. 53; 19 W. R. 217.

**Defence—When Sustainable.**—Such a purchaser's plea of a purchase for valuable consideration without notice is an absolute, unqualified, unanswerable defence, and an unanswerable plea to the jurisdiction of the court. *Ib.*

The defence of purchase for value without notice may be sustained, although the defendant, in order to make out his title to the legal estate, must rely on an instrument which discloses the title of the plaintiff, the defendant not having had notice of such instrument at the time of his purchase. *Ib.*

B., a trustee, advanced trust money to A. in 1851, on a legal mortgage of land belonging to A. in fee, the mortgage deed reciting the trust. By collusion with B., A., in 1856, obtained the title-deeds, and also a reconveyance of the legal estate, and then, suppressing the mortgage and reconveyance, conveyed as under his original title the legal estate to C. by way of mortgage. In a suit by B.'s cestui que trust:—Held, that C. was entitled to rely on the legal estate acquired through the suppressed reconveyance, and

was not affected with notice of any equities which, if he had seen that deed, he might have discovered upon inquiry. *Ib.*

The plaintiffs appointed by parol W. F. M. as their agent to purchase land. W. F. M. entered into a contract in his own name, and then assigned the benefit of the contract to J. T. M. for valuable consideration. In an action by the plaintiffs against W. F. M. and J. T. M., to establish the agency:—Held, that the plea of purchase for value without notice, raised by J. T. M., was of no avail, inasmuch as the prior equitable title vested in the plaintiffs by the force of the contract. *Cave v. Mackenzie*, 46 L. J., Ch. 564; 37 L. T. 218.

**Protection of Court when Estate equitable.**—The court will protect a purchaser for valuable consideration without notice, even though his estate may be merely equitable. *Hunter v. Walters*, 11 L. R., Eq. 292; 24 L. T. 276. Affirmed, 7 L. R., Ch. 75; 41 L. J., Ch. 175; 25 L. T. 765; 20 W. R. 418.

**Benefit of Legal Estate obtained—Administration taken out.**—A., who was entitled to a sum of money secured by a trust term in reversion after a life estate, went to Australia, and remained there many years; during which time B., representing him to be dead, obtained administration to his estate and effects, and a suit having been instituted in relation to the fund secured by the trust term, it was found by the report, and confirmed by the final decree, that he was dead. B. afterwards sold the charge to a purchaser for value, who took an assignment of the term from the trustee to a trustee for himself; and A. having come back on the death of the tenant for life, and filed a bill to set aside the sale of the charge:—Held, that, although the administration taken out by B. gave him no title to assign the charge, yet that the court would not interfere to take away from a purchaser for value without notice the benefit of the legal estate which he had obtained by the assignment of the term. *Monckton v. Braddell*, 6 Ir. R., Eq. 352.

**Liability to make good Loss which Vendor caused, though with Notice.**—F. contracted to sell to P. leasehold property. P. having paid to F. part of the purchase-money, deposited with a bank the contract in order to secure a debt due by him to the bank, thereby creating an equitable charge on his interest under the contract, and F. received and accepted a formal notice of this charge. Subsequently F. assigned the legal estate in the premises to P. in such a manner as to enable P. to defeat the bank's charge, which he did by assigning the premises to a purchaser without notice:—Held, that F. was not liable to make good the loss occasioned to the bank by such his assignment. *Shaw v. Foster*, 5 L. R., H. L. 321; 42 L. J., Ch. 49; 27 L. T. 281; 20 W. R. 907.

**Purchaser bound to Inquire into Title of Co-Tenants.**—C. and B., tenants in common in fee, in equal shares, of a messuage and premises, entered into partnership, and it was agreed by the articles that this property should be partnership assets; and it became the place where the business of the firm was carried on. After this B. made a legal mortgage in fee of one moiety to secure his private debt to a person who knew

that the property was the place of business of the firm. Some years afterwards B. absconded, and C. was obliged to pay the debts of the firm, all of which had been contracted since the mortgage, and a large balance thus became due to him:—Held, that as the mortgagee, when he took his security, knew that the firm was in possession of the property, he had constructive notice of the title of the partnership, and that his claim must be postponed to that of C.; and that the circumstance of the debts paid by C. having been incurred since the mortgage did not affect the case. *Cavander v. Bulteel*, 9 L. R., Ch. 79; 43 L. J., Ch. 370; 29 L. T. 710; 22 W. R. 177. Reversing 28 L. T. 620; 21 W. R. 647.

**Sufficiency of Inquiry.**—W., after completing a contract to buy premises, told M. that he had done so. M. was afterwards informed by the vendor that the treaty with W. was off. M. did not make any further inquiry, and bought and took an assignment of the premises himself:—Held, that he must be held to have had notice of W.'s contract. *Waldron v. Jacob*, 5 Ir. R., Eq. 131.

**Buying under an Engagement not to call for Lessor's Title—Effect of.**—An assignee of a lease cannot set up the defence of purchase for valuable consideration without notice, when he buys under an engagement not to call for the lessor's title. In such a case he must have imputed to him the knowledge which on prudent inquiry he would have obtained. *Robson v. Flight*, 4 De G., J. & S. 608.

**Condition of Premises—Effect of—Though Deeds Silent as to.**—A deed of conveyance to a purchaser of lands held under a lease purported to grant the whole of the demised premises without exception or qualification, and the covenants for title corresponded with the granting part; the vendor had previously assigned a portion of the premises to a railway company by a deed which had not been disclosed to the purchaser, but the works constructed by the company upon that part of the premises were of such a character as to be apparent to any one approaching them, and the purchaser was aware of them before he purchased:—Held, that the condition of the premises being known to both parties at the time of the contract, they should be taken to have contracted as to them in that condition, and that the deed of conveyance should be rectified so as to carry out the real contract between the parties. *Young v. Halahan*, 9 Ir. R., Eq. 70.

**Contained in Conditions of Sale—Unknown to Purchaser by Private Contract.**—Part of an estate consisted of three farms in Hampshire, and in that county valuations between outgoing and incoming tenants for hay, straw, and manure are made at fodder value, which is lower than what is called market value. The three tenants of the farms held under verbal agreements, from year to year, according to the custom of Hampshire. The defendants were devisees of the estate in trust for sale, and in contemplation of a sale, gave notice to the tenants to quit at Michaelmas, 1869. The tenants alleged that they had been promised leases by the deviser, and although there was nothing to shew that such promises were binding in law or equity,

the trustees, thinking the claim binding in honour and conscience, entered into agreements with the tenants, by which, in consideration of their giving up possession of their farms according to the notices, the trustees promised to remit the half-year's rent due at Michaelmas, 1868, to pay 100*l.* to the tenant, and to pay for hay, &c., at the termination of the tenancy, at market value. In June, 1868, the estate was put up for sale by auction. In the particulars and conditions of sale the three farms were described as in the occupation of the tenants respectively till Michaelmas, 1869, at certain rents, and certain incumbrances, subject to which the sale was made, were specified, viz., land tax and tithe rent-charge; but no express mention was made of the agreements with the tenants. The conditions stipulated that the property should be taken to be correctly described as to quantity and otherwise, and that if any error, misstatement, or omission should be discovered, the same should not annul the sale, nor should any compensation be allowed, and that the rent or possession should be received or retained, and the outgoing discharged by the vendors up to the 29th of September, and from that day by the purchaser. The property was bought in at the sale by auction, and afterwards sold by private contract on the 18th of July, 1868, to the plaintiff. The contract described the property as in the foregoing particulars, and as being purchased subject to the foregoing conditions. At the time of the purchase the plaintiff had no knowledge of the above-mentioned agreements with the tenants. Upon his becoming aware of and objecting in respect of them, it was agreed that he should complete without prejudice to his claim to be indemnified in respect of the agreements to pay market value for the hay, &c. The plaintiff afterwards paid the tenants the amount of the valuations of hay, &c., at market value, and sought to recover the difference between that and fodder value from the defendants:—Held, that the agreements with the tenants to pay market value were collateral agreements binding only on the trustees personally, and did not amount to fresh demises; and that by the arrangement between the parties, the plaintiff, having paid the tenants' claims, could recover the difference between market and fodder value from the defendants as money paid for their use. *Phillips v. Miller*, 10 L. R., C. P. 420; 44 L. J., C. P. 265; 32 L. T. 638; 23 W. R. 834—Ex. Ch. Reversing 9 L. R., C. P. 196; 43 L. J., C. P. 74; 30 L. T. 61; 22 W. R. 485.

**Notice as to subsisting Tenancy of Part of Lands.**—Notice to a purchaser of the occupancy of a portion of the lands by a tenant fixes him with notice of all the rights of the tenant, not only as between the purchaser and the tenant, but also as between the purchaser and the vendor. *Carroll v. Keays*, *Keays v. Carroll*, 22 W. R. 243. See preceding case.

The conditions of sale of a public-house stated that it was in the occupation of a tenant. A brewer, intending to use the public-house for the sale of his beer, agreed to buy it. He afterwards learnt that it was under lease to another brewer for a term of which eight years were unexpired:—Held, that the purchaser was not bound to ascertain from the tenant the terms of his tenancy; and that in such a case the vendor could not enforce specific performance.

*Caballero v. Henty*, 9 L. R., Ch. 447; 43 L. J., Ch. 635; 30 L. T. 314; 22 W. R. 446.

**Court takes nothing away which Purchaser has honestly Acquired.**—When purchasers were purchasers only of an equity of redemption, and where they could not avail themselves of the legal estate, the re-conveyance of which had been procured by fraud:—Held, that the re-conveyance must be cancelled, and an account taken of what was due on the security, and a decree that the amount found due should be paid, and that upon default of payment and on the purchaser failing to pay such amount, there must be a foreclosure instead of a sale. *Heath v. Crealock*, 10 L. R., Ch. 22; 44 L. J., Ch. 157; 31 L. T. 650; 23 W. R. 95.

Held, also, that the purchasers could not be ordered to deliver up the title deeds in their possession, the rule being that from a purchaser for value without notice the court takes nothing away which he has honestly acquired. *Id.*

**Injunction granted though Purchaser had no Notice of Right actually existing.**—Real estate, all belonging to the same owner, was sold by auction under the order of the Court of Chancery, in lots. Lot 9 was sold as building land to S., with right of way over lot 16. At the time of the sale a right of footway only existed. But by the conveyance, which was duly executed, a right of way for carts and carriages was granted. S. conveyed lot 9 with the right which had been conveyed to him, to C. Lot 16 was sold to T., who had no notice that a larger easement than the original one had been conveyed to the purchaser of lot 9. C. employed a builder to carry materials with carts over lot 16, but T., the owner of the latter lot, interfered. C. accordingly filed a bill for an injunction, and T. answered and filed a cross bill for a declaration that C. was entitled to a footway only. C. had not completed his purchase. Conflicting evidence was given as to inquiries and conversations at the sale, and it appeared that C. was present during the whole of the sale, and noted down the biddings; in consequence of which T. attempted to fix him with notice that lot 16 was subject only to the more limited right:—Held, that C. being in possession of the legal estate, and having purchased the land as building land, was entitled to an injunction against T., who was only an equitable owner, although T. purchased subject to the limited right only, and had no notice of the larger right actually conveyed. *Curtis v. Thomas*, *Thomas v. Curtis*, 33 L. T. 664.

**Inadequacy of Price—Sale by Trustee.**—S., in 1810, bought a messuage in fee for 462*l.* The price paid by C. to the trustees of his will was only 73*l.* 4*s.*, and the contract price between C. and the plaintiff in 1859 was 350*l.*:—Held, that the inadequacy of price at which the trustees sold to C. constituted a breach of trust, and that the plaintiff having notice was affected thereby and was entitled on that ground to refuse to complete the contract. *Stevens v. Austen*, 3 El. & El. 685; 30 L. J., Q. B. 212; 7 Jur., N. S. 873; 3 L. T. 810.

**Sale by Sheriff—Notice affecting Action to recover Purchase-Money.**—A lease for three lives or thirty-one years contained a clause of

forfeiture, if any writ of execution should issue, by virtue of which it should be liable to be taken in execution or sold; under a writ of fieri facias issued against the lessee, the sheriff sold and conveyed his interest under the lease, "if any," to the plaintiff, who, before he bid at the auction, knew it was a freehold lease, and was aware of the clause of forfeiture; the purchaser having got possession and having been evicted:—Held, that he could not afterwards recover the purchase-money in an action against the sheriff for money had and received. *Griffin v. Caddell*, 9 Ir. R., C. L. 488.

**Abatement not Allowed on Purchase with Notice.**—A purchaser buying with notice of tenants in possession is bound to inquire into the nature of their interest, and is not entitled to an abatement of the purchase-money because their interest proves to be larger than he supposed when he entered into the contract. *James v. Lichfield*, 9 L. R., Eq. 51; 39 L. J., Ch. 248; 21 L. T. 521; 18 W. R. 158.

### III. ENFORCEMENT, DISCHARGE AND RESCISSION.

#### I. SPECIFIC PERFORMANCE.

##### a. Mistake.

**Effect of.**—Property was put up for sale under the description of "All that inn with the brewhouse, outbuildings, and premises known as The Ship, together with the saddler's shop and premises adjoining thereto, situate at N., Nos. 454 and 455 on the tithe map, and containing by admeasurement twenty perches more or less." In the sale-room were plans of the property, which consisted of the closes numbered 454 and 455 on the tithe map. At the back of the property were two pieces of garden ground containing together about twenty perches, not belonging to the vendors, one of which had for many years been occupied with the inn and the other with the saddler's shop, and which were but slightly fenced off from the premises with which they were occupied. The defendant, who was acquainted with the property, and knew that the gardens were occupied together with the inn and saddler's shop, did not look at the plans, and bought in the belief that he was buying the whole of the property in the occupation of the tenants:—Held, that the purchaser could not resist specific performance on the ground of mistake. *Tamplin v. James*, 15 Ch. D. 215; 43 L. T. 520—C. A.

**Compensation after Conveyance.**—Where, in an agreement for the sale of land, the conditions provided that if any error or misstatement should be found it should not annul the sale, but that compensation should be made in respect thereof, and an error in the quantity of the land was discovered after the conveyance had been executed:—Held, that the purchaser was entitled to compensation. *Turner and Skelton, In re*, 13 Ch. D. 130; 49 L. J., Ch. 114; 41 L. T. 668; 28 W. R. 312. *But see next case.*

*Manson v. Thacker* (7 Ch. D. 620), not followed. *Id.*

**Mutual Mistake—Completion of Contract—"Caveat Emptor."**—Plaintiff sold by auction a

term of fifty years in a public-house at a rent of 105*l.*, and subject to a covenant against Sunday trading. It was stated at the sale that the freeholder had offered to release the covenant on having 25*l.* additional rent. Defendant was the purchaser, and after the sale received an abstract which shewed that the vendor was an under-lessee. After this the plaintiff procured from the freeholder a release of the covenant, and the defendant accepted a lease at a rent of 130*l.* and paid the purchase-money partly by an order on his brewers. On the day after completion he became aware that the release from the freeholder was not effectual without a release from the original lessee, and stopped payment of the order on the brewers until this should be obtained. The required release could not be obtained, and the defendant claimed to retain his bargain with compensation:—Held, that compensation could not be given for an error discovered after completion. *Allen v. Richardson*, 13 Ch. D. 524; 49 L. J., Ch. 137; 41 L. T. 614; 28 W. R. 313.

*Turner and Skelton, In re (supra)*, dissented from.

Held, also, that plaintiff was entitled to specific performance of the original contract at the rent of 105*l.*, and without a release of the covenant. *Id.*

A purchaser cannot, in the absence of fraud, obtain compensation after conveyance for a misrepresentation, even though such misrepresentation related to the subject-matter of the conveyance. *Manson v. Thacker*, 7 Ch. D. 620; 47 L. J., Ch. 312; 38 L. T. 209; 26 W. R. 604. See also cases *ante*, col. 318.

**Material Error in Rental.**—The contract for sale of an estate provided, *inter alia*, that any material error in the rental furnished to the purchaser, and referred to in the agreement, should not annul the sale, but that compensation should be made in respect thereof. The rental so furnished, and on the faith of which the purchaser entered into the contract, represented in substance that by a fee-farm grant of part of the estate the timber thereon (which was of the value of 800*l.* or thereabouts) was reserved to the vendor. The value of the timber formed a material element in the purchaser's calculation of the price. The timber, though reserved in the original lease in perpetuity, which had been converted into the fee-farm grant, had been afterwards granted by a subsequent owner of the estate to the lessee, and was not reserved by the fee-farm grant, and the vendor had, consequently, no title to the timber. In the abstract of title delivered to the purchaser the conveyance of the timber was set out, and the material portions of the fee-farm grant were correctly abstracted, and copies of the deeds were furnished along with the abstract; but the attention of the purchaser not being specially called to the error in the rental, the existence of the error escaped the notice of the solicitor and counsel for the purchaser, and was not in fact known to the purchaser or his solicitor until after the purchase was completed, the purchase-money paid, the conveyance executed, and possession taken by the purchaser:—Held, that the purchaser was entitled to compensation for the value of the timber. *Phelps v. White*, 7 L. R., Ir. 160—C. A.

Per Palles, C. B.:—The purchaser was so en-

titled to compensation—1st, on the ground of the antecedent misrepresentation, independently of the clause in the contract for sale providing for the allowing of compensation; 2ndly, the statement in the rental relating to the timber having been made a substantive part of the contract, on the ground of the collateral contract or warranty that the timber was so reserved. It is not necessary that the plaintiff should frame such an action either as one for damages for breach of contract or for fraudulent misrepresentation; but it is sufficient to set out in the statement of claim facts which entitle him to relief, and to pray for any relief which the facts may warrant. *Manson v. Thacker* (7 Ch. D. 620), and *Allen v. Richardson* (13 Ch. D. 524), considered, and *Bos v. Helsham* (2 L. R., Ex. 72), and *Turner and Skelton, In re* (13 Ch. D. 130), approved of. *Id.*

Certain properties were put up for sale by public auction, subject to the following condition: "If any mistake be made in the description of any of the properties, or if any error shall appear in the particulars of the sale, such mistake or error shall not annul the sale of the lot to which such mistake or error may relate, but in such a case reasonable compensation or equivalent shall be given or taken as the case may require either way, such compensation or equivalent to be settled by two referees, one to be appointed by either party, or an umpire to be named by the referees before they enter upon the reference, whose decision shall be final." A purchaser of a house, after the execution of the conveyance, discovered an error in the rental as stated in the particulars, and accordingly claimed compensation:—Held, first, that the condition was not limited to errors discovered before the conveyance was executed, and that he was entitled to compensation. *Bos v. Helsham*, 2 L. R., Ex. 72; 36 L. J., Ex. 20; 15 L. T., 481; 15 W. R. 259; 4 H. & C. 642.

Held, secondly, that the settlement of the amount of compensation by the referees was not an arbitration within the C. L. P. Act of 1854, ss. 12, 13. *Id.*

**Mistake by Purchaser's own Fault.**—Vendors in September issued particulars of sale, headed "Particulars and conditions of sale, first edition." The document contained no conditions, and stated that the property would be sold on October 18th. Lot 8 was therein described as a corner public-house and cottages, without mention of any mortgage. Shortly before the time fixed for the sale the vendors found that a mortgage for 800*l.* upon lot 8 could not be paid off for some years, and thereupon issued a second edition of particulars which postponed the sale till the 16th November, and stated that lot 8 would be sold subject to the mortgage for 800*l.* The sale took place on the 16th November; the defendant, who had the day before received a copy of the first edition of the particulars from a friend of his own, attended with that copy in his hand, and bought lot 8. The contract was signed upon a copy of the second edition, from which the auctioneer read the particulars of lot 8. It was also proved that he stated, in answer to special questions, in the defendant's hearing, that lot 8 would be sold subject to the mortgage. The defendant refused to complete his contract, on the ground that he had supposed the lot to be free from incumbrances:—Held, that, if he

had made any mistake, it was owing to his own gross negligence, and the vendor was entitled to specific performance. *Goddard v. Jeffreys*, 51 L. J., Ch. 57; 45 L. T. 674; 30 W. R. 269.

Both editions of the particulars stated the rents of lot 8 at a sum not then actually received, but which would, as notice had been given to the tenants, be payable upon the completion of repairs then contracted to be finished before the day fixed for completion. The particulars described the public-house as let to a responsible tenant for a term of which seventeen years were unexpired. It appeared that only fifteen years of the term were unexpired, and it was determinable in 1881 or 1888, at the option of the tenant:—Held, that neither of these statements was such misrepresentation as to entitle the purchaser to resist specific performance of his contract. *Id.*

**Mistake of Vendor.]**—Where a vendor instructed an auctioneer to sell certain premises, and where according to the evidence, by mistake on the part of the vendor, such instructions were wide enough to take in certain premises to which the vendor had no title, and a person who heard the particulars read at the auction became the purchaser, in the belief that he would obtain the whole of the premises, and brought an action for specific performance or damages:—Held, that mistake in such circumstances was no defence to the action. *Dyas v. Stafford*, 7 L. R., Ir. 590. See *S. C. in C. A.*, 9 L. R., Ir. 520.

**Mistake as to Parties selling Land.]**—Where personal considerations enter into a contract, error as to the person with whom the contract is made annuls the contract; not so where the person sought to be bound would have been equally willing to make the same contract with any other person. *Smith v. Wheatcroft*, 9 Ch. D. 223; 47 L. J., Ch. 745; 39 L. T. 103; 27 W. R. 42.

**Condition that Purchaser shall Assume certain State of Things—Failure of Title—Compensation.]**—In an agreement for the sale of seventeen undivided shares of a coal mine there was an article stating two conveyances by which six undivided shares of the land, beneath which the coal lay, had been conveyed to the vendors' predecessor in title, but stating that there was no express mention in the conveyances of the minerals under the land, and requiring that the purchasers should assume that six undivided shares of the minerals passed by the conveyances of the land, and thereby became absolutely vested in the vendors' predecessor in title. In the abstract of the vendors' title sent to the purchasers, mention was made of a certain indenture, but nothing further was said about it. The purchasers' solicitor inquired of the vendors' solicitor what this deed was, and was told that it could not be found, and no abstract of it or information about it could be furnished, but that it was believed not to affect the property sold. The vendors' solicitor also said, as he really believed to be the case, that though the title to the six undivided shares could not be strictly proved, yet the vendors had a good holding title to them. After these transactions the purchasers entered into the agreement, and paid the deposit money. Subsequently, the deed which was supposed to

have been lost was found, when it was discovered that by virtue of it the six undivided shares of the mine belonged to some person quite different from the vendors, and that neither they, nor their predecessor in title, had ever had any title to those shares. The purchasers refused to proceed with the agreement, whereupon the vendors brought this action for specific performance of it. The purchasers contended that without these six shares the mines would be useless to them, and claimed to be entitled to be released from the agreement:—Held, that, as there had been no fraud in the matter, but the vendors had acted under a bona fide mistake, and the purchasers had had the fact that there was a doubt as to the title brought to their notice before entering into the agreement, and had thought fit to run the risk of taking the property without having the matter cleared up, specific performance of the agreement ought to be decreed, but that a deduction must be made from the purchase-money as compensation to the purchasers for the loss of the six shares. *English v. Murray*, 49 L. T. 35; 32 W. R. 84.

**Mistake as to Powers of Building.]**—A. entered into a contract to purchase from B. a house with a forecourt, situate in Queen's-road, Bayswater, in the belief that he could build upon the whole of the property. He afterwards ascertained that no building could be erected, or alteration made in any existing building, without the consent of the Metropolitan Board of Works, and that the board had given a consent to the erection of a building on the forecourt, which was not to be of a greater height than ten feet, and he thereupon repudiated the contract, the premises being useless for the purpose for which he required them:—Held, that the court would not enforce specific performance, the contract having been entered into by A. in the belief that he could build over the whole property without restriction as to height. *Bray v. Briggs*, 26 L. T. 817; 20 W. R. 962.

#### b. Other Circumstances.

**Specific Performance when decreed though Difference existing as to Valuation of Chattels.]**—In a contract for the sale and purchase of a mansion house and estate for 24,000*l.*, it was agreed that part of the furniture and chattels should be taken at a valuation. Specific performance decreed notwithstanding the parties were unable to agree as to the valuation of the chattels. *Richardson v. Smith*, 5 L. R., Ch. 648; 39 L. J., Ch. 877; 19 W. R. 81.

**Price to be fixed by Valuers—Inadequacy of Price.]**—A. entered into a contract with B. for the sale of property to him at a price to be fixed by two valuers, named in the contract, who afterwards valued the property at an inadequate price:—Held, nevertheless, that B. was entitled to a decree for specific performance, there being no proof of fraud or collusion on the part of the valuers. *Weekes v. Gallard*, 21 L. T. 655; 18 W. R. 331.

**Commencement of Occupation—Negotiations continued after Date named.]**—W. contracted to sell a dwelling-house to H.; possession to be given on the 26th of February; H. wanted the house for immediate occupation. On February 26th

the vendor had not made a good title, and the purchaser did not enter into possession. He continued, however, to negotiate for some time longer, when he gave a peremptory notice of immediate abandonment of the contract:—Held, that there must be a decree for specific performance of the contract. *Webb v. Hughes*, 10 L. R., Eq. 281; 39 L. J., Ch. 606; 18 W. R. 749.

**How affected by Reservation.]**—A purchaser and his assignees sued for specific performance of a contract to sell land. The vendor pleaded fraud, and that the contract, if any, reserved mines. The plaintiff's subsequent pleadings affirmed there was no reservation in the contract. The contract signed by the purchaser contained a reservation; the receipt for deposit signed by the vendor stated the other terms, and was silent as to the reservation. Specific performance of the agreement with such reservation was decreed. *Smith v. Wheatcroft*, 9 Ch. D. 223; 47 L. J., Ch. 745; 39 L. T. 103; 27 W. R. 42.

**Rescission on Failure to carry out.]**—When a purchaser by decree in a suit for specific performance was decreed to pay the purchase-money within a specified time, and failed to do so, the court, on the application of the vendor, ordered the contract to be rescinded, and stayed all proceedings in the suit with costs, to be paid by the purchaser, and refused to make an order for the return of the deposit to him. *Dunn v. Vere*, 23 L. T. 432; 19 W. R. 151.

When a purchaser, after a decree for specific performance against him, made default in payment of the purchase-money:—Held, that the vendor was entitled to rescind the contract. *Watson v. Cox*, 27 L. T. 814.

**Misdescription of Boundary.]**—On a sale of a small residential property the plan exhibited shewed the western side as bounded by a strip of ground covered with a mass of shrubs or trees. An intending purchaser went with the plan in his hand, inspected the property, found on the western side a belt of shrubs bounded on the west by an iron fence, and including three magnificent trees. He then bid for the property, believing that he was buying everything up to fence. He afterwards discovered that the three trees and the iron fence stood on the globe land which adjoined this property, the real boundary being denoted by stumps, which were so shrouded by the shrubs as not easily to be seen. The plan represented in a conspicuous way all the detached trees standing on the property, none of which were nearly so large as the trees in question, but did not shew these trees. The existence of these was a material element in the value of the property as a residence:—Held, that the purchaser inspecting the property with the plan in his hand would naturally conclude the iron fence to be the boundary; that there was nothing to put him on inquiry whether it was not; that he had been misled by the fault of the vendors; and that specific performance could not be decreed against him. *Denny v. Hancock*, 6 L. R., Ch. 1; 23 L. T. 686; 19 W. R. 54.

Held, also, that whether the purchaser's motive for resisting specific performance was that he objected to having the property without the trees, or that for some other totally distinct reason he wished to escape from his bargain, was a question with which the court had no concern. *Id.*

#### **Misleading Particulars.—Purchase as Agent.]**

—A farm was put up for sale under the direction of the court by particulars accompanied by a plan, and was described as "a compact small farm containing 41A. 3R. 35P., divided as follows." Among the parcels was "490A, Bottlesey Green, containing 7A. 1R. 27P.," opposite to which, in the column shewing the amounts which made up the 41A. 3R. 35P., was entered 4A. 0R. 38P. The conditions provided that any error, misstatement, or omission in the particulars should not annul the sale, nor should any compensation be allowed except such (if any) as the judge in chambers should direct. G. bought the property in his own name, and was certified as purchaser. He in fact bought as agent for B., who was the owner of immediately adjoining property. On investigating the title it turned out that the vendors were only entitled to four undivided sevenths of 490A, which was a narrow close containing 7A. 1R. 27 P., having a long frontage to a highroad and at one end adjoined B.'s property. B. alleged that it was of great importance to the enjoyment of his property that he should have the whole of 490A., and G., by his directions, refused to complete. The vendors then entered into an arrangement with the owner of the other three-sevenths to give them up, receiving an equivalent out of another part of the farm having a frontage to another road:—Held, that, as B. had not been substituted as purchaser, G. must be treated as the real purchaser, and could not take any objection depending on the circumstances of B.'s property, and that, as the arrangement would give the purchaser all he contracted to buy, he must complete without compensation:—But held, on appeal, that G., having only purchased as agent for B., could take any objection which B. had been the nominal as well as the real purchaser, could have taken; that, for the purpose of resisting completion, the purchaser was entitled to say that he bought the farm as shewn on the plan; that, as the possession of 490A was important to the enjoyment of B.'s property, completion could not be compelled unless he could get the whole of it, and that he was not bound to accept the arrangement by which he would obtain the whole of it by giving up another part of the purchased property; and that he must therefore be discharged from his purchase. *Arnold, In re, Arnold v. Arnold*, 14 Ch. D. 270; 42 L. T. 705; 28 W. R. 635—C. A.

#### **Misrepresentation by Vendor's Agent.]**

—An agent, commissioned by a vendor to find a purchaser, has authority to describe the property, and to state any fact or circumstance which may affect the value, so as to bind the vendor; and if an agent so commissioned makes a false statement as to the description or value (though not instructed so to do), which the purchaser is led to believe, and upon which he relies, the vendor cannot recover in an action for specific performance. A surveyor was employed by the owner of a leasehold house to find a purchaser. He represented to the defendant that another person, H., was ready to buy the property for 700*l.*, and that if the defendant were to give 50*l.* more, he would make a clear profit of 7 per cent.; that H. had further offered to rent the property at 300*l.*, or the ground floor only at 200*l.* The defendant, relying on the above representations and others, which were unauthorized by the vendor, and untrue, contracted to purchase for

750l. ; but afterwards, finding out the falsehood, refused to complete. The vendor himself also made a misleading statement to the purchaser :—Held (independently of the statement made by the vendor himself), that the false statements made by the agent, being within his authority, were sufficient to vitiate the contract ; and specific performance refused. *Mullens v. Miller*, 22 Ch. D. 194 ; 52 L. J., Ch. 380 ; 48 L. T. 103 ; 31 W. R. 559.

**Sale of Agreement for Lease Voidable at Will of Third Party.]**—A vendor contracted to sell and a purchaser to purchase an agreement for a lease. The purchaser afterwards repudiated the contract. At the date of the agreement, and of the repudiation, the agreement to lease was voidable at the will of the third party, but the third party took no steps to avoid the agreement, but was willing to confirm it on certain conditions :—Held, that the purchaser was entitled to repudiate the contract. *Brewer v. Broadwood*, 22 Ch. D. 105 ; 52 L. J., Ch. 136 ; 47 L. T. 508 ; 31 W. R. 115.

**Misrepresentations as to previous Offers.]**—S. signed a written contract with R. to purchase a brick-field. In the negotiations S. asked R. whether he had ever put the property into the hands of an agent to sell for less money than he was then asking, saying that he fancied, as the fact was, that it must be the same as had been offered to him for less. R. falsely answered, "No" :—Held, that this was such a material misrepresentation as to prevent the court enforcing the contract in an action brought by R. *Roots v. Snelling*, 48 L. T. 216.

**Trustees unable to Transfer a Valid Licence.]**—The owner and licensee of an inn died on the 13th of July, 1870, having devised the inn to trustees for sale. His licence expired on the 10th of October in the same year. On the 26th of August, 1870, at the annual general licensing meeting, the trustees procured a new licence in the testator's name. On the 12th of October they contracted to sell the inn. On November the 16th the meeting took place to effect the change, but the purchaser then objected that the trustees could not transfer the licence to him, and refused to complete :—Held, that the licence taken out in the name of a dead man was invalid, and, therefore, that the trustees being unable on the 16th of November to transfer a valid licence under which the business could be lawfully carried on, could not enforce the contract against the purchaser. *Cowles v. Gale*, 7 L. R., Ch. 12 ; 41 L. J., Ch. 14 ; 25 L. T. 524 ; 20 W. R. 70.

**Uncertain and Vague in Terms.]**—By a contract T. Watts agreed to sell an estate to a purchaser with the following reservation : T. Watts "reserves the necessary land for making a railway through the estate to Prince Town :"—Held, on suit for specific performance by the purchaser, that the contract was too uncertain for the court to make a decree for specific performance of it. The vendor might have raised the defence by demurrer, which he had not done. But held, that, notwithstanding, he was entitled to full costs, and the bill was dismissed with costs. *Pearce v. Watts*, 20 L. R., Eq. 492 ; 44 L. J., Ch. 492 ; 23 W. R. 771.

A tenant in common of leaseholds in a negotiation for their purchase offered by letter to send an abstract of title, but the terms of the contract were too uncertain to bind his co-tenant ; neither such offer, nor his refusal to disclose the lessor's title, will entitle the purchaser to specific performance. *Mason v. Tyler*, 27 L. T. 371.

In a suit for specific performance of an agreement, vague in its language, a court of equity, having regard to the terms of such agreement, will consider the surrounding circumstances, and conduct of the parties in dealing with the property comprised in it, in the interval between the making of the agreement and the commencement of the suit for its enforcement. *Oxford v. Provan*, 2 L. R., P. C. 135 ; 5 Moore, P. C. C., N. S. 150.

P. & Co. entered into an agreement with O. & Co. for the transfer to them of the unexpired term of a lease held by P. & Co. of land and houses at Shanghai, and to build or finish certain houses thereon ; to proceed with the building at once ; to consult O. & Co.'s wishes in building the houses then in progress, and in building other houses not then commenced. O. & Co., on their part, agreed to take the term so to be transferred, and to pay a certain rent divided into three portions, the liability for each portion to begin from the time when the house to which that portion related was finished by P. & Co., and possession delivered over by them to O. & Co. Both parties further agreed that a proper contract should be drawn for their mutual execution by a solicitor named by them. No such contract, however, was executed. Possession was given, and the buildings altered by P. & Co. at O. & Co.'s instance :—Held, decreeing specific performance of such agreement, that the terms of the agreement expressed with sufficient clearness the intention of the parties to bind them, from the time it was made, to do the several acts stipulated for each to perform, and that the stipulation that a proper contract should be made by a legal adviser was so isolated from the other stipulations in point of sequence that it might be performed either directly after the signing of the memorandum of agreement, or when possession was given of the first house specified, or at any subsequent time, either before or after the completion of all or any of the houses to be erected. *Id.*

Held, also, that that part of the agreement which provided that the wishes of O. & Co. should be consulted in erecting the buildings, was not so vague or indefinite as to render the contract impossible to be enforced, having regard to the surrounding circumstances, and to the fact of a part performance by O. & Co. in respect of the buildings and alterations of the houses. *Id.*

**Description of Subject-Matter.]**—One of three trustees, acting as if absolute owner, entered into a contract to sell the entirety of a freehold property (in one-fifth part of which he had a beneficial interest), describing the property as "The Jolly Sailor, offices," &c. The other trustees, afterwards, refused to concur in the sale. The vendee having brought an action for specific performance of the contract :—Held, that the subject-matter of the contract was sufficiently defined, as the vagueness (if any) about the meaning of the words "Jolly Sailor, offices," &c., might be removed by an inquiry at

chambers. *Naylor v. Goodall*, 47 L. J., Ch. 63; 37 L. T. 422; 26 W. R. 162.

**Effect of Non-Disclosure.**—The owners of a colliery entered into a contract with an adjoining landowner for the purchase of his estate, without disclosing the fact, of which he was ignorant, that they had, without authority, gotten a considerable quantity of coal from under it:—Held, that the court would not enforce the contract at the suit of the purchasers, though the sale was not shewn to be at an undervalue. *Phillips v. Hounfray*, 6 L. R., Ch. 770.

**Representations as to Value by Vendee, acted on by Vendor.**—When a vendor, ignorant of the real value of an estate, sells it at a loss, on the faith of what the purchaser represents to him that it is worth, the sale will be set aside, and that irrespective of any fiduciary relation, fraud, or other concealment in the transaction between the parties. *Haygarth v. Wearing*, 12 L. R., Eq. 320; 40 L. J., Ch. 577; 24 L. T. 825; 20 W. R. 11.

**Mere Reticence.**—There being no fiduciary relation between a vendor and a purchaser, the purchaser is not bound to disclose any fact exclusively within his knowledge which might be expected to influence the price of the subject to be sold. Simple reticence does not amount to legal fraud, but a word or a gesture intended to induce the vendor to believe in the existence of a non-existing fact, which might influence the price of the subject to be sold, would be a sufficient ground for a court of equity to refuse a decree of specific performance, and so, a fortiori, would any contrivance on the part of the purchaser, better informed than the vendor as to value, to hurry the vendor into an agreement without giving him an opportunity of being fully informed on that subject, or taking advice as to the terms of the bargain. *Walters v. Morgan*, 3 De G., F. & J. 718; 4 L. T. 758.

**Effect of Prior Settlement on.**—In 1857 an infant engaged to be married wrote to his intended wife, promising that on coming of age he would give her seven specified houses. The marriage took place in 1859, after he came of age. In 1872 he executed a deed, not referring to any previous agreement, by which he conveyed the seven and two other houses to trustees upon trust for his wife for life, for her separate use, and after her death upon trust for himself for life, and after the death of the survivor, upon such trusts as the wife should by deed or will appoint, and in default of appointment, in trust for her in fee. He subsequently agreed to sell three of the houses, and the purchaser sued for specific performance:—Held, that the purchaser was entitled to specific performance, for that as the settlement did not refer to any previous agreement, dealt with other property than that mentioned in the letter of 1857, and settled the property in a different way, there was no ratification in writing of the promise contained in that letter, and the settlement therefore was voluntary, and void as against a purchaser for value. *Trowell v. Shenton*, 8 Ch. D. 318; 47 L. J., Ch. 738; 38 L. T. 369; 26 W. R. 837—C. A.

In a suit for specific performance against a

vendor and those claiming under a voluntary settlement made by him previously to the contract for sale, the court refused to declare that the settlement was void under 27 Eliz. c. 4. *Fletcher v. Kettelman*, 40 L. J., Ch. 624.

On a bill by a vendor for specific performance the purchaser set up a voluntary settlement as an objection to the title, but said he was willing to complete the purchase on having a good title. He had been let into possession as purchaser and paid part of his purchase-money, and had paid off a mortgage and got a conveyance of the legal estate and possession of the title-deeds:—Held, that, notwithstanding the voluntary settlement, the vendor was entitled to a decree for completing the purchase. *Peter v. Nicolls*, 11 L. R., Eq. 391; 24 L. T. 381; 19 W. R. 618.

**When decreed with Abatement.**—Vendors agreed to sell the entirety of certain freehold property for 6,000*l.*, and to make out a good marketable title. The purchaser, in consequence of delays on the part of the vendors, filed a bill for specific performance of the agreement. It was subsequently discovered that the vendors were entitled to only a moiety of the property:—Held, that the purchaser was entitled to a decree for specific performance of the agreement by the vendors of their moiety, with an abatement of one-half of the purchase-money. *Hooper v. Smart, Bailey v. Piper*, 18 L. R., Eq. 683; 43 L. J., Ch. 704; 31 L. T. 86; 22 W. R. 943.

In suits as to the specific performance of a contract to purchase large colliery works, the purchasers alleged as a defence misrepresentation by the vendors as to the value. As to several allegations the purchasers were held to have failed, and specific performance was decreed, but with compensation to the purchasers in respect of an alleged misrepresentation as to the amount of stores consumed in the collieries, and a consequent excess in the statement of income. An inquiry was directed as to such compensation, and it was found that there was a large excess in the statement of income beyond its true amount:—Held, that the purchasers were entitled to a deduction from their purchase-money bearing the same proportion to the whole purchase-money as the excess bore to the income stated. *Powell v. Elliot*, 10 L. R., Ch. 424; 33 L. T. 110; 23 W. R. 777.

When two persons agreed to sell property, of whom one was entitled to a moiety subject to a mortgage for its full value, and the other had no interest:—Held, that a judgment for specific performance with abatement might be made against the former. *Horrocks v. Rigby*, 9 Ch. D. 180; 47 L. J., Ch. 800; 38 L. T. 782; 26 W. R. 714.

R. agreed to sell to W. lands in New South Wales free from incumbrances, and the greater part of the purchase-money was paid. On an investigation of the title it appeared that these lands were held, with other lands, under a crown grant, containing various reservations and conditions, with a proviso for re-entry on breach of condition. W. filed a bill for specific performance, with compensation on account of these reservations, offering to complete without compensation, if the court was of opinion that he was not entitled to it. An order was made on appeal, declaring him entitled to compensation, and directing a reference as to the amount. In

answer to this inquiry, it was found that the amount of compensation could not be ascertained. W. then filed a supplemental bill, asking that if the compensation could not be ascertained R. might be decreed to repay with interest the part of the purchase-money which he had paid, and that W. might be declared entitled to a lien on the land for it:—Held, that as W. was not bound to take the property without compensation, and as the compensation could not be ascertained, he was entitled to the return of his purchase-money, with the interest at 4l. per cent., and to a lien on the estate for the amount. *Westmacott v. Robins*, 4 De G., F. & J. 390.

A condition that any error in the particulars shall not vitiate the sale, but a compensation shall be made, only applies to cases where the circumstances afford a principle by which this compensation can be estimated. *Sherwood v. Robins*, M. & M. 194; 3 C. & P. 339.

Therefore, on the sale of a reversion, expectant on the death of A. without children, an error in the statement of A.'s age does not come within the condition, as it would if the reversion was simply expectant on A.'s death, because it affects the probability of the other contingency which is not a subject of calculation, and the purchaser is entitled to rescind the contract. *Id.*

When a husband and wife agreed to sell her estate in fee simple, the purchaser being aware that the estate belonged to the wife, and she afterwards refused to convey:—Held, that the purchaser could not compel the husband to convey his interest and accept an abated price. *Castle v. Wilkinson*, 5 L. R., Ch. 534; 39 L. J., Ch. 843; 18 W. R. 586.

A husband agreed to sell property which was settled as he and his wife should jointly appoint, and in default of appointment to the use of trustees during the life of the wife for her separate use, with remainder to the husband in fee. The purchase-money was invested in consols and paid to the trustees of the settlement. On the death of the husband before completion, the wife refused to convey her life interest:—Held, that the purchaser was entitled, by way of specific performance, to a conveyance of the property subject to the widow's life interest, with compensation in respect of such interest out of the husband's personal estate; and that he was entitled to a lien on the consols in the hands of the trustees for such compensation. *Barker v. Cox*, 4 Ch. D. 464; 46 L. J., Ch. 62; 35 L. T. 662; 25 W. R. 138.

The plaintiff tendered for a lease of a farm of 214 acres and 35 acres. The defendant accepted the offer, believing it to be for the 214 acres and 27 acres not comprised in the tender. Specific performance of a lease of the 214 acres was decreed with compensation for the loss of 27 acres. *McKenzie v. Hesbeth*, 7 Ch. D. 675; 47 L. J., Ch. 231; 38 L. T. 171; 26 W. R. 189. See *Arnold v. Arnold*, ante, col. 372.

— **Allowance in respect of Occupation of Premises.**—In July, 1867, L. sold to a railway company a house in which he was carrying on the business of a victualler, the terms being that the purchase-money was to be paid on the 25th of March, 1869, or at such earlier time as the company should choose, possession to be given on payment, they paying 5 per cent. interest in the meantime; and he was to be their tenant at

a given rent, the tenancy not to be determined before the 25th of March, 1869, unless the company, after three months' notice, paid the money sooner, but to be determinable on the 25th of March, 1869, by a week's notice. The interest and rent were paid up to the 25th of March, 1869. L. gave due notice to determine the tenancy on that day; but the company not having the purchase-money ready, he refused to give up possession, and in April, filed a bill for specific performance. On the 18th of November, 1869, a decree for specific performance, with a declaration that the title had been accepted, and an order for payment of the purchase-money, with interest from the 25th of March, 1869, was made; and an inquiry was added whether, having regard to the circumstances and conduct of the parties, the company was entitled to any and what allowance in respect of L.'s occupation of the premises after the 25th of March, 1869:—Held, that the company was not entitled to any allowance by way of occupation rent. *Leggott v. Metropolitan Railway Company*, 5 L. R., Ch. 716; 18 W. R. 1060.

— **As to Measurement.**—One of the conditions of sale provided that if the purchasers should make any objections to, or requisition as to the title, evidence, conveyance, or as to compensation or otherwise which the vendor should be unwilling to remove or comply with, the vendor should be at liberty to vacate the sale. Another condition was that the admeasurements were presumed to be correct, but that if any error was discovered therein no allowance should be made or required either way. Another provided that if any error of any kind should be made in the description of the premises, such error should not invalidate the sale, but that compensation should be settled by a referee named in the condition. On a bill for a specific performance by the purchaser with a deduction to be assessed by the referee for a deficiency in quantity of nearly one-half:—Held, that although the court would not have enforced against the purchaser the condition as to erroneous admeasurements where the error was so great, that condition was sufficient to exclude any right in the purchaser to a specific performance with a deduction, and the court in his suit for that relief decreed specific performance without deduction. *Cordingley v. Cheesborough*, 4 De G., F. & J. 379.

— **Mutual Obligations.**—By a memorandum A. agreed to sell to B. certain lands therein described, and all the mines, beds and veins of coal under the same, at a certain price; and B. agreed to purchase from A. all coal that he might from time to time require, at a fair market price:—Held, that these were concurrent acts, and that A. could not sue B. for not taking the coal, without averring performance or a readiness to perform his part of the agreement. *Bankart v. Bowers*, 1 L. R. C. P. 484.

— **Impossibility of Performance.**—A court of equity will relieve against a contract, become impossible to be performed. *Smith v. Morris*, 2 Bro. C. C. 311.

On the question of executing an agreement, hardship cannot be regarded, unless it amounts to a degree of inconvenience and absurdity, so great as to afford judicial proof that such could

not be the meaning of the parties. *Pribble v. Boghurst*, 1 Swans. 329.

—**Acquiring Power to Perform.**—It is an undeniable proposition, that when a party enters into a contract without having the power of performing it, and afterwards acquires the right to do so, he is then bound to perform it. *Carne v. Mitchell*, 15 L. J., Ch. 287.

### c. Practice.

**Reference as to Title.**—In suits for specific performance where the contract is not disputed, it is in almost every case the duty of the vendor to obtain an immediate reference for title so as to save unnecessary costs. *Phillipson v. Gibbon*, 6 L. R., Ch. 428; 40 L. J., Ch. 406; 24 L. T. 602; 19 W. R. 661.

A vendor refused to take an order for reference for title by consent, but brought the suit to a hearing, when he obtained the ordinary decree only, subject to the usual inquiry as to title. The defendant took certain specific objections to the title by his answer, which were overruled by the court; while the matter was in chambers, another and important defect, which did not appear on the abstract, was discovered by him on inspection of the property. This defect was only cured by the vendor shortly before the cause came on for further consideration:—Held, that although the plaintiff was entitled to a decree, no costs should, under the circumstances, be given to either party, except that the plaintiff should pay the costs of the original hearing occasioned by his refusal to take the reference for title by consent. *Id.*

Defendants, in a vendor's specific performance suit, cannot on motion before the hearing have a reference as to title without prejudice to any question in the cause, where they have, by their answer, set up other defences beyond want of title. *Reed v. Don Pedro North Del Rey Gold Mining Company*, 3 De G., J. & S. 593.

Where land is purchased for immediate occupation the court will not direct a general enquiry as to title, so as to give the vendor an opportunity of making good defects which existed in the title when possession should have been given. *Hyde v. Warden*, 3 Ex. D. 72; 47 L. J., Ex. 121; 37 L. T. 567—C. A.

**Reference to Chambers to ascertain Portion ceded.**—The defendant purchased an estate, having agreed with the plaintiff that, if he made the purchase, he would cede part to the plaintiff. There was some uncertainty in the memorandum of agreement as to the exact portion which was to be ceded to the plaintiff. In an action by him for specific performance of the agreement, the court directed a reference to chambers to ascertain what portion the plaintiff was entitled to, and decreed that the defendant should convey such portion to the plaintiff. *Chattock v. Muller*, 8 Ch. D. 177.

### Claim to rescind Agreement and for Damages.]

—After a decree for specific performance of an agreement against a purchaser who was unable to complete,—on a motion by the plaintiffs that the agreement might be rescinded, and all further proceedings in the action stayed except as to any application which might be made to the court to award and assess the damages which

the plaintiffs had sustained by the breach of the agreement:—Held, that the plaintiffs were only entitled to have the agreement rescinded, and could not at the same time claim damages for its breach. *Ilenty v. Schroder*, 12 Ch. D. 666; 48 L. J., Ch. 792; 27 W. R. 833.

**Refused where Pecuniary Compensation Arranged.**—Where a court of equity finds an agreement which has not been performed, but has been dealt with by the parties themselves on the footing of pecuniary compensation, it is difficult to say that the non-performance of the entirety of the agreement should not be dealt with in the same manner, and therefore the specific performance of an agreement so dealt with will be refused. *Paris Chocolate Company v. Crystal Palace Company*, 3 Sm. & G. 119; 1 Jur., N. S. 720.

**Delay in bringing Action.**—A vendor, under a power reserved to him by the contract, gave notice to the purchaser on the 7th April, 1869, that, as he could not comply with the requisitions made by the purchaser, he rescinded the sale. The purchaser filed a bill for specific performance on the 30th August, 1870:—Held, that the delay was fatal to his claim for relief. *Rich v. Gale*, 24 L. T. 745.

There is no distinction between laches on the part of a vendor and laches on the part of a purchaser as a bar to a suit for specific performance. *Id.*

In granting a decree for the specific performance of an agreement to purchase the plaintiff's lands, where the defendant has been guilty of delay, and other acts amounting to a partial waiver of his originally unrestricted right to investigate the vendor's title, the court will refuse an inquiry in the case of the items as to which there has been such acceptance, allowing it to proceed as to the rest. *Corless v. Sparling*, 8 Ir. R., Eq. 335.

M. became tenant to A. of leasehold property for ten years from December, 1861, "M. to have the option at any time during the term to purchase the premises for 3,500l., and upon payment to A. the term of ten years and the rent shall thereupon cease, and M. shall thereupon be entitled to an assignment." M. entered into possession, and afterwards A. made a mortgage to G. In July, 1867, M. gave written notice to A. and to G. that he elected to purchase. A draft assignment was prepared, which could not be settled, since neither A. nor G. would assent to the purchase-money being paid to the other of them. A correspondence took place, which ended in March, 1868. G. having given notice to M. to pay his rent to him, M. made to him various irregular payments, for most of which receipts were given, expressing them to be on account of rent, and this went on after the end of the term of ten years. In November, 1872, A. became bankrupt. On the 1st of May, 1873, the solicitor of his trustee called on M., and stated that the trustee was going to sell, and wished to give him the refusal. M. desired him to consider, and did not say that he had already agreed to purchase. On the next day his solicitor discussed the matter with the trustee's solicitor, but did not set up any claim as having purchased. On the 13th of May, however, he wrote to the trustee's solicitor insisting on M.'s right under the agreement of 1861 and the notice of July, 1867, and the trustee disputing this right M. filed a bill for specific

performance:—Held, that the option in the agreement of 1861 and the notice of July, 1867, made a binding contract, although the purchase-money was not paid within the term. *Mills v. Haywood*, 6 Ch. D. 196—C. A.

Held, that M.'s right to specific performance was lost by the delay from March, 1868, to May, 1873, which was not excused by his having been in possession; for that possession, in order to have that effect, must be a possession under the contract, and such that the vendor must know, or be taken to know, that the purchaser claims to be in possession under the contract; and in this case the plaintiff did not, from March, 1868, to May, 1873, claim possession under the contract, nor did it appear that the vendors recognized him, or were bound to recognize him, as claiming possession under it. *Id.*

Where a cestui que trust objected to a sale of lands made by a trustee without the requisite consents, and after the lapse of about fourteen months took steps to set it aside:—Held, that the purchaser not having been induced to change his position by the plaintiff's delay, the latter was entitled to have such sale set aside notwithstanding his delay. *Pepperell, In re, Pepperell v. Chamberlain*, 27 W. R. 410.

See also cases ante, col. 338.

**Parties—Auctioneer.**—Although it is the law that an auctioneer holding the deposit on a purchase may be made a defendant in an action for specific performance, yet, as a general rule, the proper practice is not to make him a defendant when the deposit is of small amount, unless he refuses to pay it into court when required; but where the deposit is of large amount, he may be properly made a defendant, unless he has paid it into court before action brought. *Egmont (Earl) v. Smith, Smith v. Egmont (Earl)*, 6 Ch. D. 469; 46 L. J., Ch. 356. And see SALE (*By Auction*).

**Sub-Purchaser—Sub-Contract.**—Vendors, to their bill against their purchaser for specific performance of, or for rescinding the agreement, made a sub-purchaser a defendant; and the sub-purchaser afterwards filed a bill against his vendor for specific performance of his agreement, and made the original vendors defendants. A demurrer by the original vendors to the sub-purchaser's bill was overruled, on the ground that they had made him a defendant to their bill. *Fenwick v. Bulman*, 9 L. R., Eq. 165; 21 L. T. 628.

**Not Maintainable by Agents.**—The owner of a colliery placed it in the hands of an agent to sell at a minimum price of 12,000*l.*, on the understanding that he should be entitled to the difference between 12,000*l.* and any greater sum which the colliery might fetch. The agent treated with R. & Co., who agreed (in the event which happened) to purchase the colliery for 12,000*l.*, and pay the agent 2,000*l.* for his expenses and commission in the matter. R. & Co. afterwards declined to purchase the colliery, and the agent filed a bill against them and the owner of the property for specific performance of the agreement:—Held, that the bill was not maintainable. *Glasbrook v. Richardson*, 23 W. R. 51.

**Pleadings.**—The former practice, which, in a suit for specific performance, required the autho-

rity of an agent to enter into a binding contract on behalf of his principal to be specially pleaded, still prevails. *Vale of Neath Colliery Company v. Furness*, 45 L. J., Ch. 276; 34 L. T. 231; 24 W. R. 631.

When, therefore, a plaintiff in his statement of claim alleged that the defendant "duly authorized J. to act as his agent in and about the purchase" of a colliery, that J. acting as such agent wrote a letter to B., "who was then duly authorized to act in the matter of the sale of the colliery as agent for the plaintiff," offering 6,000*l.* for the colliery, and that B. by the plaintiff's direction by letter accepted the offer, adding, "I will send you draft contract in due course":—Held, that there was no sufficient allegation that J. and B. were duly authorized to sign a binding contract on behalf of their principals. *Id.*

The words, "the property," in reference to a colliery, are not sufficient description of the colliery plant and stock on which to found an action for specific performance. *Id.*

In an action for specific performance of an agreement made by an agent, the statement of defence, after alleging unsoundness of mind of the principal, denied that any agreement had been entered into by a person lawfully authorized, and claimed the benefit of the Statute of Frauds:—Held, that the defendant had not put in issue the question of the authority of the agent, and was only entitled to adduce evidence with respect to the unsoundness of mind. *Byrd v. Nunn*, 7 Ch. D. 284; 47 L. J., Ch. 1; 37 L. T. 585; 26 W. R. 101—C. A.

In a suit for specific performance of an agreement for the sale and purchase of land, if the defendant means to set up the Statute of Frauds as a defence he must do so before the hearing, at which time the defence is not open to him, although he has denied the existence of the agreement altogether. *Heys v. Astley*, 4 De G., J. & S. 34.

**Demurrer Overruled—Same Objection may be taken at the Hearing.**—To a bill for specific performance of an agreement the defendant demurred on the ground that the agreement was invalid under the Statute of Frauds, and the demurrer was overruled. The bill was subsequently amended, and the defendant put in an answer in which he did not again raise the objection which he had raised on his demurrer:—Held, that it was open to the defendant to take the same objection at the hearing. *Johnassen v. Bonhote*, 2 Ch. D. 298; 45 L. J., Ch. 651; 34 L. T. 745; 24 W. R. 619—C. A.

**Costs.**—Principles on which costs are given in suits for specific performance stated. *Phillipson v. Gibbon*, 6 L. R., Ch. 428; 40 L. J., Ch. 406; 24 L. T. 602; 19 W. R. 661.

When in a suit against a vendor for specific performance of a contract, the refusal to complete arose from a claim made by the defendant T. under a prior contract, but which claim T. was held to have abandoned in favour of the plaintiff, a decree was made with costs against both defendants, but with a declaration that as between the defendants the costs should be borne by T. *Wilson v. Thomson*, 20 L. R., Eq. 459; 44 L. J., Ch. 527; 23 W. R. 744.

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The purchaser of an estate cannot recover back his purchase-money on the ground of a concealment of a defect in the title by the vendor, without proving that such concealment was fraudulent; and the question of fraud is properly one for the jury. *Early v. Garrett*, 4 M. & R. 687; 9 B. & C. 928.

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If a defendant has made a material representation to induce a person to enter into a contract, and the plaintiff has entered into the contract, it is not sufficient, in order to uphold the contract against the plaintiff in an action for rescission, that he does not prove that he entered into it relying on the representation, but the defendant must shew that the plaintiff abandoned such reliance, either by having knowledge contrary to the representation, or by his explicit statement that he did not rely on such representation. In the absence of such evidence the inference remains that the plaintiff did rely on the representation. *Attwood v. Small* (6 Cl. & F. 232) explained. *Ib*.

Where representations are made of the nature and character of property offered for sale, affecting its value, and those representations turn out to be false to the knowledge of the party making them, a foundation is laid for an action for damages for the deceit, and for a suit in equity to set aside the contract of sale. *Attwood v. Small*, 6 C. & F. 232.

If a purchaser, choosing to judge for himself, does not avail himself of the knowledge, or means of knowledge, open to him or to his agents, he cannot be heard to say he was deceived by the vendor's representations, the rule being, *caveat emptor*, and the knowledge of his agents being as binding on him as his own knowledge. *Ib*.

**Representations of Vendee.**—When a vendor, ignorant of the real value of an estate, sells it at a loss on the faith of what the purchaser represents to him that it is worth, the sale will be set aside, and that irrespective of any fiduciary relation, fraud or other concealment in the transaction between the parties. *Haggarth v. Wearing*, 12 L. R., Eq. 520; 40 L. J., Ch. 577; 24 L. T. 825; 20 W. R. 11.

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**Effect of—Right to Relief.**—In 1866, A. purchased a house for residence and grounds from B. The conveyance was prepared by the purchaser's solicitor, but by a mistake the minerals under the house were excepted from it. The purchaser entered into possession, and expended money in repairs and improvements; the vendor afterwards discovered the mistake, and attempted to deal with the minerals; thereupon, five years after the purchase, the purchaser filed a bill against him, praying for specific performance of the original agreement, and to have the conveyance rectified; the vendor had died, and the suit had been renewed against his legal personal representative:—Held, that she must have the option either of having the conveyance rectified or having the whole purchase set aside, she repaying the purchase-money, with interest at 4 per cent. per annum, and all sums expended by the purchaser in repairs and permanent improvements, and he being charged with an occupation rent. *Bloomer v. Spittle*, 13 L. R., Eq. 427; 41 L. J., Ch. 869; 26 L. T. 272; 20 W. R. 435.

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**Non-Compliance with Requisitions.**—The conditions of sale of real estate provided that the

purchase, on the ground of defective title, must be paid by the applicant. *Osborn v. Osborn*, 18 W. R. 421.

Where no direction as to costs was given in the original decree in certain suits for the specific performance of a contract, the purchasers being held entitled to a considerable abatement, the vendors were ordered to pay the costs of the suit, and were not relieved on the hearing on further consideration from payment of any part of the costs on account of the failure of the purchasers as to parts of their case on the original hearing. *Powell v. Elliott*, 10 L. R., Ch. 424; 33 L. T. 110; 23 W. R. 777.

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#### c. Other Circumstances.

**Disclosure of Equitable Mortgage after Requisitions.**—At a sale by auction of leasehold property by a mortgagee under a power, one condition of sale was that within the time limited from the delivery of the abstract the purchaser should send to the vendor's solicitors his requisitions on the title or evidence, and in default of any he should be deemed to have accepted the title, and for the purpose of requisitions the abstract was to be deemed to be perfect if it supplied the information suggesting the same, and if the purchaser should insist on any requisition which the vendor should be unable or should decline to comply with, he should be at liberty to rescind the contract. An abstract was delivered, but it did not shew the real state of the title. After requisitions were sent and replies received, the purchaser's solicitors were informed by mortgagees that the property had been mortgaged by deposit of an underlease to them. The vendor, who was not aware of the mortgage, was required to pay the amount due to the mortgagee, but his reply was that he was unable and unwilling to satisfy the claim, and that he would rescind the contract. The purchasers insisted on the mortgage being discharged; and upon a summons under the Vendor and Purchaser Act, 1874, a declaration was made that the vendor was not entitled under the condition and circumstances to rescind. *Jackson and Oakshott, In re*, 14 Ch. D. 851; 49 L. J., Ch. 523; 41 L. T. 719; 28 W. R. 794.

**Non-Compliance with Requisitions.**—The conditions of sale of real estate provided that the

vendors were to furnish an abstract within seven days from the sale, and the purchaser was to make his objections and requisitions (if any) within twenty-one days, and in case the purchaser should make any objection or requisition which the vendors should be unable or unwilling to answer or comply with, the vendors should have the option of rescinding the contract:—Held, that the option of rescinding might be exercised upon any objection or requisition made by the purchaser, although the materials for it were not disclosed by the abstract, but were kept back by the vendors advisedly, but under a bonâ fide belief that they did not affect the title. *Gray v. Fowler*, 8 L. R., Ex. 249; 42 L. J. Ex. 161; 29 L. T. 297; 21 W. R. 916—Ex. Ch.

To a count, in an action by purchaser against vendor, for the breach of an agreement for the sale of land, he pleaded—first, a traverse; and secondly, that the agreement was made subject to a condition that, if the purchaser should insist on any objection or requisition which the vendor should be unable or unwilling to remove, the vendor should be at liberty, notwithstanding any negotiation or litigation in respect of such objection, or attempt to comply therewith, by notice in writing to annul the sale, and that, in such case, the purchaser should be entitled to the return of his deposit without interest, and to no further damages; averring that the vendor, being unable to remove certain objections, duly annulled the sale, according to the condition, and repaid the deposit. The agreement for sale proved by the plaintiff was subject to such condition:—Held, first, that there was no variance between the contract as declared on and as proved. *Ker v. Crowe*, 7 Ir. R., C. L. 181.

Held, secondly, that under the condition, a notice to annul the sale should be served within a reasonable time. *Ib.*

Held, thirdly, that, upon an issue whether the plea relying upon the condition was true in substance and in fact, the question whether the notice to annul the sale was served within a reasonable time was properly submitted to the jury, and that, in order to raise such a question, a replication was unnecessary. *Ib.*

**Title subject to Approval of Solicitor.**—A sale of a leasehold house was subject to approval of the purchaser's solicitor. The house and another were included in one lease, at one rent, and subject to restrictive covenants as to the whole:—Held, that (the vendor not having proved that he could obtain an apportionment of the rent and covenants) the purchaser could rescind. *Hudson v. Buck*, 7 Ch. D. 683; 47 L. J., Ch. 227; 38 L. T. 56; 26 W. R. 190.

**Inadequate or Excessive Price.**—By a contract in writing, dated the 3rd of September, 1873, E. agreed to purchase freehold farms from N. for 33,000*l.*, subject to the title being accepted by his solicitor. The purchase-money was to be paid on the 29th of September, 1873, on which day it was presumed that the contract would be completed and possession given; but in the event of the purchase not being completed on that day, the purchaser was to pay interest up to such reasonable time as might be agreed upon by his solicitor. When the title was produced, it appeared

that N. was not the legal owner of the land, but had agreed to purchase the same from the trustees of a settlement for 21,000*l.*, by a contract which was not completed till after the 29th of September, 1873. E. took the objection that it appeared on the face of the title that the trustees had sold the estate to N. for a grossly inadequate price. N. proved that the trustees had had a fair valuation made of the land before offering it to him, but, notwithstanding, on the 29th of September, E. wrote to N. stating that he considered the objection fatal, and that he rescinded the contract. N. then obtained a conveyance from the trustees, and resold the estate for 25,000*l.* to a stranger, and in August, 1875, brought an action against E. to recover the difference of price by way of damages for breach of the contract. E. filed a bill against N. to restrain the action, and to obtain a declaration that the contract was rescinded:—Held, first, that the bill to obtain a declaration of the rescission of the contract could not be maintained, and that E.'s bill must therefore be dismissed. *Noble v. Edwards*, *Edwards v. Noble*, 5 Ch. D. 378; 36 L. T. 312. See *S. C. in C. A.*, 5 Ch. D. 378; 37 L. T. 7.

Held, secondly, that the apparently inadequate price at which the estate was sold by the trustees was not a fatal objection to the title, and, therefore, that E. had no right to rescind the contract. *Ib.*

Held, thirdly, that N. had a right to re-sell the estate and claim the difference by way of damages against E., there being no distinction in this respect between a sale of chattels and of land. *Ib.*

A party who, under a misapprehension of his legal rights, parts with his property for a bonâ fide and valuable, but not an adequate, consideration, cannot have the transaction set aside on the mere ground of mistake. *Marshall v. Collett*, 1 Y. & C. 232.

Inadequacy of value is not in itself sufficient to set aside a contract. *Griffith v. Spratley*, 1 Cox, 383.

Where a purchaser, after viewing a farm, and being informed of the rent at which it was let, agreed to buy at 5,000*l.*:—Held, that the difference between this price and 3,500*l.*, which the court considered to be the value of the property, was not so great as to shock the conscience and thus constitute of itself a defence, on the ground of exorbitancy, to a suit for specific performance. *Abbott v. Swooner*, 4 De G. & S. 448.

A purchase of a contingent reversionary interest was set aside chiefly on the ground of inadequacy of value, the consideration being an annuity for the life of vendor, whose life was a bad life, and was better known to the purchaser than to the vendor to be such. *Davies v. Cooper*, 5 Mylne & C. 270.

**—Sale of Reversionary Interest.**—A sale of a reversionary interest by a young man of full age for a substantial purpose stands on the same footing as other contracts, and cannot be set aside on the ground of mere inadequacy of consideration. *Judd v. Green*, 45 L. J., Ch. 108; 33 L. T. 597.

The plaintiff was entitled on the death of his father, who was sixty-one years old, to 500*l.* to be raised by a charge upon an estate which had been purchased by the defendant. About five weeks before the plaintiff attained his majority

his father suggested to the defendant that he should purchase the plaintiff's reversionary interest. The plaintiff was at that time entirely without funds, and desired an advance to enable him to pursue the study of medicine. The negotiations lasted for more than a month, and it was finally arranged that the defendant should purchase the reversion for 326*l.* 5*s.*, to be paid by annual instalments, with interest on the unpaid amount, the costs to be paid by the plaintiff. A deed of assignment was prepared by the defendant's solicitor and was executed by the plaintiff about three weeks after attaining his majority. He employed no solicitor, and had no adviser of any kind except his father. The father died about three months afterwards, having been at the time of the sale in very bad health, though there was no evidence that the defendant knew that this was the case; but if the state of the father's health at the time when the reversion was assigned had been taken into account, the price paid would have been inadequate. On a bill filed praying that the deed might be declared fraudulent and void, and delivered up to be cancelled:—Held, by Lords Blackburn and Gordon, that in the absence of evidence of fraud, and having regard to the circumstances of the case, the transaction could not be impeached; by Lord Hatherley (dissentiente), that although there was no evidence of fraud, the plaintiff ought to have had an independent adviser, and therefore was entitled to relief in equity. *O'Rourke v. Bolingbroke*, 2 App. Cas. 814; 26 W. R. 239—H. L.

**Breach of Trust—Voluntary Settlement.]**—B. executed a voluntary settlement of land in favour of his wife and children, which contained a power of sale. Subsequently, B., being about to leave England, executed a power of attorney to E., authorizing him to sell all or any of his lands, but in general terms. E., as B.'s attorney, agreed to sell a portion of the land comprised in the settlement to the defendant; and the defendant contracted the next day, the 4th May, 1876, to sell the same piece of land to the plaintiffs. On the execution of this contract a deposit of 200*l.* was paid, and the purchase was to be completed on the 1st January, 1877. The title was objected to by the plaintiffs on the ground that the power of attorney did not authorize the sale to the defendant, and an action was commenced in the Exchequer Division in August, 1877, for the return of their deposit, and for damages for breach of the contract; the defendant asserted that the contract was binding and the title good, and by his counter-claim asked for specific performance. An order had been obtained by consent in another action to administer the trusts of the settlement, confirming the proposed sale by E. to the defendant, and it had also been decided in the action that an order might be made directing a person to convey for B. The defendant subsequently offered a conveyance direct from B. or from the trustees of the settlement, which was declined:—Held, that the power of attorney did not authorize E. to sell to the defendant any portion of the land comprised in the settlement; and that such a sale was not sufficient to call into operation the statute 27 Eliz. c. 4; that the plaintiffs could not be affected by the order in the administration action; and that, the title being defective, the plaintiffs were entitled to recover the deposit, with the costs of the action; the damages, to be ascertained, to be limited to

the conveyancing costs. *General Meat Supply Association v. Bouffter*, 41 L. T. 719—C. A.

Decision affirmed on appeal, on the ground that the trustees' suit being a suit for the execution of the trusts of the settlement, there was no jurisdiction in it to make an order to confirm a sale in derogation of those trusts. *Ib.*

**—Trustee for Infant—Lost Deed.]**—Trustees having power to sell under such conditions as they should think fit, sold by auction with a condition limiting the title to commence in 1858 (14 years previously); the next convenient root of title was a deed of 1819, from which a good title could be deduced, but the trustees could not find this deed, and had only a recital of its contents. There was a condition that all recitals and statements in the deeds and particulars should be accepted as conclusive evidence:—Held, that the sale under such conditions was a breach of trust, and an injunction was granted at the suit of an infant cestui que trust having only a very small interest. *Dance v. Goldingham*, 8 L. R., Ch. 902; 42 L. J., Ch. 777; 29 L. T. 166; 21 W. R. 761.

### III. RIGHTS AND DUTIES OF VENDOR AND VENDEE.

#### 1. GENERALLY.

**Presence on Completion.]**—Upon a sale of real property, the purchaser has not an absolute right in all cases to require the vendor's presence at the completion of the purchase. *Easer v. Daniell*, 10 L. R., C. P. 538; 38 L. T. 476.

Whether such a requisition is reasonable or not will in each case be a question for the jury. *Ib.*

The fact of the vendor having been confined in a lunatic asylum is not a reasonable ground for insisting upon a departure from the ordinary course, when it is duly certified and sworn that he was competent at the time of executing the conveyance. *Ib.*

There is no rule that the purchaser may in all cases require the purchase-deed to be executed in the presence of himself or his agent, and the purchase-money paid directly to the vendor, but that he may so require in the absence of special circumstances rendering a different course proper. *Viney v. Chaplin*, 2 De G. & J. 468; 27 L. J., Ch. 434; 4 Jur., N. S. 619.

**Notice of Sub-Contract.]**—A vendor of land may receive the balance of the purchase-money, and convey the estate to the purchaser, without regard to the receipt of a notice that the purchaser had agreed to assign the contract. *M'Craith v. Foster*, 5 L. R., Ch. 604; 39 L. J., Ch. 792; 23 L. T. 224; 18 W. R. 905.

A vendor agreed to sell leaseholds which were under a heavy rent, and received part of the purchase-money. The purchaser afterwards agreed to assign to a bank, if required, the contract for the purchase by way of security for money advanced, and the bank gave notice of this agreement to the vendor. The bank afterwards refused to advance to the purchaser the money required to complete, but this was not known to the vendor. The purchaser, after the time fixed for completion, paid the balance of the purchase-money, the vendor executed an assignment, and the purchaser assigned to an assignee without notice of the security to the bank:—Held, that the vendor was entitled to

complete without giving notice to the bank, and that the bank had no remedy against him. *Ib.*

— **Charge of Debts—Sale under Power.**—

Unless twenty years have elapsed since the death of a testator who has charged his real estate with the payment of his debts, the vendor selling under the power given by the charge is not bound to answer the purchaser's inquiry whether any of the debts of the testator still remain unpaid, and the purchaser ought not to make the inquiry, as he will get a good title, even if there are no debts. *Tanqueray-Willaine and Landau, In re*, 20 Ch. D. 465; 51 L. J., Ch. 434; 46 L. T. 452; 30 W. R. 801—C. A.

— **Title of Vendee to Rents and Profits.**—

An agreement for the purchase of land provided a certain day for completion, and that the purchasers were to receive the rents and profits and pay interest on the purchase-money if unpaid after that date. The vendors demurred to a statement of claim alleging a delay in completing the purchase, and claiming rents and profits from the vendors, who had remained in possession at the rate of 150*l.* per annum:—Held, that the demurrer must be overruled, and that the defendants by demurring had admitted 150*l.* to be the fair annual value of the rents and profits. *Metropolitan Railway Company v. Defries*, 2 Q. B. D. 387; 36 L. T. 494; 25 W. R. 841—C. A. Affirming 2 Q. B. D. 189; 36 L. T. 150; 25 W. R. 271.

— **Fines.**—B., on the 26th April, 1843, agreed to purchase a manor from A., and to complete the purchase according to the conditions of sale; and, upon the purchase taking place, agreed to sign an agreement for payment of the purchase-money on or before the 24th July, 1843. It was also agreed that, on the completion of the purchase, the purchaser should be entitled to the rents and profits of such parts of the estate as were let, from the 24th June, 1843. The day of completing the purchase was, for the convenience of the purchaser, altered from the 24th June to the 24th July. A tenant of copyhold premises, parcel of the manor, having died seised thereof in 1836, the admittance of the parties entitled to be admitted was postponed from time to time, at their request, and did not take place till the 1st July, 1843; and in December of the same year the fine was paid to the vendor. The conveyance of the manor to the purchaser was executed by the vendor in August, 1843, and the purchase-money was paid in the following September. An action having been brought by the purchaser against the vendor, to recover the fine:—Held, that he was not entitled to recover. *Hardwicke (Earl) v. Sandys (Lord)*, 14 M. & W. 761; 13 L. J., Ex. 233.

— **Vendor allowing Premises to fall into Disrepair.**—An agreement for purchase of real estate provided that the purchaser should be entitled to the possession of rents, from the 25th of March, and in the event of the purchase not being completed on that day, the purchaser should pay interest on the unpaid balance till completion. Disputes having arisen, the purchase was not completed for several years, and the vendor refused to allow the purchaser to take possession in the meantime, but suffered

the estate to remain unoccupied, and to fall into decay:—Held, that the purchaser was entitled to charge the vendor with rents and profits which, without wilful default, he might have received, and also with deterioration, and to set off what might be found due against his purchase-money and interest. *Phillips v. Silvester*, 8 L. R., Ch. 173; 42 L. J., Ch. 225; 27 L. T. 840; 21 W. R. 179. Affirming 20 W. R. 406.

— **Vendor's Duty to Let Premises after Contract of Sale.**—

When the vendor of a farm subject to a yearly tenancy finds that, without default on the part either of himself or the purchaser, the purchase cannot be completed on the appointed day, and that the tenancy will determine before actual completion, it is his duty as trustee for the purchaser, whether the tenancy is determined in the ordinary course by landlord or tenant or on a notice to quit given by the vendor at the request and for the convenience of the purchaser, to re-let the farm on a yearly tenancy so as to prevent it going out of cultivation, unless he obtains an indemnity from the purchaser against all risk arising from its remaining unlet. *Egmont (Earl) v. Smith*, 6 Ch. D. 469; 46 L. J., Ch. 356.

— **Reimbursement of Expenses by Drainage Commissioners.**—

A local drainage act provided, that the owners and proprietors of lands (at whose expense certain banks should be made for the purposes of drainage), their respective heirs and assigns, should be reimbursed such expenses or such share thereof as should be ascertained by certain commissioners appointed under the act; a subsequent act, imposing an additional tax on those lands, provided that such tax should not be payable until the repayment of such of the above expenses as the owners and proprietors of the lands for the time being should make appear to the satisfaction of the commissioners to have been necessarily expended in making banks. The act also contained clauses whereby tenants for life or in tail were expressly enabled to borrow money, and to charge the lands with it, for the purpose of defraying the expenses of making banks under both acts. A third person, who had expended a large sum of money in making banks, afterwards sold his lands, without reserving to himself, or noticing in the conveyance, the reimbursement above mentioned; and the commissioners having subsequently determined the amount of the reimbursement:—Held, that the purchaser, and not such third person, was entitled to receive it. *King v. Witham Navigation Company*, 3 B. & A. 454.

— **Right to Insurance Moneys—Insurance by Vendor—Fire after Contract but before Completion.**—

A house insured by the vendor was after the date of the contract for sale, but before completion, partly burnt down, and the vendor received the insurance moneys. There was no provision in the contract as to insurance:—Held (per Brett, L. J., and Cotton, L. J.; dissentiente James, L. J.), that the purchaser as against the vendor could not recover the insurance moneys either as an abatement of his purchase-money or for the reinstatement of the premises. *Rayner v. Preston*, 18 Ch. D. 1; 50 L. J., Ch. 472; 44 L. T. 787; 29 W. R. 546; 45 J. P. 829—C. A.

A vendor agreed with a purchaser for the sale, at a specified sum, of a house which had been insured with an insurance company against fire. The contract contained no reference to the insurance. After the date of the contract but before the day fixed for completion, the house was damaged by fire and the vendor received the insurance money from the company. The purchase was afterwards completed, and the purchase-money agreed upon, without any abatement on account of damage by fire, was paid over to the vendor:—Held, that the company was entitled to recover back a sum equal to the insurance money from the vendor. *Castellain v. Preston*, 11 Q. B. D. 380. Reversing 8 Q. B. D. 613.

**Personal Judgment against Mortgagor transferred to Third Person on Redemption.]**—In a foreclosure action personal judgment for the mortgage debt being given against the mortgagor, and a foreclosure judgment against the mortgagor and a purchaser from him:—Held, that the purchaser, in the event of his redeeming the mortgage, would be entitled to have transferred to him the personal judgment against the mortgagor, as being one of the securities held by the mortgagee for the debt. *Greenough v. Littler*, 15 Ch. D. 93; 42 L. T. 144; 28 W. R. 318.

**Right to Possession on Deposit of Purchase-Money.]**—A contract for sale of a house provided that the purchaser should be entitled to immediate possession upon depositing the purchase-money, but the purchaser was not to be considered as accepting the vendor's title:—Held, that this clause had the same operation as s. 85 of the Lands Clauses Act (8 & 9 Vict. c. 18), and the purchaser was entitled, upon depositing the purchase-money, not only to take possession, but to pull down the house, that being the object for which the purchase was effected. *Bolton v. London School Board*, 7 Ch. D. 766; 47 L. J., Ch. 461; 26 W. R. 549.

## 2. AS TO CONVEYANCE.

**Right of Purchaser to have Deed Stamped—Mortgage Deed—Ad valorem Stamp.]**—A ten shilling deed stamp on a mortgage deed is insufficient; therefore, a purchaser is entitled on a contract for sale with a mortgagor to require the mortgage deed, where so stamped, to be stamped before completion to the full ad valorem duty at the vendor's expense, notwithstanding that the mortgagee may have consented to join in the conveyance. *Whiting to Loomes*, 14 Ch. D. 822; 49 L. J., Ch. 617; 43 L. T. 83; 28 W. R. 822. Affirmed, 17 Ch. D. 10; 50 L. J., Ch. 463; 44 L. T. 721; 29 W. R. 435—C. A.

**Unstamped Deed—Compulsory Purchase—Payment into Court.]**—A freehold land society in 1871 purchased some land in Epping Forest, which was conveyed to them in fee. They conveyed it in allotments to various members of the society who respectively paid for their allotments. Afterwards the Epping Forest Act, 1878, was passed, and it provided that the land (together with other lands) should be thrown open to the public, certain compensation, the amount of which was to be ascertained by an arbitrator, being paid by the conservators ap-

pointed by the act to the owner of the soil of any land thrown open. With the act were incorporated the provisions of the Lands Clauses Act, 1845, with respect to the purchase-money or compensation coming to parties having limited interests, or prevented from treating, or not making title, and with respect to the conveyances of lands. After the passing of the act the land society repurchased the allotments from the allottees, repaying them their purchase-moneys. The allottees reconveyed the plots to the trustees of the society, the reconveyances being indorsed on the original conveyances, but the reconveyances were not stamped within the proper time after execution. The arbitrator determined the amount of compensation to be paid by the conservators to the society, and the society furnished an abstract of title to the conservators. The conservators made no objection to the title, except that the reconveyances ought to be stamped, and they required the society to have them stamped at their own expense. The society declined to do this, but offered that the allottees should join with the trustees of the society in a conveyance to the conservators. The conservators would not accept this offer, but paid the compensation money into court, and, under s. 75 of the Lands Clauses Act, executed a deed-poll vesting the land in themselves in fee. The society petitioned for the payment of the money to them:—Held, that it was not necessary that the reconveyances should be stamped; that the conservators ought to have been satisfied with the conveyance offered them by the society; and that the conservators must pay the costs of the petition. *Whiting to Loomes* (14 Ch. D. 822; 17 Ch. D. 10) distinguished. *Birkbeck Freehold Land Society, Ex parte*, 24 Ch. D. 119; 52 L. J., Ch. 777; 49 L. T. 265; 31 W. R. 716.

**Insertion in habendum of Servitudes subject to which Sold.]**—A condition that freehold property "is sold, and will be conveyed subject to all" particularized servitudes "(if any)," gives the vendor a right to have the words "subject," &c., inserted in the habendum of the conveyance though no such servitude is shewn to exist. *Gale v. Squire*, 4 Ch. D. 226; 46 L. J., Ch. 373; 36 L. T. 632; 25 W. R. 226. Affirmed, 5 Ch. D. 625; 46 L. J., Ch. 672—C. A.

**Right of Purchaser to require Separate Conveyances.]**—A vendor of land may be required by the purchaser to convey the land in parcels by separate conveyances at the same time, on tender of the entire purchase-money and the additional costs thereby occasioned; but semble, he cannot be required by the purchaser to convey the land in parcels by separate conveyances at intervals of time, without an express stipulation that he shall be bound to do so. *Egmont (Earl) v. Smith*, 6 Ch. D. 469; 46 L. J., Ch. 350.

**Covenant for Production.]**—If a vendor retains title deeds and covenants for further assurance only, the purchaser may compel him to enter into a covenant for production under that covenant. *Fuin v. Ayers*, 2 Sim. & Sta. 533.

**Execution by Agent.]**—A purchaser may refuse to accept a conveyance executed under a

power of attorney. *Coore v. Callaway*, 1 Esp. 115; *S. P. Richards v. Barton*, 1 Esp. 268.

Proof that a conveyance was executed by a person named by the defendant, will support an averment in a declaration that he himself "became the purchaser." *Seaman v. Price*, 1 C. & P. 586; 2 Bing. 437; 10 Moore, 34.

**Duty of Vendee to Prepare.**—In a contract for the sale of land, it is the duty of the vendee to prepare the conveyance, unless there is an express stipulation to the contrary; therefore, in an action against him for non-payment of the purchase-money, the declaration need not allege a tender or offer to convey; but it is sufficient to state that the vendor was ready and willing to convey. *Poole v. Hill*, 6 M. & W. 835; 9 D. P. C. 300.

A declaration by assignees of B., a bankrupt, stated that by a deed between B. of the first part, D. and S. his wife of the second part, V. and B. (described as trustees) of the third part, and the Thames Haven Dock and Railway Company of the fourth part, after reciting that certain persons, on behalf of the company, had agreed to buy premises, and that B. had agreed to sell the same, it was witnessed, that in consideration of a sum already paid to B., and in consideration of the further sum of 2,936*l.*, to be paid to B. and to V. and B., according to their respective rights and interests in the premises, on or before the 25th March, 1844, B., D., S. and V. agreed to sell the premises, and that B. would, at his own expense, deduce a good title to the same, and that B. and all other necessary parties would, on or before the 25th March, on payment by the company of the 2,936*l.*, at the costs and charges of the company, execute and procure to be executed a proper conveyance for conveying the fee simple of the premises; and that the company thereby agreed with B., that they would, on or before the 25th March, and on the execution of such conveyance, pay the 2,936*l.*, and until payment of that sum, would pay interest on the same to B. and his assigns; that the 25th March, 1844, had elapsed; that although B., before his bankruptcy, and his assignees, after it, were ready and willing to deduce a good title, and though B. and the necessary parties were ready and willing, on payment by the company of the 2,936*l.*, to execute a conveyance, and deduce a good title, but that the company discharged B. and the assignees from deducing such good title and from executing such conveyance. It then alleged as a breach, that the company did not prepare a proper conveyance, nor pay to B. or the assignees any part of the purchase-money:—Held, that the breach, that the company had not prepared the conveyance nor paid the money, was good, since, as the deed provided that the conveyance was to be at the costs and charges of the company, it lay on them to prepare it; that the execution of the conveyance and the payment of the money were to be concurrent acts, but that the deduction of a good title by B. was necessarily a condition precedent to the preparation of the conveyance, as the conveyance could not be properly prepared until the title was deduced. *Thames Dock and Railway Company v. Brymer*, 5 Ex. 696; 19 L. J., Ex. 32—Ex. Ch.

**Covenant for—Substitution by Parol.**—If A. covenants that he will, on or before a certain day,

convey to B., by such conveyance as B.'s counsel should advise, all the grounds before conveyed to him by C.; in consideration of which B. covenants to pay a certain sum, and reserve certain rents to A., and to lay out a certain sum on the premises:—Held, that A. cannot maintain an action against B., without averring such a conveyance, or a readiness to convey, to B. on or before the day all the land, but that B. prevented him by some act or neglect of his. And it is not sufficient to maintain the action to shew that after the day B. accepted a conveyance of ground rents in lieu of part of the land, and accepted that and the conveyance of the other part in lieu of the conveyance covenanted to be made by A.; for this is a substitution of a different agreement by parol, to which the covenant does not apply. *Heard v. Wadham*, 1 East, 619.

**Execution—Necessity of.**—When the price of land taken compulsorily under the Lands Clauses Act has been settled by arbitration under the act, the execution of the conveyance is, as in ordinary cases, a condition precedent to the right of action for the purchase-money. *London Union (Guardians) v. Metropolitan Railway Company*, 4 L. R., Ex. 309; 38 L. J., Ex. 225. See also *Dicker v. Jackson*, post, col. 405.

A. agreed, in consideration of 7,000*l.*, to present the nominee of B. to the next turn of a rectory, and to furnish an abstract of title to and execute a conveyance of the next presentation to B.; afterwards A., by consent of B., agreed to sell the next presentation to C. for 7,500*l.*, on having such title as A. had received, C. paying to B. absolutely, on a day certain, the odd 500*l.* A. furnished an abstract of such title as he had received, which C. refused to accept, and no conveyance was tendered to him. B. sued C. for the 500*l.*:—Held, that there was a good consideration to support an action, and A. having done all that his contract required, it was no answer that no conveyance was tendered to C. *Wilmot v. Wilkinson*, 9 D. & R. 620; 6 B. & C. 506.

### 3. LIEN.

**Vendor's Lien on Land in Register County—Notice to Sub-Purchasers.**—A vendor of land situate in a register county, part of whose purchase-money remains unpaid, is under no obligation to obtain for the unpaid amount any written security which can be registered, but is entitled to rely simply on his equitable lien, which he can enforce against sub-purchasers who have notice of it, actual or constructive; and such a vendor will not, by registering the conveyance to his purchaser, if he retains the deed in his possession, lose his lien as against sub-purchasers from the original purchaser. *Kettlewell v. Watson*, 21 Ch. D. 685; 51 L. J., Ch. 281; 46 L. T. 83; 30 W. R. 402.

Land belonging to the trustees of a charity situate in the suburbs of Leeds, in the West Riding of Yorkshire, was sold by the trustees, with the sanction of the charity commissioners, to some estate agents who occupied a good position in Leeds. They bought the land with the intention of re-selling it in small lots for building purposes. A receipt for the whole purchase-money, signed by the vendors, was indorsed on the conveyance, but only part of it was in fact

paid. The vendors retained the deed in their possession, but, at the request of the purchasers, the vendors' solicitors registered a memorandum of it in the West Riding registry. The vendors took no written security for their unpaid purchase-money, but relied only on their equitable lien. The purchasers sold the land again in lots, some of which were very small. None of the sub-purchasers had actual notice of the lien of the original vendors:—Held, that the original vendors were entitled to enforce their lien against such of the sub-purchasers as had constructive notice of it. *Ib.*

—**Release, Effect of.**—The vendors, at the request of two of the sub-purchasers, released the plots which they purchased from the lien:—Held, that it not being shewn that when these releases were given the vendors knew that the original purchasers had parted with any other portions of the land, the releases did not affect the right of the vendors to enforce their lien against the other sub-purchasers. *Ib.*

—**Onus of Proof.**—The action was brought by the original vendors against some of the sub-purchasers to enforce the lien against them. The plaintiffs in their statement of claim alleged that three of the sub-purchasers whose conveyances were expressed to be made for value, had in fact given no consideration for them, and they adduced evidence which proved this allegation in the case of one of the three:—Held, that, under the circumstances, the onus was on the plaintiffs to prove the allegation in the case of the other two, and that they had failed to do so. *Ib.*

—**Covenant of Freedom from Incumbrance—Fraud.**—The conveyances to the sub-purchasers contained the ordinary covenant by the original purchasers that the plots conveyed were free from incumbrances:—Held, that the covenants not being solicitors, the fact that they entered into this covenant, though it was very improper for them to do so, did not, coupled with the other circumstances, shew that they were parties to a fraudulent scheme so as to rebut the legal presumption that they communicated the lien of the original vendors to the sub-purchasers for whom they acted as general agents, and that, consequently, the doctrine of *Kennedy v. Green* (3 My. & K. 699) did not apply. *Ib.*

**Vendor's Lien for Deposit—Mistake.**—Particulars stated that the property was an absolute reversion in a freehold estate, and at the auction conditions were read stating that the property was subject to two mortgages. On a bill by the purchaser, who stated that he was deaf and had read the particulars but did not understand that he was buying only an equity of redemption:—Held, that, although his solicitor paid the deposit on his behalf after having read the conditions, he was entitled to a rescission of the contract, and to a return of the deposit with interest and a declaration of lien. *Torrance v. Bolton*, 8 L. R., Ch. 118; 42 L. J., Ch. 177; 27 L. T. 738; 21 W. R. 134.

**Purchase-Money Payable by Instalments—Liberty to Apply as to Future Instalments.**—In an action by a vendor whose purchase-money was to be paid by instalments, some of which

were not yet due, for specific performance of his contract and a declaration of his lien, liberty was given to apply in respect of future instalments as they accrued due. *Nives v. Nives*, 15 Ch. D. 649; 49 L. J., Ch. 674; 42 L. T. 832; 29 W. R. 302.

Under a contract for the purchase of an estate, where the money is to be paid in portions, every payment is a part performance of the contract by the vendee, and in equity transfers to him a corresponding portion of the estate. *Rose v. Watson*, 10 H. L. Cas. 672; 33 L. J., Ch. 385.

**Enforcing against Railway Company.**—When a landowner seeks to enforce his lien for unpaid purchase-money against a railway company, the court will order a sale of the land, but will not grant an injunction to restrain the company from running trains over the land. *Lycett v. Stafford and Uttoxeter Railway Company*, 13 L. R., Eq. 261; 41 L. J., Ch. 474; 25 L. T. 870.

**Rights against Heir of Intestate.**—The heir of an intestate, who had contracted to purchase land, was held entitled to the lands freed from the vendor's lien as against the estate of the intestate. *Harding v. Harding*, 13 L. R., Eq. 493; 41 L. J., Ch. 523; 26 L. T. 656.

**Sale to Company for Cash and Shares.**—A vendor agreed with a trustee for a joint-stock company about to be formed for the sale of the goodwill, plant, &c., of his business for 8,000*l.*, to be paid as to 6,000*l.* in cash and 2,000*l.* in paid-up shares. After the formation and registration of the company he executed an assignment to them, whereby, after reciting that he had agreed for the sale of the property to the company for 6,000*l.* to be paid as thereafter mentioned, that is to say 50*l.* per cent. of all sums of money to be received by the company on the sale of shares, and 50*l.* per cent. upon all money borrowed; in consideration of the sum of 6,000*l.*, to be paid to him in manner thereinbefore stated, he assigned the property to the company. 2,000*l.* worth of paid-up shares were also allotted to him. No other shares were ever subscribed for, and no money borrowed. The company was wound up, and the only assets consisted of the proceeds of sale of the property conveyed to them by the vendor, and which had been resold:—Held, that the vendor had no lien on those proceeds for his unpaid purchase-money, his lien being excluded by the nature of the contract. *Brentwood Brick and Coal Company, In re, Rowe's claim*, 4 Ch. D. 562; 46 L. J., Ch. 554; 36 L. T. 343; 25 W. R. 481—C. A.

**Priority—Recital as to Payment.**—When a purchase deed contained a recital that the purchase-money had been paid, or accounted for, but there was no receipt for the purchase-money on the back of the deed:—Held, that the vendor, in respect of his lien for unpaid purchase-money, was entitled to priority over a mortgagee of the purchaser. *Bowen v. Cobb*, 19 W. R. 614—L. J. Affirming 18 W. R. 911.

A vendor conveyed without receiving the purchase-money; the receipt of it was indorsed on the deed, and the title deeds delivered to the purchaser. The purchaser then made a mortgage by deposit, and absconded:—Held, as between the vendor's lien for his unpaid purchase-

money, and the right of the mortgagee, that the possession of the title-deeds, and the fact of the indorsement of the receipt on the deed, gave the mortgagee the better equity. *Rice v. Rice*, 2 Drew. 73; 23 L. J., Ch. 289.

**Contract in Substitution.**—A contract for the payment of purchase-money must be explicit to deprive a vendor of his lien upon the estate sold; and, though a contract is stated in the conveyance, evidence may be given to shew the real nature of the transaction, and a subsequent purchaser is bound to inquire whether it was accepted in substitution of the lien. *Frail v. Ellis*, 16 Beav. 350; 22 L. J., Ch. 467.

**Discharge.**—The vendor's lien on the estate for the purchase-money is not discharged by taking bills of exchange; which are to be considered, not as a security, but as a mode of payment. *Grant v. Mills*, 2 Ves. & B. 307; *S. P.*, *Loaring, Ex parte*, 2 Rose, 79.

**Interest in Land.**—A lease is a sale pro tanto, and a premium reserved on a lease is in the nature of purchase-money, for which, if unpaid, there is a lien on the land; and, consequently, unpaid premium is an interest in land within 9 Geo. 2, c. 36, s. 3. *Shepherd v. Beetham*, 6 Ch. D. 597; 46 L. J., Ch. 763; 36 L. T. 909; 25 W. R. 764.

**On Title-Deeds.**—An unpaid vendor of a real estate conveyed to a purchaser had not at law any lien on the title deeds for his purchase-money. *Goode v. Burton*, 1 Ex. 189; 16 L. J., Ex. 309; 11 Jur. 851.

The lien of a vendor upon the land and upon the title deeds until the purchase-money is paid him, does not apply to a conveyance to the purchaser executed by some but not all the parties, where the contract has gone off by the vendor's default; and if there is any lien on such conveyance it is vested in the purchaser as a security for his deposit. *Ozenham v. Esdaile*, 3 Y. & J. 262.

**Mortgages.**—An unpaid vendor is entitled to proceed as a mortgagee. *Hope v. Booth*, 1 B. & Ad. 498.

**Of Pawnees.**—Where, upon the sale of leasehold premises, the purchaser accepted bills for the purchase-money, and the original lease and the assignment executed by the seller were deposited with a third person as a collateral security, to be delivered up to the purchaser on payment of the bills; and the seller, after some of the bills were paid, got possession of the lease from the depository, and pledged it with persons who bonâ fide advanced money upon it, and to whom he indorsed the outstanding bills:—Held, that the pawnees had no lien on the lease beyond the amount of these bills. *Hooper v. Ramsbottom*, 4 Camp. 121.

**Lien of Purchaser for Compensation.**—R. agreed to sell to W. lands in New South Wales free from incumbrances, and the greater part of the purchase-money was paid. On an investigation of the title it appeared that these lands were held, with other lands, under a crown grant, containing various reservations and conditions, with a proviso for re-entry on breach of condition. W. filed a bill for specific perform-

ance, with compensation on account of these reservations, offering to complete without compensation, if the court was of opinion that he was not entitled to it. An order was made on appeal, declaring him entitled to compensation, and directing a reference as to the amount. In answer to this inquiry, it was found that the amount of compensation could not be ascertained. W. then filed a supplemental bill, asking that if the compensation could not be ascertained R. might be decreed to repay with interest the part of the purchase-money which he had paid, and that W. might be declared entitled to a lien on the land for it:—Held, that as W. was not bound to take the property without compensation, and as the compensation could not be ascertained, he was entitled to the return of his purchase-money, with the interest at 4l. per cent. and to a lien on the estate for the amount. *Wentmacott v. Robins*, 4 De G., F. & J. 390.

A husband agreed to sell property which was settled as he and his wife should jointly appoint, and in default of appointment to the use of trustees during the life of the wife for her separate use, with remainder to the husband in fee. The purchase-money was invested in consols and paid to the trustees of the settlement. On the death of the husband before completion, the wife refused to convey her life interest:—Held, that the purchaser was entitled, by way of specific performance, to a conveyance of the property subject to the widow's life interest, with compensation in respect of such interest out of the husband's personal estate; and that he was entitled to a lien on the consols in the hands of the trustees for such compensation. *Barker v. Cox*, 4 Ch. D. 464; 46 L. J., Ch. 62; 35 L. T. 662; 25 W. R. 138.

#### 4. PURCHASE-MONEY.

**Authority of Solicitor to Receive.**—The 56th section of the Conveyancing Act, 1881, does not authorize vendors who are trustees with a power of sale to require the purchaser to pay the purchase-money to their solicitor on production of the deed of conveyance duly executed in cases where, before the act, they could not have required the purchaser to pay the purchase-money to their solicitor under a special authority. Trustees of real estate, with a power to sell and give receipts, sold the estate. The purchasers required that the vendors should attend in person to receive the purchase-money, or should authorize the purchasers to pay it into a bank to the joint account of the vendors. The vendors insisted that the money should be paid to their solicitor, on his producing the conveyance duly executed. They gave no special reason why the money should be paid to the solicitor, but relied on the 56th section of the Conveyancing Act, 1881. A summons having been taken out under the Vendor and Purchaser Act:—Held (dissentiente Bagallay, L. J.), that the 56th section had no application, and that the purchasers had a right to insist on their requisition. *Bellamy and Metropolitan Board of Works, In re*, 24 Ch. D. 387; 52 L. J., Ch. 870; 48 L. T. 801; 31 W. R. 900; 47 J. P. 550—C. A. Reversing 52 L. J., Ch. 89.

Although a purchaser has not the right in every case to insist upon the vendor being present to receive his purchase-money, yet should the requisition be made under circumstances

which justify it, the vendor should comply with the request. *Viney v. Chaplin*, 2 De G. & J. 468; 27 L. J., Ch. 434; 4 Jur., N. S. 619.

In any case where a vendor does not attend personally to receive his money, a purchaser has the right to insist upon a written authority to pay to the solicitor. *Id.*

A vendor's solicitor has no authority by virtue of his office to receive the purchase-money, although he may have possession of the deed of conveyance, with the receipt indorsed on it or signed by his client. *Id.*

**Agent for Sale.**—An agent employed to sell an estate has not, as such, authority to receive payment. *Mynn v. Jolliffe*, 1 M. & Rob. 326.

**Recovery by Purchaser on Failure of Vendor's Title.**—When an interest, either legal or equitable, in any real property has been sold, and the conveyance has been executed by the parties to the same, the purchaser, in the absence of fraud on the vendor's part, cannot maintain an action for money received for his use to recover the price paid by him, if the vendor had no title to the property sold and his conveyance turns out to be worthless. In order to protect himself, a purchaser ought to take care that proper covenants are inserted in the deed of grant to him. *Clare v. Lamb*, 10 L. R., C. P. 334; 44 L. J., C. P. 177; 32 L. T. 196; 23 W. R. 389.

Leasehold premises were mortgaged by S., who subsequently married L. After the death of L., his executors concurred in a sale by the mortgagee to C., and received the balance of the purchase-money after payment of the mortgage debt, interest and expenses, and, in the bona fide belief that L. was legally entitled to the equity of redemption, disposed of such balance as part of his estate. S., the widow of L., afterwards filed a bill against C., the purchaser, to recover the property, and obtained a decree against him for the value of the equity of redemption, C. being treated as assignee of the mortgage:—Held, that C. could not recover back the money paid to the executors as upon a failure of consideration, but must have recourse to his remedy upon the covenant for title, if any. *Id.*

**Time for Payment—Relief against Forfeiture of.**—A company incorporated by act of parliament for making a dock agreed with a landowner to purchase a piece of land for 4,000*l.*, of which the sum of 2,000*l.* was to be paid at once, and the remaining 2,000*l.* on a future day named in the agreement, with a provision that if the whole of the 2,000*l.* and interest were not paid off by that day, in which respect time was to be of the essence of the contract, the vendors might repossess the land as of their former estate, without any obligation to repay any part of the purchase-money:—Held, that this stipulation was in the nature of a penalty, from which the company was entitled to be relieved on payment of the balance of the purchase-money, with interest. *Dagenham (Thames) Dock Company, In re, Hulse, Ex parte*, 8 L. R., Ch. 1022; 43 L. J., Ch. 261.

**Amount of.**—On the purchase, at a specified price per acre, of land, described in the particulars as grass land, bounded by a public drain, and "containing by estimation twenty-three acres or thereabouts, but to be surveyed," the

land when measured usque ad medium flum aquæ contained 23a. 0r. 26p., of which 1a. 0r. 33p. was comprised within the drain:—Held, that if the land comprised within the drain was included in the conveyance, the purchaser was bound to pay for it at the specified rate. *Poppo, In re*, 25 W. R. 248—C. A.

**Apportionment of.**—A message belonged to one who devised his real estate in trust for sale. An adjoining message was vested in the trustees of his settlement upon trust for sale, and the purchase-money, subject to the payment of definite sums, belonged to the testator's estate. Under a decree for administering the estate the two messages were put up for sale together in one lot, and it was provided that the purchase-money should be paid into court to the credit of the cause, "The proceeds of the sale of the testator's real estate." The trustees of the settlement had obtained liberty to attend the proceedings as to the sale. The purchaser objected to the title on the ground that the two properties were sold together for one lump sum, without any provision for apportioning it, and that it was to be paid into court in a suit unconnected with the settlement:—Held, that this objection was not sustainable, for that the court, having the money in its custody, would see it properly applied. The court, however, for the satisfaction of the purchaser, ordered that the purchase-money should be apportioned, and the part apportioned to the settled message paid into court to a separate account. *Cavendish v. Cavendish*, 10 L. R., Ch. 319; 33 L. T. 219; 23 W. R. 313.

A trustee for sale may properly sell the trust property, together with other property, for an entire price, where a sale in that manner will be more beneficial for the cestui que trust, provided the purchase-money be properly apportioned, and the conditions of sale affecting the other property are not such as to injure the sale of the trust property. *Cooper, In re*, 4 Ch. D. 802; 46 L. J., Ch. 133; 35 L. T. 890; 25 W. R. 301.

A purchaser under such circumstances ought to see that the purchase-money is properly apportioned before completion. *Id.*

**On Sale by an Executor.**—On a purchase from an executor or other person having power to deal with real estate, if there is no reason to infer that the executor is not selling for payment of debts, the purchaser is discharged from seeing to the application of the purchase-moneys. Secus, if the executor is selling for securing his own private debt, or otherwise for his own benefit. *Haynes v. Forshaw*, 22 L. J., Ch. 1060; 17 Jur. 930.

**Enquiry as to Debts.**—Unless twenty years have elapsed since the death of a testator who has charged his real estate with the payment of his debts, the vendor selling under the power given by the charge is not bound to answer the purchaser's inquiry whether any of the debts of the testator still remain unpaid, and the purchaser ought not to make the inquiry, as he will get a good title even if there are no debts. *Tanqueray-Willauve and Landau, In re*, 20 Ch. D. 465; 51 L. J., Ch. 434; 46 L. T. 452; 30 W. R. 801—C. A.

**Vendors only having Title to Moiety.**—When

day. A delay in the completion arose from a defect in a power of sale in a settlement, which was afterwards cured by a decree rectifying the settlement:—Held, that interest was payable from the day appointed for completion. *Palmerston (Viscount) v. Turner*, 33 Beav. 525; 33 L. J., Ch. 457; 10 Jur., N. S. 577; 12 W. R. 816.

**Instalments—Part left on Mortgage—Reduction.**—An estate was contracted to be sold at a sum to be paid by six instalments, with additions in the form of interest, at 5 per cent., until the day of payment thereof. By a subsequent contract it was agreed, that the last instalment, instead of being paid at the appointed day, should remain on mortgage, at  $4\frac{1}{2}$  per cent. for fourteen years, but that the stipulations of the first contract as to the previous instalments should continue in force. The reduction from 5 to  $4\frac{1}{2}$  per cent. is dependent upon the fulfilment of the terms of the first contract with respect to the previous instalments; and these being suffered to remain unpaid long after the appointed periods, and no mortgage having been executed, the vendor is entitled to recover 5 per cent. upon the last instalment, as well as upon the others. *Attwood v. Taylor*, 1 M. & G. 279; 1 Scott, N. R. 611.

By a contract of sale, the purchaser was to pay a certain sum by six instalments, and also 5 per cent. half-yearly from the day appointed for the payment of the second instalment, upon the four remaining instalments, until paid; such additional sums, by way of percentage, to be secured by the bond of the purchaser. In the contract, and also in the declaration thereon, this additional percentage was called interest upon the instalments. Neither the instalments, nor the additional percentage were paid as they became due, nor was any bond given:—Held, that the purchaser was chargeable with interest upon the last four instalments until actual payment of those instalments; but that the jury was not bound, either at common law or under 3 & 4 Will. 4, c. 42, s. 28, to give interest upon the additional percentage treated by the parties as interest. *Id.*

**Parties to Sue—Joint Interest in Lands.**—A., B. and C., being interested in lands, but having no common legal interest in any portion of them, agreed together to put them up for sale, according to their interests; and the lands were so put up, under the direction of their agent, in lots. Each lot was described in a separate paper containing the conditions of sale, in which it was stipulated that the vendors should deliver an abstract of title; that the conveyances should be executed, and the purchase-money paid on a certain day, from which time the purchaser should have possession; and that if the purchaser should be let in before payment of the purchase-money, he should be considered tenant at will to the vendors, and pay interest at the rate of 4 per cent. on the amount of purchase-money, as and for rent. The defendant bought some of the lots under these conditions—two by auction and two by private contract. No abstract of title was delivered; but he was let into possession and held for several years, not paying the purchase-money. He knew of the arrangement entered into between A., B. and C. for the sale of the premises:—Held, that A., B. and C. could not jointly sue upon an implied contract by the defendant, to waive the delivery of an abstract,

and perform the condition for payment of 4 per cent. interest as rent. *Seaton v. Booth*, 4 A. & E. 529; 1 H. & W. 742.

#### 6. ACTION FOR PRICE.

**After Resale.**—Where the vendor, after an abortive sale, resells to another person, he cannot sue the first purchaser for lands bargained and sold. *James v. Shore*, 1 Stark. 426.

**On Breach of Contract—Damages.**—Where a party has been let into possession of lands under a contract of purchase, but does not complete the purchase, and refuses to pay the purchase-money, and no conveyance is executed, the vendors cannot recover from him the whole amount of the purchase-money, but only the damages actually sustained by his breach of contract. *Laird v. Pim or Payne*, 7 M. & W. 474; 8 D. P. C. 860.

**Joint or Several Liability—Parties to Sue.**—By articles of agreement, reciting that the defendant had contracted with J., as the agent of the plaintiff and the other owners of the property, for the purchase of the lands therein mentioned, the defendant covenanted with the plaintiff and the several other parties beneficially interested, to perform such contract by paying the purchase-money on a certain day:—Held, that this covenant was several; and that the plaintiff might sue alone for the non-payment of his share of the purchase-money, without joining the other parties beneficially interested. *Poole v. Hill*, 6 M. & W. 835; 9 D. P. C. 300.

**On Fraud by Agent and Purchaser.**—When an agent for the sale of an estate colludes with a purchaser, and in consideration of a bribe or honorarium allows the purchaser to obtain the estate at less than its value, with a view to a sale at a higher price to a sub-purchaser, and the transaction is concealed from the vendor, both agent and purchaser will be held jointly and severally liable to pay to the vendor the increased amount obtained by the sub-sale. *Morgan v. Elford*, 4 Ch. D. 352.

On appeal, the court, being of opinion on the evidence and correspondence that the bargain between the agent and the owner was that the agent should have whatever the estate fetched above a certain price, dismissed the bill without giving any opinion on the above points. *Id.*

**On Covenant to Pay by Notes.**—A covenant to pay D. 213*l.* 15*s.* as and for the purchase-money for certain seams and beds of coal and minerals, in manner and at the times following, viz.: "21*l.* 7*s.* 6*d.* on the day of the date thereof, and the remaining 192*l.* 7*s.* 6*d.* by four several promissory notes, under the hand of the defendant, bearing date with the deed, payable to D. or order on the 1st of July in every year, until the whole of the purchase-money should be paid, with interest thereon after the rate of 5*l.* per cent. per annum until the promissory notes should be paid," is a covenant to pay the purchase-money when the notes become due, and the covenant is not performed by the mere delivery of the promissory notes. *Dixon v. Holroyd*, 7 El. & Bl. 903; 27 L. J., Q. B. 43; 3 Jur., N. S. 1147.

**Consideration—I. O. U.]**—A count stated, that

proved the sufficiency of the notice, but did not point out that the sum paid in was deficient by 500*l.* On discovering the deficiency, the purchaser paid in 500*l.*, with interest, at 5 per cent.:—Held, that the purchaser was not liable for interest subsequently to the time when he paid 38,000*l.* into the bank. *Kershaw v. Kershaw*, 9 L. R., Eq. 56; 21 L. T. 651; 18 W. R. 477.

**Evidence of Possession.**]—The putting up of a notice board for the purpose of selling or letting building land by a purchaser:—Held, to render him liable to pay interest on the purchase-money. *Ballard v. Shutt*, 15 Ch. D. 122; 49 L. J., Ch. 618; 43 L. T. 173; 29 W. R. 73.

**Covenant for Delivery of Abstract.**]—By articles of agreement, the defendant agreed to purchase land of the plaintiff, and the plaintiff agreed that he would within one month from the date thereof, or from being required so to do, deliver to the defendant an abstract of title; and the defendant agreed that he would pay a portion of the purchase-money on signing the agreement, and the residue on or before a given day (four years from the date of the agreement), with interest thereon, payable half-yearly, between the date of the agreement and the day fixed for the payment of the residue:—Held, that the delivery of the abstract was not a condition precedent to the plaintiff's right to enforce payment of the half-yearly interest. *Dicker v. Jackson*, 6 C. B. 103; 17 L. J., C. P. 234; 12 Jur. 541.

**Willingness to Complete.**]—A purchaser agreed that, if the completion of the purchase "shall be delayed on his part" beyond the 27th June, he would pay interest. The vendor and his trustee were willing to complete on that day, but the purchaser was not prepared; and on the 28th November, when the purchaser was ready, the vendor's trustee would not join:—Held, that the purchaser was liable to interest only from the 27th June to the 28th November. *Perry v. Smith*, Car. & M. 554.

**Delay in Investigating Title—Money Lying Idle.**]—A. agreed to advance B. 4,000*l.* on mortgage of freehold and copyhold premises; and it was stipulated, that, within one week from the date of the agreement, B. should deliver to A. or his solicitor a complete abstract of the title to the premises, and produce the title deeds necessary to verify the same, and deduce and shew a good marketable title within one month after the delivery of the abstract; and if B. should not, within a week, deliver such abstract, and produce the title deeds, and within a month after the delivery of the abstract deduce a marketable title, then it was to be at A.'s option to consider the agreement void; and B. should forthwith pay to A. all costs and charges incurred by him in investigating the title to the premises. Abstracts of title were delivered soon after the agreement, but they were found defective. From the 24th September, 1831, the day when the title ought to have been completed, until the 14th May, 1832, negotiations were going on, A. remonstrating on the badness of the title, and informing B. that his money had, during the whole interval, been lying idle, and B. during this interval endeavouring to amend his title until the last-mentioned day, when he

failed to do so, and the negotiation ended. In an action brought by A. to recover the amount of costs and charges incurred by him in investigating the title, and also interest on the 4,000*l.* which had been lying idle from the 24th September until the 14th May:—Held, that A. was not entitled to recover the interest. *Sweetland v. Smith*, 1 C. & M. 585.

Interest paid by a purchaser upon money borrowed by him to complete the purchase, and kept idle (pending an endeavour by the vendor to clear up the title), may be recovered as damages against the latter for breach of contract. *Sherry v. Oke*, 8 D. P. C. 349.

In an action by the intended purchaser against the vendor of an estate, the declaration stated articles of agreement between the defendant and the plaintiff, whereby the defendant, in consideration of 2,115*l.*, agreed that he would, on or before the 25th day of March next, well and effectually convey the estate to the plaintiff, with a good title; and the plaintiff agreed, that on the 25th day of March, on having such conveyance, he would pay the defendant the purchase-money; and that, in case the purchase should not be completed on the 25th day of March, the plaintiff was to pay interest on the purchase-money before it was completed. Breach, that, although the plaintiff was always, from the making of the agreement until and upon the 25th day of March, ready and willing to accept a conveyance, and to pay the purchase-money, whereof the defendant had notice, yet the defendant did not, on the day and year last aforesaid, or at any other time whatsoever, make a good title to the plaintiff of the estate, nor had he at any time any such title; alleging damage by expenses incurred in investigating the title, and loss of interest on the purchase-money while lying at a banker's:—Held, that the plaintiff could not recover for any expenses or loss of interest subsequent to the 25th of March. *Metcalfe v. Fowler*, 6 M. & W. 830.

**Delay—"From whatever Cause."**]—In conditions of sale, a time was fixed for the delivery of the abstract, and also for the payment of the purchase-money, or for interest to run if the money was not paid at that time, "from whatever cause the delay might have arisen." The vendor did not deliver the abstract at the time stipulated:—Held, that the purchaser was only liable to pay interest from the time a good title was shewn. *De Visme v. De Visme*, 1 Mac. & G. 336; 1 Hall & T. 408; 19 L. J., Ch. 52; 13 Jur. 1037.

Where conditions of sale provide that interest shall be paid by the purchaser from a fixed time, if the completion should be delayed by any cause whatever, delay merely occasioned by the state of the title, and not wilful on the part of the vendor, falls within the provision. *Sherwin v. Shakspear*, 5 De G., M. & G. 517.

Where a purchaser agrees, that if, "from any cause whatever," the purchase shall not be completed on the day fixed, he will pay interest, the rule is this—he must pay such interest, unless the delay has been occasioned by any misconduct on the part of the vendor. *Williams v. Glenton*, 34 Beav. 528.

A contract for sale provided, that "if, from any cause whatever," the purchase was not completed on the day named, the purchaser should pay interest on the purchase-money from that

day. A delay in the completion arose from a defect in a power of sale in a settlement, which was afterwards cured by a decree rectifying the settlement:—Held, that interest was payable from the day appointed for completion. *Palmerston (Viscount) v. Turner*, 33 Beav. 525; 33 L. J., Ch. 457; 10 Jur., N. S. 577; 12 W. R. 816.

**Instalments—Part left on Mortgage—Reduction.**—An estate was contracted to be sold at a sum to be paid by six instalments, with additions in the form of interest, at 5 per cent., until the day of payment thereof. By a subsequent contract it was agreed, that the last instalment, instead of being paid at the appointed day, should remain on mortgage, at 4½ per cent. for fourteen years, but that the stipulations of the first contract as to the previous instalments should continue in force. The reduction from 5 to 4½ per cent. is dependent upon the fulfilment of the terms of the first contract with respect to the previous instalments; and these being suffered to remain unpaid long after the appointed periods, and no mortgage having been executed, the vendor is entitled to recover 5 per cent. upon the last instalment, as well as upon the others. *Attwood v. Taylor*, 1 M. & G. 279; 1 Scott, N. R. 611.

By a contract of sale, the purchaser was to pay a certain sum by six instalments, and also 5 per cent. half-yearly from the day appointed for the payment of the second instalment, upon the four remaining instalments, until paid; such additional sums, by way of percentage, to be secured by the bond of the purchaser. In the contract, and also in the declaration thereon, this additional percentage was called interest upon the instalments. Neither the instalments, nor the additional percentage were paid as they became due, nor was any bond given:—Held, that the purchaser was chargeable with interest upon the last four instalments until actual payment of those instalments; but that the jury was not bound, either at common law or under 3 & 4 Will. 4, c. 42, s. 28, to give interest upon the additional percentage treated by the parties as interest. *Ib.*

**Parties to Sue—Joint Interest in Lands.**—A., B. and C., being interested in lands, but having no common legal interest in any portion of them, agreed together to put them up for sale, according to their interests; and the lands were so put up, under the direction of their agent, in lots. Each lot was described in a separate paper containing the conditions of sale, in which it was stipulated that the vendors should deliver an abstract of title; that the conveyances should be executed, and the purchase-money paid on a certain day, from which time the purchaser should have possession; and that if the purchaser should be let in before payment of the purchase-money, he should be considered tenant at will to the vendors, and pay interest at the rate of 4 per cent. on the amount of purchase-money, as and for rent. The defendant bought some of the lots under these conditions—two by auction and two by private contract. No abstract of title was delivered; but he was let into possession and held for several years, not paying the purchase-money. He knew of the arrangement entered into between A., B. and C. for the sale of the premises:—Held, that A., B. and C. could not jointly sue upon an implied contract by the defendant, to waive the delivery of an abstract,

and perform the condition for payment of 4 per cent. interest as rent. *Scaton v. Booth*, 4 A. & E. 529; 1 H. & W. 742.

#### 6. ACTION FOR PRICE.

**After Resale.**—Where the vendor, after an abortive sale, resells to another person, he cannot sue the first purchaser for lands bargained and sold. *James v. Shore*, 1 Stark. 426.

**On Breach of Contract—Damages.**—Where a party has been let into possession of lands under a contract of purchase, but does not complete the purchase, and refuses to pay the purchase-money, and no conveyance is executed, the vendors cannot recover from him the whole amount of the purchase-money, but only the damages actually sustained by his breach of contract. *Laird v. Pim or Payne*, 7 M. & W. 474; 8 D. P. C. 860.

**Joint or Several Liability—Parties to Sue.**—By articles of agreement, reciting that the defendant had contracted with J., as the agent of the plaintiff and the other owners of the property, for the purchase of the lands therein mentioned, the defendant covenanted with the plaintiff and the several other parties beneficially interested, to perform such contract by paying the purchase-money on a certain day:—Held, that this covenant was several; and that the plaintiff might sue alone for the non-payment of his share of the purchase-money, without joining the other parties beneficially interested. *Poole v. Hill*, 6 M. & W. 835; 9 D. P. C. 300.

**On Fraud by Agent and Purchaser.**—When an agent for the sale of an estate colludes with a purchaser, and in consideration of a bribe or honorarium allows the purchaser to obtain the estate at less than its value, with a view to a sale at a higher price to a sub-purchaser, and the transaction is concealed from the vendor, both agent and purchaser will be held jointly and severally liable to pay to the vendor the increased amount obtained by the sub-sale. *Morgan v. Elford*, 4 Ch. D. 352.

On appeal, the court, being of opinion on the evidence and correspondence that the bargain between the agent and the owner was that the agent should have whatever the estate fetched above a certain price, dismissed the bill without giving any opinion on the above points. *Ib.*

**On Covenant to Pay by Notes.**—A covenant to pay D. 21*l.* 15*s.* as and for the purchase-money for certain seams and beds of coal and minerals, in manner and at the times following, viz.: "21*l.* 7*s.* 6*d.* on the day of the date thereof, and the remaining 19*l.* 7*s.* 6*d.* by four several promissory notes, under the hand of the defendant, bearing date with the deed, payable to D. or order on the 1st of July in every year, until the whole of the purchase-money should be paid, with interest thereon after the rate of 5*l.* per cent. per annum until the promissory notes should be paid," is a covenant to pay the purchase-money when the notes become due, and the covenant is not performed by the mere delivery of the promissory notes. *Dixon v. Holroyd*, 7 El. & Bl. 903; 27 L. J., Q. B. 43; 3 Jur., N. S. 1147.

**Consideration—I. O. U.**—A count stated, that

in consideration that the plaintiff agreed with the defendant to sell and transfer to him, by the 22nd of January, a lease of a farm for 500*l.*, and the implements, stock, &c., at a valuation, the defendant agreed to purchase the same, subject to his being approved of as a tenant by S.; and also, at and upon making the agreement, to pay down 500*l.* as a deposit, and to complete the purchase, and pay the valuation by the 22nd of January; that the defendant being unable to pay the 500*l.* upon the making the agreement, in consideration that the plaintiff dispensed with payment down of the 500*l.*, and would take the defendant's I O U for the same, he promised the plaintiff that he would pay the 500*l.* as soon as he could write to his banker, at Berwick, and procure his banker to remit the same. Breach, that the money was not paid:—Held, that the count disclosed a sufficient consideration for the defendant's promise. *Davis v. Nisbett*, 10 C. B., N. S. 752; 31 L. J., C. P. 6; 8 Jur., N. S. 211; 9 W. R. 840.

A plea, that before the defendant could procure his banker to remit, and before any demand of payment of the I O U, the defendant was disapproved as a tenant by S., is a good answer to the count. *Id.*

A plea, on equitable grounds, that before demand of payment of the I O U, the defendant was disapproved of as a tenant by S., and the plaintiff was thereby rendered unable to sell and transfer the lease, is not a good equitable defence, inasmuch as the plea discloses no ground upon which the defendant could be liable to an injunction in a court of equity. *Id.*

Replication to this plea, that it was part of the agreement that the 500*l.* should be forfeited in case of non-completion of the agreement by the defendant on the 22nd of January; that it was agreed that, for the purpose of obtaining the defendant's being approved as a tenant by S., he should apply to S. to accept him as such tenant; and that, before any disapproval of S., the defendant applied to S. to accept him as tenant, and afterwards the defendant withdrew such application, and declined to be accepted as tenant by S.; and that such disapproval was procured and occasioned by the act of the defendant, and from his unwillingness to fulfil the agreement, and not otherwise:—Held, that, assuming the plea to be an answer to the count, the replication was a good answer to the plea. *Id.*

**Priority of Purchaser's Costs over Mortgage after Contract.**—A vendor brought an action claiming a declaration that his contract for sale was at an end. The purchaser made a counter-claim for the specific performance of the contract. Judgment was given for the defendant, with costs, on both claim and counter-claim:—Held, that the defendant was entitled to deduct his costs from his purchase-money in priority to a mortgage of the plaintiff, whose mortgage had been created after the contract for sale, but before the commencement of the action. *Green v. Sevin*, 13 Ch. D. 589.

## 7. ACTION FOR DEPOSIT.

**Parties to Action—Auctioneers as Co-Defendants.**—Auctioneers (as well as the vendors) were held to be proper defendants to an action for rescission and costs brought by the purchaser of a property, which he alleged without contra-

diction that he was induced to purchase by the fraudulent mock-bidding of such auctioneers.—Semble, that it would not have been open to him to make them parties for the mere purpose of discovery. The order, therefore, of Jessel, M. R., dismissing them from the action upon payment of the deposit-money into court, was discharged. *Heatly v. Newton*, 45 L. T. 455; 30 W. R. 72—C. A.

**Right of Vendor to Retain.**—By the conditions of sale it was provided as follows:—"Should the purchaser neglect or fail to comply with any of the conditions, his deposit-money shall be absolutely forfeited to the vendor, who shall be at liberty to re-sell the property by public auction or private sale; and if the amount or price which shall be obtained by such second sale shall not be sufficient to cover the amount bid for the same at the present sale, and all the expenses of or incidental to the present sale, the deficiency shall be paid by the defaulter to the vendor." The purchaser paid a deposit, but failed to complete the purchase. There was no re-sale:—Held, that the vendor was entitled to retain the deposit and also to recover the auctioneers' charges for the abortive sale, and the costs incurred by him in preparing to complete the sale. *Essex v. Daniell*, 10 L. R., C. P. 538; 32 L. T. 476.

When a contract for sale goes off by default of the purchaser, the vendor is entitled to retain the deposit. *Barrell, Ex parte, Parnell, In re*, 10 L. R., Ch. 512; 44 L. J., Ch. 138; 33 L. T. 115; 23 W. R. 846.

By a contract for sale of real estate it was stipulated that a portion of the purchase-money should be paid immediately and the residue on the completion of the contract. There was no stipulation as to the forfeiture of the deposit in case the purchase went off through the purchaser's default. After the title had been accepted the purchaser became bankrupt, and the trustee disclaimed the contract under the Bankruptcy Act, 1869, s. 23, and called upon the vendor to repay the deposit:—Held, that the vendor was entitled to retain the deposit. *Id.*

**Agreement to make "Good Marketable Title"—Purchaser's Knowledge of Defect.**—T. agreed to sell to C. certain freehold houses, and to make a good marketable title. On investigation of the title it appeared that the houses were part of a property which had been sold by a building society in lots, subject to stringent restrictive covenants which were admitted to make the title not a marketable one. T. having declined to procure a release of the covenants, C. brought an action to recover back his deposit. T. adduced evidence that C. knew of the restrictions at the time of the contract, and the jury found that he did:—Held, that this evidence could not be admitted to modify the terms of the express contract, and that the plaintiff was entitled to recover. *Cato v. Thompson*, 9 Q. B. D. 616; 47 L. T. 491—C. A.

**Defective Title—Specific Performance Impossible.**—Where the word "assigns" was omitted in the description of the donees of a power of sale contained in a will, the title of the devisees of the surviving donee was held to be too doubtful for a court of equity to compel specific performance of a contract of sale entered into between the plaintiff and such assignees, and he was held to

be entitled to recover his deposit. *Stevens v. Austen*, 3 El. & El. 685; 30 L. J., Q. B. 212; 7 Jur., N. S. 873; 3 L. T. 810.

An intended purchaser, who by the conditions of sale is to have a good title made out, may, upon an insufficient title being offered to him, recover his deposit money and expenses, in an action against the intended vendor. *Simmons v. Heseltine*, 5 C. B., N. S. 554; 28 L. J., C. P. 129; 5 Jur., N. S. 270.

— **To Lease.**—S., being in the occupation of a public-house, contracted with W. to sell to him the residue of the lease, of which twelve and a half years at least were unexpired. W., the day after signing the contract, by which he agreed to take possession on the 15th April, 1878, paid a sum as a deposit to S.'s agent. The abstract of title shewed that S.'s lessors had a right of option to determine the lease at the end of five years, and W. at once rescinded the contract, and required the return of the deposit-money. S. refused to repay the money, and W. issued a writ in his action on the 10th of April to recover it:—Held, that W.'s objection to the title was valid; that he was not bound to wait till the 15th of April before issuing the writ; and that he was entitled to repayment of the deposit-money with interest. *Weston v. Savage*, 10 Ch. D. 736; 48 L. J., Ch. 239; 27 W. R. 654.

**Delay in Sending in Objections.**—The defendant purchased from a railway company land over a tunnel, which, not being "superfluous," the company had no power to sell, and the plaintiff contracted to purchase the land from the defendant as freehold building land. One of the conditions of sale was that the title should commence with the conveyance from the company; another, that the purchaser should not require the production of or investigate or make any objection or requisition in respect of such conveyance; and another, that the purchaser should send his objection, if any, to the title within seven days from the delivery of the abstract. The plaintiff declined to complete after the expiration of the seven days, and sued for the deposit:—Held, that the deposit could not be recovered. *Rosenberg v. Cook*, 8 Q. B. D. 162; 51 L. J., Q. B. 170; 30 W. R. 344—C. A.

**Objections, when Made.**—In an action to recover the deposit on the purchase of an estate, on the ground of a defect in the vendor's title, specified on rescinding the contract, no objection can be insisted on at the trial which was not stated as a reason for refusing to complete the contract, if it is of such a nature that it might if then stated be removed. *Todd v. Hoggart*, M. & M. 128.

**Mutual Mistake—Misdescription.**—A person purchased at a sale by auction, for 2,500*l.*, property which was described in the particulars of sale as an "immediate reversion in fee simple." Shortly after signing the contract he discovered that by the conditions of sale, which were produced for the first time and read aloud by the vendor's agent at the commencement of the sale, but which the purchaser was prevented by deafness from hearing distinctly, the purchaser was to take the property, subject to the obligation of paying off mortgages for 2,500*l.*, in addition to

his purchase-money, the real value of the reversion being considerably under 5,000*l.*:—Held, that the purchaser was entitled to have the contract rescinded on the ground of common mistake, and of misdescription in the particulars; and that he was also entitled to have the deposit which he had paid returned, with interest at 4 per cent., and, until payment, to a lien for the amount on the vendor's interest in the property. *Torrance v. Bolton*, 14 L. R., Eq. 124; 41 L. J., Ch. 643; 27 L. T. 19; 20 W. R. 718. Affirmed, 8 L. R., Ch. 118; 42 L. J., Ch. 177; 27 L. T. 738; 21 W. R. 134.

**Against Agent.**—Where A. became the purchaser of an estate sold by the defendant at a public auction, and signed a memorandum of agreement, in which he was described as the agent of S., who afterwards repudiated the contract, of which notice was given to the agent of the vendor before the payment of the deposit, which A. afterwards paid according to the conditions of sale:—Held, on the title proving defective, that A. was entitled to the deposit in his own name. *Langstroth v. Toulmin*, 3 Stark. 145.

**Against Principal.**—A., as agent of B., the owner of land, entered into an agreement for sale with C., the agent of D., but who appeared to act on his account, and the parties bound themselves in a penalty for the performance of the agreement, whereupon C. paid A. part of the purchase-money as a deposit:—Held, that D. might sue B. to recover back the deposit on a breach of the agreement. *Norfolk (Duke) v. Worthy*, 1 Camp. 337.

**Solicitor of Vendor—Stakeholder.**—A. was employed as solicitor for the vendor of real estate. By the conditions of sale the deposit was to be paid into his hands "as agent for the vendor," and he signed the contract of sale and receipt for the deposit as such agent:—Held, that he was not a stakeholder, and was liable to pay over the deposit to the vendor on demand, and in default to pay interest from the time of such demand. *Edgell v. Day*, 1 H. & R. 8; 1 L. R., C. P. 80; 35 L. J., C. P. 7.

**Under Unwritten Contract.**—Upon the abandonment of an unwritten contract for the sale of land, on defect of title, the deposit-money paid by the purchaser to the auctioneer may be recovered. *Gosbell v. Archer*, 4 N. & M. 485; 2 A. & E. 500; 1 H. & W. 31.

But the expenses of investigating the title cannot be recovered without proof of a written contract binding on the vendor, nor interest upon the deposit. *Ib.*

**Contract under Seal.**—If A. agrees to sell an estate to B., and is afterwards disabled from doing so, B. may recover back the money deposited, although the contract for the sale is under seal. *Greville v. Da Costa*, Peake's Ad. Cas. 113.

**Non-Performance by either Party—Intention.**—By an agreement for the purchase of a public-house, 300*l.* was paid by the purchaser by way of deposit, and in part of the purchase-money. The purchase was to be completed on a certain day; and it was agreed that, if either party should refuse to perform the agreement, he

should pay the other 1,000*l.* liquidated damages:—Held, that on this agreement it was not intended that the 300*l.* should be forfeited on the failure of the purchaser to complete the contract. *Palmer v. Temple*, 1 P. & D. 379; 9 A. & E. 508.

**When Second Action Allowed.**—[On the day for completing the purchase the purchaser threw up the contract, on the ground that the vendor was not ready to complete, and sued him for 1,000*l.* liquidated damages, and for 300*l.* The jury found a verdict for the vendor, on the ground that he was ready to complete the contract. After the writ was sued out against the vendor, he disposed of the public-house to another party, and the purchaser again sued him for 300*l.* :—Held, that as the former action failed on the sole ground that it was prematurely brought, the judgment in it was no bar; and that, as the parties did not intend the 300*l.* to be forfeited as a deposit, the purchaser was entitled to recover it back. *Ib.*

**Payment—Brewer's Cheque.**—[In an action on an agreement to transfer a public-house and assign the licences, the parties binding themselves in a penalty for the performance of the terms, if the vendor could not assign the licences, and the vendee had not the money ready at an appointment to settle the business, the penalty cannot be recovered; but if the vendee has paid a deposit, it may be recovered back. A cheque upon a brewer's house is not sufficient in such a case, if tendered in payment, though it is proved to be the constant practice to use cheques instead of money, in order to prevent robbery, on account of the lateness of the hour at which settlements take place in the transfer of public-houses. *Clarke v. King*, 2 C. & P. 286; R. & M. 394.

**I O U given for.**—[A. agreed to sell and B. to buy a public-house, goodwill, &c., by an agreement which contained these words: "As earnest of this agreement, the purchaser has paid into the hands of the vendor 50*l.*, which is to be allowed in part of payment at the completion of this agreement; but if the vendor should not fulfil the same on his part, he shall return the deposit in addition to the damages hereinafter stated; and if the purchaser should fail to fulfil his part of the agreement, then the deposit-money shall become forfeited in part of the following damages; and if either of the parties should neglect to perform, or refuse to comply with any part of this agreement, the party so refusing or neglecting shall pay to the other of them on demand 50*l.*, mutually agreed upon to be the damages ascertained and fixed on breach thereof." Instead of the deposit B. gave an I O U, which he never paid, and he afterwards refused to fulfil the agreement:—Held, that A. was entitled to recover 50*l.* as a forfeited deposit. *Hinton v. Sparks*, 3 L. R., C. P. 161; 37 L. J., Q. P. 81; 17 L. T. 600.

**Payment by Bill.**—[If a party has given a bill of exchange or a cheque for the amount of a deposit on a sale by auction, any ground on which the party could recover back his deposit, if paid in money, will be a good ground of defence in an action upon the bill or cheque. *Mills v. Oddy*, 6 C. & P. 728. See *S. C.*, 2 C., M. & R. 103; 5 Tyr. 571; 1 Gale, 92. See *Dixon v. Holroyd*, ante, 408.

**Sale by Bankrupt's Assignees—Supersession—Reappointment.**—[A bankrupt's assignees contracted for the sale of his copyhold lands, and received a deposit. The commission was afterwards superseded, because when it issued the petitioning creditor's debt was not due. Another commission issued, upon the petition of another creditor, and the same assignees were chosen:—Held, that the plaintiff, having abandoned his contract pending the old commission, might recover back his deposit. *Bartlett v. Tuckin*, 1 Marsh. 583; 6 Taunt. 259. And see *Roper v. Combes*, 6 B. & C. 534.

**Forfeiture for Non-Completion—Payment by Bankrupt in Fraud of Creditors—Right to follow Money.**—[A bankrupt, having disposed of his goods in fraud of his creditors, opened an account in a bank with the proceeds, and having entered into a contract for the purchase of land in an assumed name, paid a deposit to the defendant, the auctioneer, by a cheque drawn upon the bank. The vendor and the defendant acted bona fide and without notice of the bankruptcy or of the fraudulent conduct of the bankrupt:—Held, that the bankrupt's trustee was not entitled to recover the deposit from the defendant so as to prevent it from being forfeited to the vendor upon the non-completion of the contract. *Collins v. Stimson*, 11 Q. B. D. 142; 52 L. J., Q. B. 440; 48 L. T. 828; 31 W. R. 920; 47 J. P. 439.

**Condition to make good Loss on Resale.**—[The plaintiff put up for sale by auction real property upon conditions of sale which stipulated that the purchaser of each lot should "forthwith pay into the hands of the auctioneer a deposit of 20 per cent. on the purchase-money, and sign an agreement" to pay the remainder, and "that if the purchaser of either lot shall fail to comply with these conditions, the deposit money shall be actually forfeited to the vendor, who shall be at full liberty to resell such lot either by public auction or private contract; and any deficiency that may arise upon such resale, together with all expenses attending the same, shall immediately after such second sale be made good by such defaulter, and on nonpayment thereof, such amount shall be recoverable by the vendor as and for liquidated damages." The defendant became a purchaser, but did not pay the deposit, or complete the purchase. The plaintiff resold at a price below that for which the defendant had purchased, and the deficiency, with the expenses of sale, exceeded the amount of the deposit:—Held, that the plaintiff was entitled to recover from the defendant the amount of the deficiency and expenses only, and not, in addition to this, the amount of the deposit. *Ockenden v. Henley*, El., Bl. & El. 485; 27 L. J., Q. B. 36; 4 Jur., N. S. 999.

Had the deposit been paid, and the bargain completed, the deposit would have gone in part payment of the purchase-money, and in case of the non-completion of the bargain, if the deficiency and expenses had together been less than the deposit, the purchaser would have been entitled to the whole deposit, but nothing more. *Ib.*

**Interest on.**—[If a purchaser pays a deposit to the auctioneers at the time of sale in part of his purchase-money, and brings an action against them to recover it back in consequence of the vendors not being able to make a good title, and

to the entrance. *Wall v. City of London Real Property Company*, 9 L. R., Q. B. 249; 43 L. J., Q. B. 249; 30 L. T. 53.

**Building Land—Houses Erected.]**—A. sold some building land to B., and he covenanted for title. After some houses had been built on the land, the purchaser was evicted:—Held, that he was entitled to recover upon the covenants, not only the value of the land, but also that of the houses subsequently built thereon. *Bunny v. Hopkinson*, 27 Beav. 565; 29 L. J., Ch. 93; 6 Jur., N. S. 187; 1 L. T. 53.

**Knowledge of Defect.]**—Where a party agrees to grant a good and valid lease, having full knowledge that he has no title, the plaintiff, in an action for breach of such agreement, may recover, beyond his expenses, damages resulting from the loss of his bargain, and the defendant cannot, under a plea of payment of money into court, give evidence that the plaintiff was aware of the defect of title. *Robinson v. Harman*, 1 Ex. 850; 18 L. J., Ex. 202.

**In Action against Agent Acting without Authority.]**—The defendant professing to be agent for the owners (he being one of them) of an estate, entered into a contract of sale of it to the plaintiff; some time afterwards he wrote to say that there had been some misunderstanding, that he thought he was authorized to sell, but that it appeared that the parties interested took a different view; the owners refused to complete, and sold the estate for a larger sum than that offered by the plaintiff; the plaintiff then brought an action against the owners, when in answer to interrogatories, they (including the defendant) swore there was no authority, but the plaintiff still prosecuted the action, on the ground that an advertisement, stating that to treat and view the property applications were to be made to the defendant, was sufficient authority, and was not disputed; he then brought an action against the defendant for misrepresentation of authority:—Held, that he was entitled to recover as damages, first, the costs of investigating title; secondly, the costs of the previous action up to the time of the answers, and a reasonable time to consider them, but not beyond; thirdly, the difference between the contract price and the market value, of which the price for which the estate sold was *prima facie* evidence; but he could not recover loss on cattle, &c., bought in contemplation of the completion of the purchase. *Godwin v. Francis*, 5 L. R., C. P. 295; 39 L. J., C. P. 121; 22 L. T. 338.

An auctioneer entered into an agreement, on the behalf of A., to sell certain premises to B., without having communicated to A. that B. was in treaty for them. A. had previously sold the premises to another party, and therefore could not fulfil the contract so made with B., whereupon B. sued A. for non-performance of his contract:—Held, that B. was not entitled to recover damages for the loss of his bargain. *Tyrer v. King*, 2 C. & K. 149.

**Deeds of Conveyance.]**—A purchaser cannot recover from the vendor the expenses of preparing deeds of conveyance of the property, after he has refused to complete the purchase, on account of the non-production of certain title deeds, though his attorney prepared the convey-

ances on the faith of a note written in the margin of the abstract by the vendor's solicitors, stating that all the title-deeds were examined by them on the original purchase, and that, if it should be required, they would apply to the solicitor for the original seller, in whose custody they were. *Jarmain v. Egelstone*, 5 C. & P. 172.

**Sale to Solicitor for Company—Dissolution.]**—

On the 27th September, 1848, the defendant agreed to demise to the plaintiff, on or before the 29th November next, a ferry and messuages and premises, at yearly rents; and the defendant agreed, within fourteen days from that date, to furnish an abstract of his title to the premises, and deduce a good title, and the plaintiff agreed to pay to the defendant on or before the 29th November, 3,150*l.* and interest. The defendant did not within fourteen days, or at any time, deduce a good title. On the 17th September, 1850, the plaintiff, who was a solicitor, and promoter of a company for making a ferry, erecting gas-works, and bathing-houses, at Hayling Island, entered into an agreement with the defendant, the owner of land there, for a demise to the plaintiff of a ferry, land, houses, and premises; and the defendant agreed, within fourteen days from the date thereof, to furnish an abstract of his title to the premises, and deduce a good title; and the plaintiff agreed to pay the defendant, on or before the 29th November, 3,150*l.* After the agreement, the company was provisionally registered by the plaintiff as its promoter. Two abstracts of title were sent by the defendant to the plaintiff, which, being objected to, on the 10th November the defendant sent a further abstract, which disclosed a mortgage of the premises intended to be demised to the trustees of the defendant's marriage settlement, one of whom was imbecile; there were also two judgments entered up against the defendant. In consequence of these objections to the title, the company could not proceed with its objects, and was finally dissolved. The purchase-money was not paid to the defendant:—Held, that the plaintiff was entitled to a verdict, and to recover as damages the costs of preparing, stamping, and entering into the agreement, the expenses of investigating the title, and endeavouring to procure a good title, and procure the lease to be granted, but not the expenses of raising the purchase-money and loss of interest, nor the expenses of preparing the company's deed of settlement and registering it provisionally, nor the loss of profits from the granting of the lease and the establishment of the company, nor the profits he would have derived from being employed as solicitor by the company, nor as to any advantage which he might have derived from his time, labour, &c., bestowed in the formation of the company. *Hanslip v. Padwick*, 5 Ex. 615; 19 L. J., Ex. 372.

**Leasehold—Value—Improvements.]**—A. entered into possession of premises under an agreement with B., under which he was to hold them as

tenant for two years, at the yearly rent of 50*l.*, with liberty to him to make, at his expense, such alterations in and additions to the premises as he might think proper, the same being improvements, and A. to have the option of purchasing the premises at any time during the two years for 600*l.*, "it being understood between the parties

that B. was possessed of the premises for his own life, and the life of C., and of the survivor of them." It being, however, discovered that B. had not the precise interest mentioned in the agreement, A. brought an action to recover damages for the breach of contract, and also compensation for the money expended by him in improvements.—Held, that he was only entitled to recover the value of the proposed lease, and not the value of the improvements. *Worthington v. Warrington*, 8 C. B. 134; 18 L. J., C. P. 350.

**Costs in Chancery.**—M. agreed with F. to purchase land from him: on the production of F.'s title M. objected to it: F. insisted that it was good, and gave notice that he should sell at his risk. M. then filed a bill against F. for specific performance, and the question of title was referred by the Court of Chancery to a master, who reported that F. had not a good title, whereupon the bill was dismissed without costs on either side, that being the practice of the Court of Chancery in such cases:—Held, that M. could not recover from F., as damages for breach of the contract, costs incurred by M. in the chancery suit. *Malden v. Fyson*, 11 Q. B. 292; 17 L. J., Q. B. 85; 12 Jur. 228.

**How Recoverable.**—In an action by a vendee against a vendor for a return of the deposit, he can only recover the expenses of investigating the title by declaring specially. *Flureau v. Thornhill*, 2 W. Bl. 1078.

Where a declaration for breach of an agreement to assign a lease alleged that the defendant did not make out a good title, "by reason whereof the plaintiff has been necessarily put to great expenses amounting to a large sum of money," in and about investigating the title:—Held, that he might, by way of damage, recover the amount of a bill of costs due to his attorney, for investigating the title, though he had not paid such bill before action. *Richardson v. Chasen*, 10 Q. B. 756; 16 L. J., Q. B. 890; 11 Jur. 890.

Where the vendor of an estate (the vendee having made a deposit in part payment of the purchase-money) fails to make out a good title by the time stipulated, and the vendee dies, the personal representative of the vendee, and not his heir, is entitled to maintain an action to recover damages for loss of interest on the deposit, and for expenses incurred by the vendee in endeavouring to procure a title—the injury accruing to the personal estate. *Orme v. Broughton*, 4 M. & Scott, 417; 10 Bing. 359.

**Where Claim to Rescind.**—On a motion by plaintiffs in an action for specific performance that the contract should be rescinded, and that all further proceedings should be stayed, except as to any claim for damages sustained by them:—Held, that the plaintiffs were only entitled to have the agreement rescinded, and could not claim also damages for breach. *Henty v. Schröder*, 12 Ch. D. 666; 28 L. J., Ch. 792; 27 W. R. 833.

## 9. PLEADINGS AND EVIDENCE IN ACTIONS.

**Claims.**—Where in an action by the vendor against the vendee of land, for not accepting it and paying the purchase-money, he averred that

he was seised in fee of the land, and that the defendant agreed to purchase it on having a good title, and that his title to the land was made good, perfect, and satisfactory to the defendant, and that he, the plaintiff, had been always ready and willing and offered to convey the land to the defendant, but that he did not pay the purchase-money:—Held, that such general allegations of title in the plaintiff, and that his title was made good and satisfactory to the defendant, and that the plaintiff was ready and willing and offered to convey to the defendant, were tantamount to a performance of the agreement on his part, so as to entitle him to recover for a breach on the defendant's part in not paying the purchase-money. *Martin v. Smith*, 6 East, 555; 2 Smith, 543.

By the conditions of the sale by auction of a copyhold estate, it was stipulated that the purchaser should pay down a deposit, and sign an agreement for the payment of the remainder of the purchase-money at a certain time, on having a good title, and that he should have a proper surrender of the estate on payment of the remainder of the purchase-money:—Held, in an action by the seller, for the non-performance of the conditions on the part of the purchaser, that it was not sufficient to state that the seller had been always ready and willing and frequently offered to make a good title to the estate, and to make a proper surrender on payment of the purchase-money; but the declaration ought to have averred, that the seller actually made a good title, and surrendered the estate to the purchaser, or a tender and refusal; and also to have shewn what title the seller had. *Phillips v. Fielding*, 2 H. Bl. 123.

A declaration alleging that the plaintiff agreed to sell and the defendant to buy land for 120*l.*, which the defendant agreed to pay on or before four years, with 5 per cent. half-yearly, until paid; that the four years had not expired, that the money had not been paid, and that a certain sum was due for interest, is good—without averring title to the land, or that the plaintiff was ready and willing to convey. *Wilks v. Smith*, 2 D., N. S. 215; 10 M. & W. 355; 11 L. J., Ex. 365.

A plaintiff declared upon a contract by the defendant then holding land for a term of years, to assign all his interest to the plaintiff, on payment by the plaintiff, within seven years from a day named, of 140*l.* Breach, that, before the seven years expired, the defendant assigned all his interest to a stranger:—Held, first, that it was not necessary that the declaration should aver a tender of the money, or a request by the plaintiff, or the plaintiff's readiness to accept an assignment. *Lovelock v. Franklyn*, 8 Q. B. 371; 15 L. J., Q. B. 146; 10 Jur. 246; *S. P.*, *Giles v. Giles*, 9 Q. B. 164; 15 L. J., Q. B. 387; 11 Jur. 83.

Held, secondly, that the breach, as laid, was a good ground of action, the defendant having incapacitated himself from performing the contract, if called on. *Id.*

**Defences.**—A declaration stated, that the defendant caused to be put up to sale by auction certain premises, for the residue of a term of years, on the condition, that the defendant should deduce and make a good title thereto, commencing with the lease of the premises under which they were then held; and assigned, as a breach,

vendors having agreed to sell the entirety of property could make a title to one moiety only:—Held, that the purchaser was entitled to have such moiety conveyed to him on payment of one moiety of the purchase-money. *Bailey v. Piper*, 18 L. R., Eq. 683; 43 L. J., Ch. 704; 31 L. T. 86; 22 W. R. 943.

**Abatement of, not allowed on Purchase with Notice.]**—A purchaser buying with notice of tenants in possession is bound to inquire into the nature of their interest, and is not entitled to an abatement of the purchase-money because their interest proves to be larger than he supposed when he entered into the contract. *James v. Lichfield*, 9 L. R., Eq. 51; 39 L. J., Ch. 248.

**Payment to Trustee in Bankruptcy.]**—A trader had, before adjudication (the purchaser having had no notice of any act of bankruptcy), contracted to sell a leasehold property, and had received a deposit in respect of the purchase-money. After the adjudication had been made, but before it had been advertised, the purchaser, having no notice of the adjudication, paid the remainder of the purchase-money to the bankrupt:—Held, that the trustee in the bankruptcy could not be compelled to assign the lease to the purchaser except upon the terms of his paying the purchase-money. *Rabidge, Ex parte, Pooley, In re*, 8 Ch. D. 367; 38 L. T. 663; 26 W. R. 646—C. A.

**Payment of Purchase-Money to Bankrupt after Notice of Adjudication.]**—Purchasers paid part of the purchase-money by a post-dated cheque. Before the date of payment they had notice that the vendor was adjudicated a bankrupt, but they did not stop the cheque, which was honoured in due course:—Held, that they must pay the money over again to the trustee. *Armstead, Ex parte, Palmer, In re*, 45 L. T. 557; 30 W. R. 124.

**To Debtor after Filing Petition.]**—When a debtor has filed a petition for liquidation, and resolutions accepting a composition are afterwards passed as provided by the act, such debtor remains absolute master of his property until the creditors take action under s. 126 of the Bankruptcy Act, 1869, and a purchaser from him is not entitled to any evidence whether or not the instalments under the composition have been duly paid. *Kearley, In re*, 7 Ch. D. 615; 47 L. J., Ch. 474; 38 L. T. 92; 26 W. R. 324.

**Payment into Court on Objection to Conveyance.]**—When the purchaser of property under an administration decree declined to complete his purchase upon the ground of non-concurrence on a previous sale of one or two persons interested in the purchase-money:—Held, that he must nevertheless bring the purchase-money into court, the objection being one of conveyance and not of title. *Matson v. Deane*, 4 De G., J. & S. 345.

**Heir-at-Law—Equity against Personal Estate.]**—The vendor's heir-at-law, who has obtained a decree setting aside the sale on repayment of the purchase-money to the purchaser, has no equity to resort to the personal estate to recoup him; not even to a portion of it identified as part of the purchase-money. *Ryder v. Ryder*, 8 Ir. R., Eq. 86.

A person contracted to purchase real estate, subject to a condition that if he made any requisition which the vendor was unable or unwilling to comply with, the vendor should be at liberty to rescind the contract. He made several requisitions and died intestate without completing the contract, and after his death the vendor rescinded it on account of his alleged inability to comply with one of the requisitions, which if not complied with might have given the purchaser a right to compensation, but would not have entitled him to annul the contract:—Held, that the heir-at-law of the purchaser was entitled to have the amount of the purchase-money paid to him out of the intestate's personal estate. *Hudson v. Cooke or Cook*, 13 L. R., Eq. 417; 41 L. J., Ch. 306; 26 L. T. 180; 20 W. R. 407.

**Agreement for Work and Labour instead of Price—Indorsement of Receipt.]**—A. assigned and sold an unexpired lease of premises, and the fee simple of a messuage, to B.; and in each instrument recited that he had received the purchase-money, and on the back of each wrote a receipt for the purchase-money in full; after which a memorandum of agreement, not signed or stamped, was drawn up between the parties, reciting that B. had lately purchased of A. the premises in question; and that A. being indebted to B. in 100l. had agreed that the same should be considered as in part payment of the purchase-money; but, it being understood, that, in case the dividend about to be paid by A. to his creditors should not amount to 20s. in the pound, then that A. was to do work for B. in his line of a builder to the amount of such deficiency; and that B. was to retain in his hands 60l., to be also considered as in part payment of the purchase-money; and for which sum B. was to do and perform work for A. in his line of a plumber and glazier. *Indebitatus assumpsit* being brought by A. to recover the money actually due to him, as the purchase-money of the premises, the declaration alleging that the sum was due for and in respect of divers tenements sold by the plaintiff to the defendant; and that thereupon, in consideration that the plaintiff would take the work and labour of the defendant as a plumber and glazier at reasonable prices, to the extent of the debt, in payment and satisfaction thereof, the defendant undertook to do and perform for the plaintiff all such work and labour as he might require, to the extent of the debt; averring readiness of the plaintiff to receive the work, and refusal of the defendant to perform it:—Held, that neither the agreement, nor parol evidence of the contents, was admissible to shew that the consideration money had not been paid. *Baker v. Dewey*, 3 D. & R. 99; 1 B. & C. 704.

##### 5. INTEREST ON PURCHASE-MONEY.

**Deposit of Purchase-Money—Notice.]**—A purchaser contracted for the purchase of real estate at the price of 38,500l., which was to carry interest at 5 per cent. until payment, and he was let into possession. Afterwards, difficulties having arisen in completing the purchase, he paid 38,000l. into a bank to a separate account, and gave notice to the vendors that this sum was appropriated for the purposes of the purchase, and that he would refuse to pay interest under the contract. The vendors replied that they dis-

puted the sufficiency of the notice, but did not point out that the sum paid in was deficient by 500*l*. On discovering the deficiency, the purchaser paid in 500*l*., with interest, at 5 per cent. :—Held, that the purchaser was not liable for interest subsequently to the time when he paid 38,000*l*. into the bank. *Kershaw v. Kershaw*, 9 L. R., Eq. 56; 21 L. T. 651; 18 W. R. 477.

**Evidence of Possession.**]—The putting up of a notice board for the purpose of selling or letting building land by a purchaser:—Held, to render him liable to pay interest on the purchase-money. *Ballard v. Shutt*, 15 Ch. D. 122; 49 L. J., Ch. 618; 43 L. T. 173; 29 W. R. 73.

**Covenant for Delivery of Abstract.**]—By articles of agreement, the defendant agreed to purchase land of the plaintiff, and the plaintiff agreed that he would within one month from the date thereof, or from being required so to do, deliver to the defendant an abstract of title; and the defendant agreed that he would pay a portion of the purchase-money on signing the agreement, and the residue on or before a given day (four years from the date of the agreement), with interest thereon, payable half-yearly, between the date of the agreement and the day fixed for the payment of the residue:—Held, that the delivery of the abstract was not a condition precedent to the plaintiff's right to enforce payment of the half-yearly interest. *Dicker v. Jackson*, 6 C. B. 103; 17 L. J., C. P. 234; 12 Jur. 541.

**Willingness to Complete.**]—A purchaser agreed that, if the completion of the purchase "shall be delayed on his part" beyond the 27th June, he would pay interest. The vendor and his trustee were willing to complete on that day, but the purchaser was not prepared; and on the 28th November, when the purchaser was ready, the vendor's trustee would not join:—Held, that the purchaser was liable to interest only from the 27th June to the 28th November. *Perry v. Smith*, Car. & M. 554.

**Delay in Investigating Title—Money Lying Idle.**]—A. agreed to advance B. 4,000*l*. on mortgage of freehold and copyhold premises; and it was stipulated, that, within one week from the date of the agreement, B. should deliver to A. or his solicitor a complete abstract of the title to the premises, and produce the title deeds necessary to verify the same, and deduce and shew a good marketable title within one month after the delivery of the abstract; and if B. should not, within a week, deliver such abstract, and produce the title deeds, and within a month after the delivery of the abstract deduce a marketable title, then it was to be at A.'s option to consider the agreement void; and B. should forthwith pay to A. all costs and charges incurred by him in investigating the title to the premises. Abstracts of title were delivered soon after the agreement, but they were found defective. From the 24th September, 1831, the day when the title ought to have been completed, until the 14th May, 1832, negotiations were going on, A. remonstrating on the badness of the title, and informing B. that his money had, during the whole interval, been lying idle, and B. during this interval endeavouring to amend his title until the last-mentioned day, when he

failed to do so, and the negotiation ended. In an action brought by A. to recover the amount of costs and charges incurred by him in investigating the title, and also interest on the 4,000*l*. which had been lying idle from the 24th September until the 14th May:—Held, that A. was not entitled to recover the interest. *Sweetland v. Smith*, 1 C. & M. 585.

Interest paid by a purchaser upon money borrowed by him to complete the purchase, and kept idle (pending an endeavour by the vendor to clear up the title), may be recovered as damages against the latter for breach of contract. *Sherry v. Oke*, 3 D. P. C. 349.

In an action by the intended purchaser against the vendor of an estate, the declaration stated articles of agreement between the defendant and the plaintiff, whereby the defendant, in consideration of 2,115*l*., agreed that he would, on or before the 25th day of March next, well and effectually convey the estate to the plaintiff, with a good title; and the plaintiff agreed, that on the 25th day of March, on having such conveyance, he would pay the defendant the purchase-money; and that, in case the purchase should not be completed on the 25th day of March, the plaintiff was to pay interest on the purchase-money before it was completed. Breach, that, although the plaintiff was always, from the making of the agreement until and upon the 25th day of March, ready and willing to accept a conveyance, and to pay the purchase-money, whereof the defendant had notice, yet the defendant did not, on the day and year last aforesaid, or at any other time whatsoever, make a good title to the plaintiff of the estate, nor had he at any time any such title; alleging damage by expenses incurred in investigating the title, and loss of interest on the purchase-money while lying at a banker's:—Held, that the plaintiff could not recover for any expenses or loss of interest subsequent to the 25th of March. *Metcalfe v. Fowler*, 6 M. & W. 830.

**Delay—"From whatever Cause."**]—In conditions of sale, a time was fixed for the delivery of the abstract, and also for the payment of the purchase-money, or for interest to run if the money was not paid at that time, "from whatever cause the delay might have arisen." The vendor did not deliver the abstract at the time stipulated:—Held, that the purchaser was only liable to pay interest from the time a good title was shewn. *De Visne v. De Visne*, 1 Mac. & G. 336; 1 Hall & T. 408; 19 L. J., Ch. 62; 13 Jur. 1037.

Where conditions of sale provide that interest shall be paid by the purchaser from a fixed time, if the completion should be delayed by any cause whatever, delay merely occasioned by the state of the title, and not wilful on the part of the vendor, falls within the provision. *Sherwin v. Shakspear*, 5 De G., M. & G. 517.

Where a purchaser agrees, that if, "from any cause whatever," the purchase shall not be completed on the day fixed, he will pay interest, the rule is this—he must pay such interest, unless the delay has been occasioned by any misconduct on the part of the vendor. *Williams v. Glenton*, 34 Beav. 528.

A contract for sale provided, that "if, from any cause whatever," the purchase was not completed on the day named, the purchaser should pay interest on the purchase-money from that

day. A delay in the completion arose from a defect in a power of sale in a settlement, which was afterwards cured by a decree rectifying the settlement:—Held, that interest was payable from the day appointed for completion. *Palmerston (Viscount) v. Turner*, 33 Beav. 525; 33 L. J., Ch. 457; 10 Jur., N. S. 577; 12 W. R. 816.

**Instalments—Part left on Mortgage—Reduction.**—An estate was contracted to be sold at a sum to be paid by six instalments, with additions in the form of interest, at 5 per cent., until the day of payment thereof. By a subsequent contract it was agreed, that the last instalment, instead of being paid at the appointed day, should remain on mortgage, at  $4\frac{1}{2}$  per cent. for fourteen years, but that the stipulations of the first contract as to the previous instalments should continue in force. The reduction from 5 to  $4\frac{1}{2}$  per cent. is dependent upon the fulfilment of the terms of the first contract with respect to the previous instalments; and these being suffered to remain unpaid long after the appointed periods, and no mortgage having been executed, the vendor is entitled to recover 5 per cent. upon the last instalment, as well as upon the others. *Attwood v. Taylor*, 1 M. & G. 279; 1 Scott, N. R. 611.

By a contract of sale, the purchaser was to pay a certain sum by six instalments, and also 5 per cent. half-yearly from the day appointed for the payment of the second instalment, upon the four remaining instalments, until paid; such additional sums, by way of percentage, to be secured by the bond of the purchaser. In the contract, and also in the declaration thereon, this additional percentage was called interest upon the instalments. Neither the instalments, nor the additional percentage were paid as they became due, nor was any bond given:—Held, that the purchaser was chargeable with interest upon the last four instalments until actual payment of those instalments; but that the jury was not bound, either at common law or under 3 & 4 Will. 4, c. 42, s. 28, to give interest upon the additional percentage treated by the parties as interest *ib.*

**Parties to Sue—Joint Interest in Lands.**—A., B. and C., being interested in lands, but having no common legal interest in any portion of them, agreed together to put them up for sale, according to their interests; and the lands were so put up, under the direction of their agent, in lots. Each lot was described in a separate paper containing the conditions of sale, in which it was stipulated that the vendors should deliver an abstract of title; that the conveyances should be executed, and the purchase-money paid on a certain day, from which time the purchaser should have possession; and that if the purchaser should be let in before payment of the purchase-money, he should be considered tenant at will to the vendors, and pay interest at the rate of 4 per cent. on the amount of purchase-money, as and for rent. The defendant bought some of the lots under these conditions—two by auction and two by private contract. No abstract of title was delivered; but he was let into possession and held for several years, not paying the purchase-money. He knew of the arrangement entered into between A., B. and C. for the sale of the premises:—Held, that A., B. and C. could not jointly sue upon an implied contract by the defendant, to waive the delivery of an abstract,

and perform the condition for payment of 4 per cent. interest as rent. *Seaton v. Booth*, 4 A. & E. 529; 1 H. & W. 742.

#### 6. ACTION FOR PRICE.

**After Resale.**—Where the vendor, after an abortive sale, resells to another person, he cannot sue the first purchaser for lands bargained and sold. *James v. Shore*, 1 Stark. 426.

**On Breach of Contract—Damages.**—Where a party has been let into possession of lands under a contract of purchase, but does not complete the purchase, and refuses to pay the purchase-money, and no conveyance is executed, the vendors cannot recover from him the whole amount of the purchase-money, but only the damages actually sustained by his breach of contract. *Laird v. Pim or Payne*, 7 M. & W. 474; 8 D. P. C. 860.

**Joint or Several Liability—Parties to Sue.**—By articles of agreement, reciting that the defendant had contracted with J., as the agent of the plaintiff and the other owners of the property, for the purchase of the lands therein mentioned, the defendant covenanted with the plaintiff and the several other parties beneficially interested, to perform such contract by paying the purchase-money on a certain day:—Held, that this covenant was several; and that the plaintiff might sue alone for the non-payment of his share of the purchase-money, without joining the other parties beneficially interested. *Poole v. Hill*, 6 M. & W. 835; 9 D. P. C. 300.

**On Fraud by Agent and Purchaser.**—When an agent for the sale of an estate colludes with a purchaser, and in consideration of a bribe or honorarium allows the purchaser to obtain the estate at less than its value, with a view to a sale at a higher price to a sub-purchaser, and the transaction is concealed from the vendor, both agent and purchaser will be held jointly and severally liable to pay to the vendor the increased amount obtained by the sub-sale. *Morgan v. Elford*, 4 Ch. D. 352.

On appeal, the court, being of opinion on the evidence and correspondence that the bargain between the agent and the owner was that the agent should have whatever the estate fetched above a certain price, dismissed the bill without giving any opinion on the above points. *ib.*

**On Covenant to Pay by Notes.**—A covenant to pay D. 213*l.* 15*s.* as and for the purchase-money for certain seams and beds of coal and minerals, in manner and at the times following, viz.: "21*l.* 7*s.* 6*d.* on the day of the date thereof, and the remaining 192*l.* 7*s.* 6*d.* by four several promissory notes, under the hand of the defendant, bearing date with the deed, payable to D. or order on the 1st of July in every year, until the whole of the purchase-money should be paid, with interest thereon after the rate of 5*l.* per cent. per annum until the promissory notes should be paid," is a covenant to pay the purchase-money when the notes become due, and the covenant is not performed by the mere delivery of the promissory notes. *Dixon v. Holroyd*, 7 El. & Bl. 903; 27 L. J., Q. B. 43; 3 Jur., N. S. 1147.

**Consideration—I. O. U.**—A count stated, that

in consideration that the plaintiff agreed with the defendant to sell and transfer to him, by the 22nd of January, a lease of a farm for 500*l.*, and the implements, stock, &c., at a valuation, the defendant agreed to purchase the same, subject to his being approved of as a tenant by S.; and also, at and upon making the agreement, to pay down 500*l.* as a deposit, and to complete the purchase, and pay the valuation by the 22nd of January; that the defendant being unable to pay the 500*l.* upon the making the agreement, in consideration that the plaintiff dispensed with payment down of the 500*l.*, and would take the defendant's I O U for the same, he promised the plaintiff that he would pay the 500*l.* as soon as he could write to his banker, at Berwick, and procure his banker to remit the same. Breach, that the money was not paid:—Held, that the count disclosed a sufficient consideration for the defendant's promise. *Davis v. Nisbett*, 10 C. B., N. S. 752; 31 L. J., C. P. 6; 8 Jur., N. S. 211; 9 W. R. 840.

A plea, that before the defendant could procure his banker to remit, and before any demand of payment of the I O U, the defendant was disapproved as a tenant by S., is a good answer to the count. *Id.*

A plea, on equitable grounds, that before demand of payment of the I O U, the defendant was disapproved of as a tenant by S., and the plaintiff was thereby rendered unable to sell and transfer the lease, is not a good equitable defence, inasmuch as the plea discloses no ground upon which the defendant could be liable to an injunction in a court of equity. *Id.*

Replication to this plea, that it was part of the agreement that the 500*l.* should be forfeited in case of non-completion of the agreement by the defendant on the 22nd of January; that it was agreed that, for the purpose of obtaining the defendant's being approved as a tenant by S., he should apply to S. to accept him as such tenant; and that, before any disapproval of S., the defendant applied to S. to accept him as tenant, and afterwards the defendant withdrew such application, and declined to be accepted as tenant by S.; and that such disapproval was procured and occasioned by the act of the defendant, and from his unwillingness to fulfil the agreement, and not otherwise:—Held, that, assuming the plea to be an answer to the count, the replication was a good answer to the plea. *Id.*

**Priority of Purchaser's Costs over Mortgage after Contract.]**—A vendor brought an action claiming a declaration that his contract for sale was at an end. The purchaser made a counter-claim for the specific performance of the contract. Judgment was given for the defendant, with costs, on both claim and counter-claim:—Held, that the defendant was entitled to deduct his costs from his purchase-money in priority to a mortgage of the plaintiff, whose mortgage had been created after the contract for sale, but before the commencement of the action. *Green v. Sevin*, 13 Ch. D. 589.

#### 7. ACTION FOR DEPOSIT.

**Parties to Action—Auctioneers as Co-Defendants.]**—Auctioneers (as well as the vendors) were held to be proper defendants to an action for rescission and costs brought by the purchaser of a property, which he alleged without contra-

diction that he was induced to purchase by the fraudulent mock-bidding of such auctioneers.—Semble, that it would not have been open to him to make them parties for the mere purpose of discovery. The order, therefore, of Jessel, M. R., dismissing them from the action upon payment of the deposit-money into court, was discharged. *Heatly v. Newton*, 45 L. T. 455; 30 W. R. 72—C. A.

**Right of Vendor to Retain.]**—By the conditions of sale it was provided as follows:—"Should the purchaser neglect or fail to comply with any of the conditions, his deposit-money shall be absolutely forfeited to the vendor, who shall be at liberty to re-sell the property by public auction or private sale; and if the amount or price which shall be obtained by such second sale shall not be sufficient to cover the amount bid for the same at the present sale, and all the expenses of or incidental to the present sale, the deficiency shall be paid by the defaulter to the vendor." The purchaser paid a deposit, but failed to complete the purchase. There was no re-sale:—Held, that the vendor was entitled to retain the deposit and also to recover the auctioneers' charges for the abortive sale, and the costs incurred by him in preparing to complete the sale. *Essex v. Daniell*, 10 L. R., C. P. 538; 32 L. T. 476.

When a contract for sale goes off by default of the purchaser, the vendor is entitled to retain the deposit. *Barrell, Ex parte, Parnell, In re*, 10 L. R., Ch. 512; 44 L. J., Ch. 138; 33 L. T. 115; 23 W. R. 846.

By a contract for sale of real estate it was stipulated that a portion of the purchase-money should be paid immediately and the residue on the completion of the contract. There was no stipulation as to the forfeiture of the deposit in case the purchase went off through the purchaser's default. After the title had been accepted the purchaser became bankrupt, and the trustee disclaimed the contract under the Bankruptcy Act, 1869, s. 23, and called upon the vendor to repay the deposit:—Held, that the vendor was entitled to retain the deposit. *Id.*

**Agreement to make "Good Marketable Title"—Purchaser's Knowledge of Defect.]**—T. agreed to sell to C. certain freehold houses, and to make a good marketable title. On investigation of the title it appeared that the houses were part of a property which had been sold by a building society in lots, subject to stringent restrictive covenants which were admitted to make the title not a marketable one. T. having declined to procure a release of the covenants, C. brought an action to recover back his deposit. T. adduced evidence that C. knew of the restrictions at the time of the contract, and the jury found that he did:—Held, that this evidence could not be admitted to modify the terms of the express contract, and that the plaintiff was entitled to recover. *Cato v. Thompson*, 9 Q. B. D. 616; 47 L. T. 491—C. A.

**Defective Title—Specific Performance Impossible.]**—Where the word "assigns" was omitted in the description of the donees of a power of sale contained in a will, the title of the devisees of the surviving donee was held to be too doubtful for a court of equity to compel specific performance of a contract of sale entered into between the plaintiff and such assignees, and he was held to

be entitled to recover his deposit. *Stevens v. Austen*, 3 El. & El. 685; 30 L. J., Q. B. 212; 7 Jur., N. S. 873; 3 L. T. 810.

An intended purchaser, who by the conditions of sale is to have a good title made out, may, upon an insufficient title being offered to him, recover his deposit money and expenses, in an action against the intended vendor. *Simmons v. Heseltine*, 5 C. B., N. S. 554; 28 L. J., C. P. 129; 5 Jur., N. S. 270.

— **To Lease.**—S., being in the occupation of a public-house, contracted with W. to sell to him the residue of the lease, of which twelve and a half years at least were unexpired. W., the day after signing the contract, by which he agreed to take possession on the 15th April, 1878, paid a sum as a deposit to S.'s agent. The abstract of title shewed that S.'s lessors had a right of option to determine the lease at the end of five years, and W. at once rescinded the contract, and required the return of the deposit-money. S. refused to repay the money, and W. issued a writ in his action on the 10th of April to recover it:—Held, that W.'s objection to the title was valid; that he was not bound to wait till the 15th of April before issuing the writ; and that he was entitled to repayment of the deposit-money with interest. *Weston v. Savage*, 10 Ch. D. 736; 48 L. J., Ch. 239; 27 W. R. 654.

**Delay in Sending in Objections.**—The defendant purchased from a railway company land over a tunnel, which, not being "superfluous," the company had no power to sell, and the plaintiff contracted to purchase the land from the defendant as freehold building land. One of the conditions of sale was that the title should commence with the conveyance from the company; another, that the purchaser should not require the production of or investigate or make any objection or requisition in respect of such conveyance; and another, that the purchaser should send his objection, if any, to the title within seven days from the delivery of the abstract. The plaintiff declined to complete after the expiration of the seven days, and sued for the deposit:—Held, that the deposit could not be recovered. *Rosenberg v. Cook*, 8 Q. B. D. 162; 51 L. J., Q. B. 170; 30 W. R. 344—C. A.

**Objections, when Made.**—In an action to recover the deposit on the purchase of an estate, on the ground of a defect in the vendor's title, specified on rescinding the contract, no objection can be insisted on at the trial which was not stated as a reason for refusing to complete the contract, if it is of such a nature that it might if then stated be removed. *Todd v. Hoggart*, M. & M. 128.

**Mutual Mistake—Misdescription.**—A person purchased at a sale by auction, for 2,500*l.*, property which was described in the particulars of sale as an "immediate reversion in fee simple." Shortly after signing the contract he discovered that by the conditions of sale, which were produced for the first time and read aloud by the vendor's agent at the commencement of the sale, but which the purchaser was prevented by deafness from hearing distinctly, the purchaser was to take the property, subject to the obligation of paying off mortgages for 2,500*l.*, in addition to

his purchase-money, the real value of the reversion being considerably under 5,000*l.*:—Held, that the purchaser was entitled to have the contract rescinded on the ground of common mistake, and of misdescription in the particulars; and that he was also entitled to have the deposit which he had paid returned, with interest at 4 per cent., and, until payment, to a lien for the amount on the vendor's interest in the property. *Torrance v. Bolton*, 14 L. R., Eq. 124; 41 L. J., Ch. 643; 27 L. T. 19; 20 W. R. 718. Affirmed, 8 L. R., Ch. 118; 42 L. J., Ch. 177; 27 L. T. 738; 21 W. R. 134.

**Against Agent.**—Where A. became the purchaser of an estate sold by the defendant at a public auction, and signed a memorandum of agreement, in which he was described as the agent of S., who afterwards repudiated the contract, of which notice was given to the agent of the vendor before the payment of the deposit, which A. afterwards paid according to the conditions of sale:—Held, on the title proving defective, that A. was entitled to the deposit in his own name. *Langstroth v. Toulmin*, 3 Stark. 145.

**Against Principal.**—A., as agent of B., the owner of land, entered into an agreement for sale with C., the agent of D., but who appeared to act on his account, and the parties bound themselves in a penalty for the performance of the agreement, whereupon C. paid A. part of the purchase-money as a deposit:—Held, that D. might sue B. to recover back the deposit on a breach of the agreement. *Norfolk (Duke) v. Worthy*, 1 Camp. 337.

**Solicitor of Vendor—Stakeholder.**—A. was employed as solicitor for the vendor of real estate. By the conditions of sale the deposit was to be paid into his hands "as agent for the vendor," and he signed the contract of sale and receipt for the deposit as such agent:—Held, that he was not a stakeholder, and was liable to pay over the deposit to the vendor on demand, and in default to pay interest from the time of such demand. *Edgell v. Day*, 1 H. & R. 8; 1 L. R., C. P. 80; 35 L. J., C. P. 7.

**Under Unwritten Contract.**—Upon the abandonment of an unwritten contract for the sale of land, on defect of title, the deposit-money paid by the purchaser to the auctioneer may be recovered. *Gosnell v. Archer*, 4 N. & M. 485; 2 A. & E. 500; 1 H. & W. 31.

But the expenses of investigating the title cannot be recovered without proof of a written contract binding on the vendor, nor interest upon the deposit. *Ib.*

**Contract under Seal.**—If A. agrees to sell an estate to B., and is afterwards disabled from doing so, B. may recover back the money deposited, although the contract for the sale is under seal. *Greville v. Da Costa*, Peake's Ad. Cas. 113.

**Non-Performance by either Party.**—In public sale.—By an agreement for the purchase of a way house, 300*l.* was paid by the purchaser by way of deposit, and in part of the purchase-money. The purchase was to be completed on a certain day; and it was agreed that, if either party should refuse to perform the agreement,

should pay the other 1,000*l.* liquidated damages:—Held, that on this agreement it was not intended that the 300*l.* should be forfeited on the failure of the purchaser to complete the contract. *Palmer v. Temple*, 1 P. & D. 379; 9 A. & E. 508.

**When Second Action Allowed.**—On the day for completing the purchase the purchaser threw up the contract, on the ground that the vendor was not ready to complete, and sued him for 1,000*l.* liquidated damages, and for 300*l.* The jury found a verdict for the vendor, on the ground that he was ready to complete the contract. After the writ was sued out against the vendor, he disposed of the public-house to another party, and the purchaser again sued him for 300*l.* :—Held, that as the former action failed on the sole ground that it was prematurely brought, the judgment in it was no bar; and that, as the parties did not intend the 300*l.* to be forfeited as a deposit, the purchaser was entitled to recover it back. *Id.*

**Payment—Brewer's Cheque.**—In an action on an agreement to transfer a public-house and assign the licences, the parties binding themselves in a penalty for the performance of the terms, if the vendor could not assign the licences, and the vendee had not the money ready at an appointment to settle the business, the penalty cannot be recovered; but if the vendee has paid a deposit, it may be recovered back. A cheque upon a brewer's house is not sufficient in such a case, if tendered in payment, though it is proved to be the constant practice to use cheques instead of money, in order to prevent robbery, on account of the lateness of the hour at which settlements take place in the transfer of public-houses. *Clarke v. King*, 2 C. & P. 286; R. & M. 394.

**I O U given for.**—A. agreed to sell and B. to buy a public-house, goodwill, &c., by an agreement which contained these words: "As earnest of this agreement, the purchaser has paid into the hands of the vendor 50*l.*, which is to be allowed in part of payment at the completion of this agreement; but if the vendor should not fulfil the same on his part, he shall return the deposit in addition to the damages hereinafter stated; and if the purchaser should fail to fulfil his part of the agreement, then the deposit-money shall become forfeited in part of the following damages; and if either of the parties should neglect to perform, or refuse to comply with any part of this agreement, the party so refusing or neglecting shall pay to the other of them on demand 50*l.*, mutually agreed upon to be the damages ascertained and fixed on breach thereof." Instead of the deposit B. gave an I O U, which he never paid, and he afterwards refused to fulfil the agreement:—Held, that A. was entitled to recover 50*l.* as a forfeited deposit. *Hinton v. Sparks*, 3 L. R. C. P. 161; 37 L. J., C. P. 81; 17 L. T. 600.

**Payment by Bill.**—If a party has given a bill of exchange or a cheque for the amount of a deposit on a sale by auction, any ground on which the party could recover back his deposit, if paid in money, will be a good ground of defence in an action upon the bill or cheque. *Mills v. Oddy*, 40 C. & P. 728. See *S. C.*, 2 C. M. & R. 103; 5 Tr. 571; 1 Gale, 92. See *Dixon v. Holroyd*, 1 C. & P. 408.

**Y—In an action upon the bill or cheque.** *Mills v. Oddy*, 40 C. & P. 728. See *S. C.*, 2 C. M. & R. 103; 5 Tr. 571; 1 Gale, 92. See *Dixon v. Holroyd*, 1 C. & P. 408.

**either in an action upon the bill or cheque.**

**Sale by Bankrupt's Assignees—Supersession—Reappointment.**—A bankrupt's assignees contracted for the sale of his copyhold lands, and received a deposit. The commission was afterwards superseded, because when it issued the petitioning creditor's debt was not due. Another commission issued, upon the petition of another creditor, and the same assignees were chosen:—Held, that the plaintiff, having abandoned his contract pending the old commission, might recover back his deposit. *Bartlett v. Tuckin*, 1 Marsh. 583; 6 Taunt. 259. And see *Roper v. Combes*, 6 B. & C. 534.

**Forfeiture for Non-Completion—Payment by Bankrupt in Fraud of Creditors—Right to follow Money.**—A bankrupt, having disposed of his goods in fraud of his creditors, opened an account in a bank with the proceeds, and having entered into a contract for the purchase of land in an assumed name, paid a deposit to the defendant, the auctioneer, by a cheque drawn upon the bank. The vendor and the defendant acted *bonâ fide* and without notice of the bankruptcy or of the fraudulent conduct of the bankrupt:—Held, that the bankrupt's trustee was not entitled to recover the deposit from the defendant so as to prevent it from being forfeited to the vendor upon the non-completion of the contract. *Collins v. Stimson*, 11 Q. B. D. 142; 52 L. J., Q. B. 440; 48 L. T. 828; 31 W. R. 920; 47 J. P. 439.

**Condition to make good Loss on Resale.**—The plaintiff put up for sale by auction real property upon conditions of sale which stipulated that the purchaser of each lot should "forthwith pay into the hands of the auctioneer a deposit of 20 per cent. on the purchase-money, and sign an agreement" to pay the remainder, and "that if the purchaser of either lot shall fail to comply with these conditions, the deposit money shall be actually forfeited to the vendor, who shall be at full liberty to resell such lot either by public auction or private contract; and any deficiency that may arise upon such resale, together with all expenses attending the same, shall immediately after such second sale be made good by such defaulter, and on nonpayment thereof, such amount shall be recoverable by the vendor as and for liquidated damages." The defendant became a purchaser, but did not pay the deposit, or complete the purchase. The plaintiff resold at a price below that for which the defendant had purchased, and the deficiency, with the expenses of sale, exceeded the amount of the deposit:—Held, that the plaintiff was entitled to recover from the defendant the amount of the deficiency and expenses only, and not, in addition to this, the amount of the deposit. *Ockenden v. Henley*, El. Bl. & El. 485; 27 L. J., Q. B. 36; 4 Jur., N. S. 999.

Had the deposit been paid, and the bargain completed, the deposit would have gone in part payment of the purchase-money, and in case of the non-completion of the bargain, if the deficiency and expenses had together been less than the deposit, the purchaser would have been entitled to the whole deposit, but nothing more. *Id.*

**Interest on.**—If a purchaser pays a deposit to the auctioneers at the time of sale in part of his purchase-money, and brings an action against them to recover it back in consequence of the vendors not being able to make a good title, and

such deposit is recovered from them, the purchaser is entitled to interest on the deposit from the time the purchase should have been completed, and may recover it from the vendor on alleging the special damage in his declaration. *Farquhar v. Farley*, 1 Moore, 322; 7 Taunt. 592.

When a vendor fails to make a good title to an estate the vendee is entitled to be paid at the rate of 5l. per cent. for interest on his deposit money, though the Court of Chancery had ordered payment of 4l. per cent. *Hodges v. Lichfield (Earl)*, 1 Scott, 443; 1 Bing. N. C. 492; 1 Hodges, 40. See *Torrance v. Bolton*, *supra*.

#### 8. DAMAGES FOR BREACH OF CONTRACT.

**Measure of, Generally.]**—The measure of damages for breach of contract is the same in contracts relating to realty as in contracts relating to chattels. *Noble v. Edwards*, 5 Ch. D. 378; 36 L. T. 312. *S. C.*, on appeal, 5 Ch. D. 378; 37 L. T. 7.

In the case of a breach of contract where a vendor is entitled to recover nothing as purchase-money, but is entitled to compensation for the loss and injury he has sustained by the breach of contract, the measure of the damage is the difference between the price fixed by the contract and the market value at the time of the breach. But when the market value is unascertainable, and a serious loss and injury is proved, the court, acting on the principle that no wrong done is to remain without a redress, awards substantial damages. Such damages must not be greater in amount than the amount the vendor would have been entitled to under the contract if it had been punctually carried out. *Lafitte & Company, In re, Lafitte's claim*, 23 W. R. 379.

In an action for refusing to complete an agreement for the purchase of land, the measure of damage is not the amount of the purchase-money, but only such damage as the vendor has actually sustained by the breach of contract. *Laird v. Pim*, 7 M. & W. 474; 8 D. P. C. 860.

The measure of damages was the difference between the contract price and the market value at the time of the breach of the contract. In the absence of evidence to the contrary, the price at which the property was resold was the test of the market value. *Engel v. Fitch*, 4 L. R., Q. B. 659; 38 L. J., Q. B. 304; 17 W. R. 894; 10 B. & S. 738—Ex. Ch.

**Deposit—Expenses of Investigating Title.]**—Mortgagees with a power of sale sold to the plaintiff by auction the lease of a house, the particulars of sale stating that possession would be given on completion of the purchase. The transaction was, by the conditions of sale, to be completed by the 26th December. By the fifth condition, in case the vendor should be unable or unwilling to remove or comply with any objection or requisition as to the title, he was at liberty to rescind the contract and to return the deposit money without interest, costs, or other compensation. The mortgagor being in possession refused to give it up; and the plaintiff, having sold to a purchaser who bought the house for occupation, required possession before completion. Thereupon the mortgagees rescinded the contract on account of the expense they would incur in order to enable them to complete:—Held, first, that the plaintiff was en-

titled to recover not only the deposit and expenses of investigating the title, but also damages for the loss of his bargain. *Ib.*

A vendor contracting to sell to a vendee an estate with a good title, when he has only an equitable title himself, and is not in possession, and failing in his contract by the time stipulated, is liable to more than nominal damages for the breach of the contract, in addition to the expenses incurred by the purchaser. *Hopkins v. Grazebrook*, 9 D. & R. 22; 6 B. & C. 31.

In an action for damages by a vendee against a vendor, for not making a good title to an estate, he is not entitled to recover for expenses incurred in negotiating the purchase or for having the estate surveyed. *Hodges v. Lichfield (Earl)*, 1 Scott, 443; 1 Bing. N. C. 492; 1 Hodges, 40.

But he is entitled to recover charges incurred in investigating the title, including the searching for judgments, but not the costs of drawing and ingrossing a conveyance of the estate, the same having been prematurely prepared. *Ib.*

The vendor having filed a bill in equity, against the vendee, for a specific performance of the contract, which was dismissed with costs, which were accordingly taxed and paid to the vendee by the vendor:—Held, that the vendee could not recover his extra costs, beyond the taxed costs, which were incurred by him in defending the suit in equity. *Ib.*

Held, also, that the vendee could not recover costs incurred by him in investigating the title to the estate, after the filing the bill in equity. *Ib.*

An incumbrancer on land broke his covenant which he had made with the plaintiff, a speculator, to join in a conveyance to A., with a view to a project by which the plaintiff was to realize the value of the land, as building land, with profit to himself:—Held, per Pollock, C. B., and Bramwell, B., that he was only liable in damages for the expenses of preparing the deed of conveyance. Per Martin, B.: He was liable, in addition, for the loss of profit to the plaintiff. *Duckworth v. Ewart*, 2 H. & C. 129; 33 L. J., Ex. 24; 10 Jur., N. S. 214; 12 W. R. 608.

The expenses of a purchaser about his purchase were allowed him by way of damages, but damages in respect of expenses incurred in respect of an attempted resale were refused as being too remote. *Hart v. Swaine*, 7 Ch. D. 42; 47 L. J., Ch. 5; 37 L. T. 376; 26 W. R. 30. See also *Godwin v. Francis*, and *Hanslip v. Padwick*, *infra*.

**Not Recoverable if Vendor without Fraud cannot make Good Title.]**—Upon a contract for the sale and purchase of a real estate, if the vendor, without fraud, is incapable of making a good title, the proposing purchaser is not entitled to recover compensation in damages for the loss of his bargain. *Bain v. Fothergill*, 7 L. R., H. L. 158; 43 L. J., Ex. 243; 31 L. T. 387. Affirming 6 L. R., Ex. 59; 40 L. J., Ex. 34; 23 L. T. 670; 19 W. R. 134.

F. was in possession of a mining royalty under a written agreement for a lease, of which he had taken an assignment. One of the stipulations of the agreement was that H. (the person with whom the agreement was originally made) should not assign without the licence of the lessors. They were ready to consent to the assignment to F., provided he would execute a duplicate

should pay the other 1,000*l.* liquidated damages:—Held, that on this agreement it was not intended that the 300*l.* should be forfeited on the failure of the purchaser to complete the contract. *Palmer v. Temple*, 1 P. & D. 379; 9 A. & E. 508.

**When Second Action Allowed.**—On the day for completing the purchase the purchaser threw up the contract, on the ground that the vendor was not ready to complete, and sued him for 1,000*l.* liquidated damages, and for 300*l.* The jury found a verdict for the vendor, on the ground that he was ready to complete the contract. After the writ was sued out against the vendor, he disposed of the public-house to another party, and the purchaser again sued him for 300*l.* :—Held, that as the former action failed on the sole ground that it was prematurely brought, the judgment in it was no bar; and that, as the parties did not intend the 300*l.* to be forfeited as a deposit, the purchaser was entitled to recover it back. *Id.*

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...—If a party has given a bill or cheque for the amount of a deposit on a public-house, any ground on which the vendor may cover back his deposit, if paid in good faith, is a good ground of defence in an action on the bill or cheque. *Mills v. Oddy*, 12 C. C., 2 C., M. & R. 103; 5 Q. B. 22. See *Dixon v. Holroyd*,

**Sale by Bankrupt's Assignees—Supersession—Reappointment.**—A bankrupt's assignees contracted for the sale of his copyhold lands, and received a deposit. The commission was afterwards superseded, because when it issued the petitioning creditor's debt was not due. Another commission issued, upon the petition of another creditor, and the same assignees were chosen:—Held, that the plaintiff, having abandoned his contract pending the old commission, might recover back his deposit. *Bartlett v. Tuckin*, 1 Marsh. 583; 6 Taunt. 259. And see *Roper v. Combes*, 6 B. & C. 534.

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**Interest on.**—If a purchaser pays a deposit to the auctioneers at the time of sale in part of his purchase-money, and brings an action against them to recover it back in consequence of the vendors not being able to make a good title, and

to the entrance. *Wall v. City of London Real Property Company*, 9 L. R., Q. B. 249; 43 L. J., Q. B. 249; 30 L. T. 53.

**Building Land—Houses Erected.]**—A. sold some building land to B., and he covenanted for title. After some houses had been built on the land, the purchaser was evicted:—Held, that he was entitled to recover upon the covenants, not only the value of the land, but also that of the houses subsequently built thereon. *Bunny v. Hopkinson*, 27 Beav. 565; 29 L. J., Ch. 93; 6 Jur., N. S. 187; 1 L. T. 53.

**Knowledge of Defect.]**—Where a party agrees to grant a good and valid lease, having full knowledge that he has no title, the plaintiff, in an action for breach of such agreement, may recover, beyond his expenses, damages resulting from the loss of his bargain, and the defendant cannot, under a plea of payment of money into court, give evidence that the plaintiff was aware of the defect of title. *Robinson v. Harman*, 1 Ex. 850; 18 L. J., Ex. 202.

**In Action against Agent Acting without Authority.]**—The defendant professing to be agent for the owners (he being one of them) of an estate, entered into a contract of sale of it to the plaintiff; some time afterwards he wrote to say that there had been some misunderstanding, that he thought he was authorized to sell, but that it appeared that the parties interested took a different view; the owners refused to complete, and sold the estate for a larger sum than that offered by the plaintiff; the plaintiff then brought an action against the owners, when in answer to interrogatories, they (including the defendant) swore there was no authority, but the plaintiff still prosecuted the action, on the ground that an advertisement, stating that to treat and view the property applications were to be made to the defendant, was sufficient authority, and was unsuited; he then brought an action against the defendant for misrepresentation of authority:—Held, that he was entitled to recover as damages, first, the costs of investigating title; secondly, the costs of the previous action up to the time of the answers, and a reasonable time to consider them, but not beyond; thirdly, the difference between the contract price and the market value, of which the price for which the estate sold was *prima facie* evidence; but he could not recover loss on cattle, &c., bought in contemplation of the completion of the purchase. *Godwin v. Francis*, 5 L. R., C. P. 295; 39 L. J., C. P. 121; 22 L. T. 338.

An auctioneer entered into an agreement, on the behalf of A., to sell certain premises to B., without having communicated to A. that B. was in treaty for them. A. had previously sold the premises to another party, and therefore could not fulfil the contract so made with B., whereupon B. sued A. for non-performance of his contract:—Held, that B. was not entitled to recover damages for the loss of his bargain. *Tyrer v. King*, 2 C. & K. 149.

**Deeds of Conveyance.]**—A purchaser cannot recover from the vendor the expenses of preparing deeds of conveyance of the property, after he has refused to complete the purchase, on account of the non-production of certain title deeds, though his attorney prepared the convey-

ances on the faith of a note written in the margin of the abstract by the vendor's solicitors, stating that all the title-deeds were examined by them on the original purchase, and that, if it should be required, they would apply to the solicitor for the original seller, in whose custody they were. *Jarmain v. Egelstone*, 5 C. & P. 172.

**Sale to Solicitor for Company—Dissolution.]**—On the 27th September, 1848, the defendant agreed to demise to the plaintiff, on or before the 29th November next, a ferry and messuages and premises, at yearly rents; and the defendant agreed, within fourteen days from that date, to furnish an abstract of his title to the premises, and deduce a good title, and the plaintiff agreed to pay to the defendant on or before the 29th November, 3,150*l.* and interest. The defendant did not within fourteen days, or at any time, deduce a good title. On the 17th September, 1850, the plaintiff, who was a solicitor, and promoter of a company for making a ferry, erecting gas-works, and bathing-houses, at Hayling Island, entered into an agreement with the defendant, the owner of land there, for a demise to the plaintiff of a ferry, land, houses, and premises; and the defendant agreed, within fourteen days from the date thereof, to furnish an abstract of his title to the premises, and deduce a good title; and the plaintiff agreed to pay the defendant, on or before the 29th November, 3,150*l.* After the agreement, the company was provisionally registered by the plaintiff as its promoter. Two abstracts of title were sent by the defendant to the plaintiff, which, being objected to, on the 10th November the defendant sent a further abstract, which disclosed a mortgage of the premises intended to be demised to the trustees of the defendant's marriage settlement, one of whom was imbecile; there were also two judgments entered up against the defendant. In consequence of these objections to the title, the company could not proceed with its objects, and was finally dissolved. The purchase-money was not paid to the defendant:—Held, that the plaintiff was entitled to a verdict, and to recover as damages the costs of preparing, stamping, and entering into the agreement, the expenses of investigating the title, and endeavouring to procure a good title, and procure the lease to be granted, but not the expenses of raising the purchase-money and loss of interest, nor the expenses of preparing the company's deed of settlement and registering it provisionally, nor the loss of profits from the granting of the lease and the establishment of the company, nor the profits he would have derived from being employed as solicitor by the company, nor as to any advantage which he might have derived from his time, labour, &c., bestowed in the formation of the company. *Hanslip v. Padwick*, 5 Ex. 615; 19 L. J., Ex. 372.

**Leasehold—Value—Improvements.]**—A. entered into possession of premises under an agreement with B., under which he was to hold them as tenant for two years, at the yearly rent of 50*l.*, with liberty to him to make, at his expense, such alterations in and additions to the premises as he might think proper, the same being improvements, and A. to have the option of purchasing the premises at any time during the two years for 600*l.*, "it being understood between the parties

that B. was possessed of the premises for his own life, and the life of C., and of the survivor of them." It being, however, discovered that B. had not the precise interest mentioned in the agreement, A. brought an action to recover damages for the breach of contract, and also compensation for the money expended by him in improvements:—Held, that he was only entitled to recover the value of the proposed lease, and not the value of the improvements. *Worthington v. Warrington*, 8 C. B. 134; 18 L. J., C. P. 350.

**Costs in Chancery.**—M. agreed with F. to purchase land from him: on the production of F.'s title M. objected to it: F. insisted that it was good, and gave notice that he should sell at his risk. M. then filed a bill against F. for specific performance, and the question of title was referred by the Court of Chancery to a master, who reported that F. had not a good title, whereupon the bill was dismissed without costs on either side, that being the practice of the Court of Chancery in such cases:—Held, that M. could not recover from F., as damages for breach of the contract, costs incurred by M. in the chancery suit. *Malden v. Fyson*, 11 Q. B. 292; 17 L. J., Q. B. 85; 12 Jur. 228.

**How Recoverable.**—In an action by a vendee against a vendor for a return of the deposit, he can only recover the expenses of investigating the title by declaring specially. *Flureau v. Thornhill*, 2 W. Bl. 1078.

Where a declaration for breach of an agreement to assign a lease alleged that the defendant did not make out a good title, "by reason whereof the plaintiff has been necessarily put to great expenses amounting to a large sum of money," in and about investigating the title:—Held, that he might, by way of damage, recover the amount of a bill of costs due to his attorney, for investigating the title, though he had not paid such bill before action. *Richardson v. Chasen*, 10 Q. B. 756; 16 L. J., Q. B. 890; 11 Jur. 890.

Where the vendor of an estate (the vendee having made a deposit in part payment of the purchase-money) fails to make out a good title by the time stipulated, and the vendee dies, the personal representative of the vendee, and not his heir, is entitled to maintain an action to recover damages for loss of interest on the deposit, and for expenses incurred by the vendee in endeavouring to procure a title—the injury accruing to the personal estate. *Orme v. Broughton*, 4 M. & Scott, 417; 10 Bing. 359.

**Where Claim to Rescind.**—On a motion by plaintiffs in an action for specific performance that the contract should be rescinded, and that all further proceedings should be stayed, except as to any claim for damages sustained by them:—Held, that the plaintiffs were only entitled to have the agreement rescinded, and could not claim also damages for breach. *Henty v. Schröder*, 12 Ch. D. 666; 28 L. J., Ch. 792; 27 W. R. 833.

## 9. PLEADINGS AND EVIDENCE IN ACTIONS.

**Claims.**—Where in an action by the vendor against the vendee of land, for not accepting it and paying the purchase-money, he averred that

he was seised in fee of the land, and that the defendant agreed to purchase it on having a good title, and that his title to the land was made good, perfect, and satisfactory to the defendant, and that he, the plaintiff, had been always ready and willing and offered to convey the land to the defendant, but that he did not pay the purchase-money:—Held, that such general allegations of title in the plaintiff, and that his title was made good and satisfactory to the defendant, and that the plaintiff was ready and willing and offered to convey to the defendant, were tantamount to a performance of the agreement on his part, so as to entitle him to recover for a breach on the defendant's part in not paying the purchase-money. *Martin v. Smith*, 6 East, 555; 2 Smith, 543.

By the conditions of the sale by auction of a copyhold estate, it was stipulated that the purchaser should pay down a deposit, and sign an agreement for the payment of the remainder of the purchase-money at a certain time, on having a good title, and that he should have a proper surrender of the estate on payment of the remainder of the purchase-money:—Held, in an action by the seller, for the non-performance of the conditions on the part of the purchaser, that it was not sufficient to state that the seller had been always ready and willing and frequently offered to make a good title to the estate, and to make a proper surrender on payment of the purchase-money; but the declaration ought to have averred, that the seller actually made a good title, and surrendered the estate to the purchaser, or a tender and refusal; and also to have shewn what title the seller had. *Phillips v. Fielding*, 2 H. Bl. 123.

A declaration alleging that the plaintiff agreed to sell and the defendant to buy land for 120*l.*, which the defendant agreed to pay on or before four years, with 5 per cent. half-yearly, until paid; that the four years had not expired, that the money had not been paid, and that a certain sum was due for interest, is good—without averring title to the land, or that the plaintiff was ready and willing to convey. *Wilks v. Smith*, 2 D., N. S. 215; 10 M. & W. 355; 11 L. J., Ex. 365.

A plaintiff declared upon a contract by the defendant then holding land for a term of years, to assign all his interest to the plaintiff, on payment by the plaintiff, within seven years from a day named, of 140*l.* Breach, that, before the seven years expired, the defendant assigned all his interest to a stranger:—Held, first, that it was not necessary that the declaration should aver a tender of the money, or a request by the plaintiff, or the plaintiff's readiness to accept an assignment. *Lovelock v. Franklyn*, 8 Q. B. 371; 15 L. J., Q. B. 146; 10 Jur. 246; *S. P.*, *Giles v. Giles*, 9 Q. B. 164; 15 L. J., Q. B. 387; 11 Jur. 83.

Held, secondly, that the breach, as laid, was a good ground of action, the defendant having incapacitated himself from performing the contract, if called on. *Ib.*

**Defences.**—A declaration stated, that the defendant caused to be put up to sale by auction certain premises, for the residue of a term of years, on the condition, that the defendant should deduce and make a good title thereto, commencing with the lease of the premises under which they were then held; and assigned, as a breach,

that he did not deduce a good title commencing with the lease. Plea, that the premises so put up to sale were premises of which the defendant was possessed under a mortgage from the plaintiff, for the residue of the term, and that they were put up to sale under a power of sale in the mortgage; that before, and at the time of the mortgage, the plaintiff held the premises under a lease from L., subject to a covenant by the plaintiff for repair, and proviso for re-entry, or the cesser of the term, at the option of L., on breach of such covenant; and the plaintiff, before and at the time of such sale, had full knowledge of all the premises; that the defendant did deduce a good title to the premises, commencing with the lease, in all respects except this, that the premises were out of repair, of which the plaintiff had full knowledge; that they were at the time of the sale in as good repair as at the time of the mortgage; and that L. had not re-entered or claimed to re-enter, or in any way avoided the lease:—Held, bad on general demurrer. *Barnett v. Wheeler*, 7 M. & W. 364.

The plaintiff agreed to sell to the defendant a share in a mining sett for 250*l.*, and the defendant agreed to purchase at that price, and the parties agreed to form a company, and as soon as the company was registered the defendant agreed to pay the money, as before stated:—Held, that the readiness and willingness of the plaintiff to convey, and the payment of the purchase-money, were concurrent acts, and that therefore, to an action for non-payment of the money, a plea that the plaintiff was not ready and willing to convey was a good answer. *Marsden v. Moore*, 4 H. & N. 500; 28 L. J., Ex. 288.

A plea that the plaintiff had not at any time any title to the share in the mining sett, nor any right or title to convey the same, was good, as the plea must be construed as involving a denial, not only of a title in the plaintiff himself, but also of the power to procure a title by any grantor. *Id.*

In an action by vendee against vendor, for not delivering a proper abstract of title, the declaration alleged, that the sale was subject to a condition that the vendor should deliver an abstract of title to the purchaser; and assigned a breach in the non-delivery of any abstract shewing such a good and sufficient title as the vendee was, according to the condition, entitled to require to be shewn. A plea, that at the time of the making of the contract, it was agreed, as part of the contract, that the vendor should deliver an abstract of his title, commencing with a deed of conveyance from A. to B. only, and should not be required to furnish any other abstract, or go into any previous title:—Held, to amount to an argumentative and circuitous denial of the contract stated in the declaration, and to the general issue. *Sharland v. Leifchild*, 4 C. B. 529; 5 D. & L. 139; 16 L. J., C. P. 217; 11 Jur. 523; *S. P.*, *Wheeler v. Wright*, 7 M. & W. 359; 9 D. P. C. 729.

**Replication.**—On the sale by auction of property, the conditions provided, that the vendors should, within twenty days after the sale, deliver an abstract of title: and that all objections thereto not taken in writing within ten days afterwards should be considered as waived. In an action by the purchaser against the vendors for breach of the conditions, the latter pleaded that

they, within twenty days after the sale, delivered an abstract; but that the purchaser did not, within ten days afterwards, take any objection to the title in writing. The purchaser replied, that, although the vendors did, within twenty days, deliver an abstract, yet that they did not by the abstract disclose a good and sufficient title; and that the purchaser did, within ten days after the delivery of the abstract, take objections to the title in writing:—Held, that the replication did not introduce new matter, but amounted to a traverse of the latter allegation in the plea. *Smith v. Tanner*, 2 Scott, N. R. 77; 1 M. & G. 803; 1 Drink. 21.

**Evidence to Support.**—In a declaration for not completing a purchase of a copyhold, it was alleged, that on the 27th June the vendor “was ready and willing, at the office of the steward of the manor, to receive the residue of the purchase-money, and then and there to surrender.” This was denied by the plea:—Held, that this allegation was proved by shewing that the vendor was ready and willing to have gone to the steward’s office on that day to surrender, but did not do so, because on the 25th the purchaser told the solicitor, who was concerned for all parties, that he was not ready to complete the purchase on the 27th. *Perry v. Smith*, Car. & M. 554.

In an action against a purchaser of a freehold at an auction for not completing, the declaration averred that the vendor delivered an abstract of title pursuant to the conditions of sale, which averment was traversed:—Held, that the allegation was not sustained by proof that the vendor caused the lease and assignment which composed the whole title to be handed to the purchaser for perusal, and offered to send them to his attorney to enable him to prepare the necessary assignment. *Horne v. Wingfield*, 3 Scott, N. R. 340; 3 M. & G. 33.

A declaration stated, that the defendant agreed to sell a dwelling-house and fixtures for the residue of a term of years, then and still unexpired therein, to commence on and from a certain day, to wit, the 1st of January, 1840, for the sum of 60*l.* The evidence adduced was the following agreement: “I agree to sell the house and fixtures, 163, Piccadilly, to commence from the 1st of January next, for 60*l.* :”—Held, a variance between the declaration and agreement, as the latter purported to convey the fee-simple. *Hughes v. Barker*, 1 D., N. S. 80; 8 M. & W. 244.

Where the plaintiff stated in his declaration, that he was possessed of a lease of certain premises for a certain term of years, which he put up for sale, and which the defendant purchased; in an action for not completing the purchase, the plaintiff in proving his title must prove the execution of the original lease as well as of the mesne assignments to himself. *Laythorpe v. Bryant*, 1 Scott, 327; 1 Bing. N. C. 421; 1 Hodges, 19.

Upon a sale of houses by auction, according to particulars and conditions of sale, one of which was for the delivery of an abstract of title within ten days, and another for the payment of a deposit to the auctioneer, the purchaser of two houses paid a deposit, signed an agreement as purchaser, and obtained a receipt from the auctioneer for the money paid as for a deposit on a sale by auction of the premises

described in the particulars and conditions of sale. The abstract of title not being delivered, the purchaser brought an action against the auctioneer for the recovery of the deposit:—Held, that the production of the receipt and of the conditions of sale, without producing the written contract signed by the purchaser, was insufficient. *Curtis v. Greated*, 3 N. & M. 449; 1 A. & E. 167.

Where there was a misrepresentation as to certain property made *bonâ fide*, but without authority, by the auctioneer at the time of sale:—Held, that evidence of what passed at the sale was admissible against the vendor. *Brett v. Clowser*, 5 C. P. D. 376.

T. agreed to sell to C. certain freehold houses, and to make a good marketable title. On investigation it appeared that the title was not marketable owing to certain restrictive covenants, of which it was alleged C. was aware at the time of the purchase:—Held, that evidence of C.'s knowledge was not admissible to vary the express terms of the contract. *Cato v. Thompson*, 9 Q. B. D. 616; 47 L. T. 491—C. A.

#### V. SALE UNDER ORDER OF COURT.

**Reserved Biddings.**—Although in sales directed by the court it is usual to fix the reserved price at the amount at which the estate has been valued, an exception will be made where a mortgagee, who, being also a trustee, is incapable of bidding, is desirous of having it fixed at an amount sufficient to cover his debt. *Tennant v. Trenchard*, 41 L. J., Ch. 779; 20 W. R. 785.

A trustee, who had a charge on the estate of greater amount than its value, as fixed by the cestui que trust for the reserved bidding, was allowed to fix the reserved bidding at the amount of his charge, he having, on a previous occasion, been refused leave to bid at the instance of the cestui que trust. *Id.*

As a general rule when a party applies for a sale and not foreclosure, the reserved bidding will be fixed at the amount of the value of the estate, the person applying for the sale being able, on giving up the conduct of the sale, to protect himself by bidding. *Id.*

**Opening Biddings.**—In an administration suit an estate was ordered to be sold by auction, but the reserved price not having been reached the sale by auction became inoperative. A subsequent offer to purchase subject to the approval of the court within ten days was carried in before the chief clerk, who approved of the offer and ordered the contract to be carried out, whereupon the deposit was paid and the abstract delivered. Before the order had been passed and entered, a much higher price was offered. Upon summons to vary the chief clerk's certificate by setting aside the sale and directing the offer for a larger amount to be accepted:—Held, that the certificate of the chief clerk, although not passed and entered, was tantamount to a confirmation of the contract, and that the principle of the act 30 & 31 Vict. c. 48, s. 7, by which the old practice of opening biddings on a sale by auction was discontinued, except upon the ground of fraud or improper conduct, applied equally to a sale by private contract entered into under the sanction of the court, and that such a contract could not be discharged, where no unfairness existed. The

chief clerk's certificate was therefore confirmed. *Bartlett, In re, Newman v. Hook*, 16 Ch. D. 561; 50 L. J., Ch. 205; 44 L. T. 17; 29 W. R. 279.

In order to entitle parties to open the biddings after a sale by auction under the court since the passing of the Sales of Land by Auction Act, 1867, there must be either fraud or such misconduct as borders on fraud. *Delves v. Delves*, 20 L. R., Eq. 77; 23 W. R. 499.

On a sale under a decree in an administration suit, a trustee of the testator's will joined with the auctioneer in fixing 3,000*l.* as the reserved price of a lot; and this was the fair market value of the lot. The trustee was the agent of the person who was the only bidder, and purchased at the reserved price. Before the sale the trustee told his employer that he ought to buy the property, and that 3,000*l.* was a fair price; but he did not tell him that this was the reserved price. After the sale an adjoining proprietor offered 4,000*l.*:—Held, that the court was not warranted in opening the biddings. *Id.* See next case.

**Who may Purchase.**—The rule that, at a sale in a suit by an order of the court, parties to the suit and their solicitors cannot become purchasers, will not be extended so as to embrace the case of a purchase by a person who, being the solicitor in another suit for persons interested in the proceeds of such sale, has obtained an order to attend the proceedings in the first suit on their behalf, and whose name, without his consent or knowledge, has been placed in the particulars of sale, as that of a person from whom copies and information could be obtained. *Guest v. Smythe*, 5 L. R., Ch. 551; 39 L. J., Ch. 536; 22 L. T. 563; 18 W. R. 742.

But if the purchaser's position had been brought within any of the well established rules of equity, the court would not have been precluded from opening the sale by reason of the 30 & 31 Vict. c. 48, s. 7. *Id.*

C. was the solicitor of an executor, the defendant in a creditor's administration action. A life interest, part of the estate, was put up for sale by the court, and C. obtained leave to bid. The interest was sold, after an abortive auction, to C. by private contract:—Held, that the sale could not be set aside by reason of non-disclosure by C. of circumstances affecting the value of the life interest. *Boswell v. Coaks*, 23 Ch. D. 302; 52 L. J., Ch. 465; 48 L. T. 929; 31 W. R. 540.

**Who may Sell—Chief Clerk.**—The court has jurisdiction to direct an estate to be sold by auction by the chief clerk, without the employment of an auctioneer. And this jurisdiction will be exercised, if all parties interested are before the court, and concur in desiring the sale so to be made. *Pemberton v. Barnes*, 13 L. R., Eq. 349; 41 L. J., Ch. 209; 26 L. T. 389.

**Trustee.**—When a sale has been decreed in one of two concurrent suits, the fact of the party to whom has been given the conduct of the cause being an entire stranger to the family and to the property is a sufficient reason for taking away from him the conduct of the sale, and giving it to the trustee and testamentary guardian of the infants. *Garneson, In re, Garneson v. Sharrod*, 21 W. R. 98.

**— Under Power by Legal Personal Representative of Mortgagee.]**—The 4th section of the Vendor and Purchaser Act, 1874, does not enable the legal personal representative of a deceased mortgagee of real estate to convey upon a sale under a power in the mortgage. *White's Mortgage, In re*, 51 L. J., Ch. 856; 29 W. R. 820.

**Sale by Private Contract when Auction abortive.]**—Although in pursuance of an order of court directing a sale of real estate by public auction, an attempt has been made to sell by public auction and has failed, the property cannot be sold otherwise than by public auction until a proper order for the purpose has been obtained, and any prevailing practice at chambers to the contrary is irregular. *Berry v. Gibbons, Loe, Ex parte*, 15 L. R., Eq. 150; 42 L. J., Ch. 231.

When the court has made an order for the sale of property by public auction, and the sale has proved abortive, the parties cannot make a valid contract for sale of the property under the order by private tender without the personal sanction of the judge who made the order; it is not sufficient for them to have obtained the sanction of the chief clerk. *Ib.*

**Rescinding for want of Title.]**—Conditions of sale, settled by the court in 1871, provided that a conveyance on a sale made by B. in 1838, should be the root of title: that no objection or requisition should be made with respect to earlier title, and that recitals in deeds twenty years old should be conclusive evidence of the instruments recited. That conveyance purported to recite the will, but stopped short of the final gift over, thus shewing a good title to the fee in B. —Held, that a purchaser under the court was not precluded from shewing that B.'s title under the will was defective, and that he was entitled to be freed from his contract, and to get all his costs. *Else v. Else*, 13 L. R., Eq. 196; 41 L. J., Ch. 213; 25 L. T. 927; 20 W. R. 286.

A sale in chambers under a decree in a partition suit having been declared invalid on the ground that the sale took place before the certificate in answer to the inquiries directed by the decree was made:—Held, that the vendors could not avail themselves of a condition enabling them, if unwilling, or unable for any reasonable cause to remove or comply with any objection or requisition by a purchaser, to rescind on repayment of the deposit without interest and without costs on either side; and that the discharged purchaser was entitled to the stock arising from his deposit, which had been paid into court and invested, with the dividends thereon, or the actual amount of deposit and the produce, with costs, charges, and expenses. *Powell v. Powell*, 19 L. R., Eq. 422; 44 L. J., Ch. 311; 32 L. T. 148; 23 W. R. 482.

**"Rent having no Money Value"—Return of Deposit.]**—An annual rent of merely nominal amount, e. g., three shillings, is not "a rent having no money value" within s. 65, sub-s. 1, of the Conveyancing Act, 1881, even though it may have in practice not been regularly paid, those words meaning, rather, a rent which, when received, has no money value. The court has jurisdiction, upon a summons under s. 9 of the Vendor and Purchaser Act, 1874, to order the return of a purchaser's deposit with interest.

*Smith and Stott's Contract, In re*, 48 L. T. 512; 31 W. R. 411.

**Protection of Purchaser.]**—By the 70th section of the Conveyancing Act, 1881, the title of the purchaser is protected even where an objection to the order appears on the face of it. *Hall Dare's Contract, In re*, 21 Ch. D. 41; 51 L. J., Ch. 671; 46 L. T. 755; 30 W. R. 556—C. A.

**— When Part of Property omitted.]**—At a sale of an estate by auction under the direction of the court, E., having previously been informed of the value of the timber, purchased lot 2, and agreed to take the timber at the price named by the auctioneer. The chief clerk confirmed the sale and filed his certificate. It was subsequently discovered that the value of the timber on a portion of the lot had been, by the mistake of the auctioneer, omitted:—Held, that the purchaser was entitled to hold the property without submitting to a valuation of the timber. *Griffiths v. Jones*, 15 L. R., Eq. 279; 42 L. J., Ch. 468; 21 W. R. 470.

**Restrictive Covenant—Qualifying Proviso.]**—In a sale by the court the particulars of sale contained certain reservations and stipulations as to the property, and one of the conditions of sale provided that the conveyances should contain covenants by the purchasers for securing the liabilities and rights under such reservations and stipulations, the form of such covenants, in case of dispute, to be settled by the judge. A dispute having arisen between a purchaser and the vendor concerning the form of the covenant, the judge settled the covenant, adding a proviso that if the purchaser assigned his purchase, and the assignee entered into a similar covenant, the purchaser should be freed from further liability:—Held, that the vendor was entitled to an unqualified covenant, and that the proviso must be struck out. *Pollock v. Rabbits*, 21 Ch. D. 466; 47 L. T. 637; 31 W. R. 150—C. A.

**Appeal from Form settled by Judge.]**—The order of a judge settling the form of a conveyance is subject to appeal. *Ib.*

**Vendor and Purchaser Act, 1874, s. 2, sub-s. 1.]**—This section does not alter the rule as to notice to a lessee. *Patman v. Harland and Thornwell v. Johnson, post*, col. 432, and *White's Mortgage, In re, supra*.

**Duty of Auctioneer to Pay Money into Court.]**—It is the duty of an auctioneer who is nominated to conduct a sale by the court, to pay any money received by him into court, at all events as between himself and the court. After certificate, the ordinary course of business is for the solicitors to receive the money from the auctioneer, and themselves pay it into court. *Biggs v. Bree*, 51 L. J., Ch. 263; 46 L. T. 8; 30 W. R. 278—C. A. Affirming 51 L. J., Ch. 64; 45 L. T. 648; 30 W. R. 132.

## VI. COVENANTS BINDING ON PURCHASERS—NOTICE.

**Running with Land—To Reconvey.]**—By a deed which recited that the plaintiff company

were seised in fee of certain land not required for the purposes of their railway, the company conveyed the land to G. P. in fee, and G. P. covenanted that he, his heirs, and assigns would at any time thereafter, whenever the land might be required for the railway, and whenever thereunto requested by the company on a six months' notice, reconvey on receiving the same sum as that paid by G. P. Fourteen years afterwards the defendant purchased the lands from G. P.'s heir, with notice of the above covenant. The company then gave notice to the defendant to reconvey, and on his refusing brought an action against him for specific performance:—Held, that an executory interest in property to arise on a future event which may not happen within the limits of the rule against perpetuities is void, though it be limited to an ascertained person who can release it at any time. The dictum in *Gilbertson v. Richards* (*infra*) and the decision in *Birmingham Canal Company v. Cartwright* (*infra*) dissented from. But held, also, that in the present case the covenant did not create any estate or interest in land, and therefore was not obnoxious to the rule against perpetuities, and that specific performance must be decreed, the covenant being binding on an alienee with notice on the principle of *Tulk v. Moxhay* (2 Ph. 774). But held, by the Court of Appeal, that as the covenant gave to the company an executory interest in land to arise on an event which might occur after the period allowed by the rules as to remoteness, it was invalid on the ground of remoteness. *Birmingham Canal Company v. Cartwright* (*infra*) overruled. The doctrine of *Tulk v. Moxhay* (2 Ph. 774) only applies to restrictive covenants and not to covenants to do acts relating to the land. *London and South-Western Railway Company v. Gomm*, 20 Ch. D. 562; 51 L. J., Ch. 530; 46 L. T. 449; 30 W. R. 620—C. A. Reversing 45 L. T. 506.

In a conveyance of a plot of land (reserving the mines under it to the vendor) there was a covenant by the vendor with the purchaser that, in case the vendor, his heirs or assigns, should at any time thereafter sell, or agree to sell to any person the mines under some adjoining lands belonging to him, he, his heirs or assigns, would at the same time offer to the purchaser of the plot of land, his heirs or assigns, the mines under that plot, and give him and them the refusal of the same for one month from the time such offer should be made at the same price per acre as the vendor, his heirs or assigns should have agreed to sell the adjoining mines; and if the purchaser, his heirs or assigns, should accept such offer, and within such month agree to purchase the mines so offered, at the price at which they should be offered, the vendor, his heirs or assigns, should convey the same to the purchaser, his heirs or assigns:—Held, that this covenant was not obnoxious to the rule against perpetuities. *Birmingham Canal Company v. Cartwright*, 11 Ch. D. 421; 48 L. J., Ch. 552; 40 L. T. 784; 27 W. R. 597.

Where it was agreed between a covenantor and covenantee that a rent was to arise at any time thereafter when the mortgagees should enter into possession:—Held, that though no rent can be created which violates the law against remoteness, as a rent in fee simple may be granted to a man and his heirs to continue for ever, so also one may be granted to commence at any

time, however remote. *Gilbertson v. Richards* 4 H. & N. 277; *S. C.*, on appeal, 5 H. & N. 459; 29 L. J., Ex. 213.

**User of Land.]**—A covenant between vendor and purchaser, on the sale of land, that the purchaser and his assigns shall use or abstain from using the land in a particular way will be enforced in equity against all subsequent purchasers with notice, independently of the question whether it be one which runs with the land so as to be binding on subsequent purchasers at law. *Tulk v. Moxhay*, 2 Ph. 774.

Certain persons having formed themselves into a company for the establishment of a railroad called the Trevil, E. & J., who held certain ironworks under a long lease, covenanted with the proprietors of the railroad and their assigns, that they, their executors, administrators and assigns would procure all the limestone wanted for the ironworks from the Trevil quarry, and carry it along the Trevil railroad, paying a certain toll. E. & J. assigned their lease of the ironworks to the defendants, who began to construct a railroad to other lime quarries situated eastward of the Trevil quarry. On a bill for an injunction to restrain them from using that or any other new road:—Held, that the covenant was valid and did not tend to create a perpetuity. *Keppel v. Bayley*, 2 My. & K. 517.

**— Land Never to be Sold.]**—A deed of conveyance contained an agreement that certain land, described in the deed, should "never be hereafter sold, but should be left for the common benefit of both parties and their successors." In a suit brought to compel the removal of a house alleged to have been built on the land in contravention of the agreement:—Held, that the agreement was one the performance of which might be enforced in equity, because on the true construction of its terms it amounted, not to a perpetual restriction of sale, but to an agreement on the part of the grantor to leave the land in the state in which it was at the time of the conveyance; and because the agreement contemplated, not an uncertain and indefinite use of the land by the parties, but that the land should be left open for the advantage of the parties as adjoining proprietors. *McLean v. McKay*, 5 L. R., P. C. 327; 29 L. T. 352; 21 W. R. 798—P. C.

**— Liability of Assignee with Notice.]**—Land was granted to J. in fee subject to a rent-charge. The grantee covenanted for himself, his heirs, executors, and administrators, that he, his heirs or assigns, would pay the rent, would erect buildings on the land, and would thereafter keep them in repair. The grantor afterwards assigned the rent-charge with the benefit of all covenants to the plaintiff, and the land and buildings which had been erected came by assignment to A., who mortgaged them, subject to the covenants, to the defendants, who afterwards entered into possession. In an action on the covenant to repair:—Held, that the defendants were not liable, that the covenant did not run with the land, that it was a collateral affirmative covenant, and did not impose a burden on the land, so that the defendants could not, as assignees with notice, be compelled to perform it. *Haywood v. Brunswick Permanent Benefit Building Society*, 8 Q. B. D. 403; 51 L. J., Q. B.

73; 45 L. T. 699; 30 W. R. 299; 46 J. P. 356—C. A.

*Cooke v. Chilcott* (3 Ch. D. 694) questioned. *Tulk v. Moxhay* (2 Ph. 774) explained. *Id.*

A purchaser of a piece of land with a well or spring upon it covenanted with the vendor, who retained land adjoining intended to be disposed of for building sites, to erect a pump and reservoir, and to supply water from the well to all houses built on the vendor's land:—Held, first, that both the benefit and the burden of the covenant ran with the land, and that the case was not within the second resolution in *Spencer's case* (5 Rep. 16a.; 1 Sm. L. C. 60), but if not, a sub-purchaser with notice of the covenant was bound by it. *Cooke v. Chilcott*, 3 Ch. D. 694; 34 L. T. 207.

Held, secondly, that, though the covenant was not one of which the court would decree specific performance directly, as being for the construction of works which the court could not superintend, it could be enforced indirectly by an injunction restraining the defendant from allowing the work to remain unperformed. *Id.*

A covenant relating to but not running with land is binding on an assign with notice. *Luker v. Dennis*, 7 Ch. D. 227; 47 L. J., Ch. 174; 37 L. T. 827; 26 W. R. 167.

A proviso in a lease of a seam of coal under lands empowered the lessor to distrain for rent the chattels, effects, goods, &c., employed upon or under the lands, in connexion with the working of the coal, as well within the limits of the lands, as also in, or under or about any other lands in which there should be any pits or openings, through which the coal demised should be for the time being in course of working by the lessees, their executors, administrators and assigns, and for that purpose to enter into and upon such other lands:—Held, that such a proviso or covenant could not attach to land in which the lessor had no interest, and that he could not by virtue of it distrain on any "such other lands" after an assignment of the lessees' interest therein. *Daniel v. Stepany*, 7 L. R., Ex. 327; 41 L. J., Ex. 208; 27 L. T. 380; 21 W. R. 17.

**Usual Covenant—Restrictive.**—Land was granted in fee in consideration of a rent-charge, and the deed of grant contained a covenant to build houses on the land, the rent of which should be double the value of the rent reserved by the deed, without limiting any time within which such building was to be required:—Held, that such covenant was unusually restrictive. *Andrew v. Aitken*, 22 Ch. D. 218; 52 L. J., Ch. 294; 48 L. T. 148; 31 W. R. 425.

Seemingly, that although the assignee of the grantee of the land was not liable affirmatively on such covenant, he might be called on to allow the house to be built in accordance with the covenant. *Id.*

**As to Part of Divided Estate—Repurchase.**—A sold part of an estate to B., who entered into restrictive covenants for himself, his heirs and assigns, with A., his heirs, executors, and administrators, as to buildings on the purchased property; but A. did not enter into any covenants as to the land retained. After this A. sold to other persons various lots of the part retained, but nothing appeared as to the contents of their conveyances, nor was there any evidence that

they were informed of the covenants entered into by B. After this A. bought back from B. what he had sold to him:—Held, that the benefit of B.'s covenants did not in equity pass to the subsequent purchasers of other parts of the estate from A., and that A., after the repurchase, could make a title to the repurchased land discharged from the covenants. *Keates v. Lyon*, 4 L. R., Ch. 218; 38 L. J., Ch. 357; 20 L. T. 255; 17 W. R. 338.

**By Purchaser of Freehold—Breach by Sub-Tenant without actual Notice.**—A sub-tenant is liable to a restrictive covenant entered into by the purchaser of the freehold for himself and his assigns, though neither the sub-tenant nor his lessor has actual notice of it, and in spite of the provision of s. 2 of the Vendor and Purchaser Act, 1874, preventing the examination of the title to the freehold. In the conveyance in 1875 to F. of part of a building estate purchased by him, F. covenanted for himself, his heirs, executors, administrators, and assigns, with the owner or owners for the time being of the remainder of the property, not to carry on the trade of retailer of wine, spirits, or beer, on the land purchased. F. leased to D., who sub-leased to J., neither D. nor J. having actual notice of the restriction. J. opened a shop for the sale of wine and beer to be consumed off the premises. Upon a motion for an injunction by T., the purchaser of another part of the building estate:—Held, that J. was liable for breach of the covenant. *Thornwell v. Johnson*, 50 L. J., Ch. 641; 44 L. T. 768; 29 W. R. 677.

**By Lessor's Predecessor in Title—Constructive Notice to Lessee.**—A purchaser or lessee having notice of a deed forming part of the chain of title of his vendor or lessor, has constructive notice of the contents of such deed, and is not protected from the consequences of not looking at the deed, even by the most express representation on the part of the vendor or lessor that it contains no restrictive covenants, nor anything in any way affecting the title. The rule that a lessee has constructive notice of his lessor's title has not been altered by s. 2, sub-s. 1, of the Vendor and Purchaser Act, 1874, but a lessee is now in the same position with regard to notice as if he had, before the act, stipulated not to inquire into his lessor's title. *Wilson v. Hart* (1 L. R., Ch. 463) observed upon. *Patman v. Harland*, 17 Ch. D. 353; 50 L. J., Ch. 642; 44 L. T. 728; 29 W. R. 707.

**Purchaser without Notice when no Protection.**—The only exception, and the well-known exception, to the rule which protects a purchaser with notice taking from a purchaser without notice is that which prevents a trustee buying back trust property which he has sold, or a fraudulent man who has acquired property by fraud saying he sold it to a bona fide purchaser without notice and has got it back again. Those are cases to shew that a person shall not take advantage of his own wrong. *Barrow's case*, per M. R., 14 Ch. D. at p. 445; 49 L. J., Ch. 498; 42 L. T. 891—C. A.

See also cases *ante*, col. 430.

**For Quiet Enjoyment—Effect of.**—Under a

settlement A. had power to charge estates; he did so charge them, but in excess of his powers: he then assigned 5,000*l.* of the sums charged to the plaintiff, which was also beyond his powers. The assignment to the plaintiff contained a covenant by A. for the quiet enjoyment of the premises assigned against "any person or persons there or thereafter having or possessing any title or interest in, out of, or respecting the same:"—Held, that the right of the owners of the estate not to have the 5,000*l.* raised was a right respecting it, and that A.'s estate was liable on the covenant to make good the plaintiff's purchase-money. *Ilenty v. Wrey*, 19 Ch. D. 492; 45 L. T. 752; 30 W. R. 317. *And see S. C. in C. A.*, 21 Ch. D. 332; 47 L. T. 231; 30 W. R. 850.

On a conveyance of land to A. in fee, he covenanted with B., the vendor, that he and his assigns would not permit to be carried on in any building built on any part of the land the trade of a seller of beer. A. afterwards demised for twenty-one years a building on part of the land, which at that time was used as a grocer's shop; the lessee covenanted that he and his assigns would not carry on therein, or permit to be carried on, certain trades (that of a seller of beer not being one); and A. covenanted that the lessee and his assigns should peaceably enjoy the demised premises without any lawful let, suit, or interruption by or from him or any person lawfully claiming from, by, or under him. This lease was assigned to D.; and he, without notice of A.'s covenant with B., altered and fitted up the premises as a beer-shop, upon which B. obtained an injunction from the Court of Chancery restraining D. from carrying on the trade of a beerhouse on the premises. D. then brought an action against A. for a breach of the express or of an implied covenant in the deed of demise:—Held, that the express covenant for quiet enjoyment excluded any implied covenant; and that that covenant did not amount to a warranty to the lessee that he might use the premises for any purpose not mentioned in the restrictive covenant on his part; and therefore that D. could not recover. *Dennett v. Atherton*, 7 L. R., Q. B. 316; 41 L. J., Q. B. 165; 20 W. R. 442—Ex. Ch.

—**Decree in Equity no Disturbance in Possession.**—In a conveyance of land by the defendant to the plaintiff, the defendant covenanted for title and quiet enjoyment notwithstanding any act or thing done or suffered by him or by any of his ancestors or predecessors in title. After the conveyance a decree was made in a suit in chancery in which the plaintiff, though not a party, was represented as being one of a class of persons against whom the suit was brought, and by the decree the land so conveyed by the defendant was declared to be subject to a general right of common over it:—Held, that the decree alone, without any entry or actual disturbance of the plaintiff in his possession, was no breach of the defendant's covenant for quiet enjoyment. *Howard v. Maitland*, 11 Q. B. D. 695; 53 L. J., Q. B. 42—C. A.

Held, also, that the court, in the absence of evidence of a grant of such right of common by some predecessor in title of the defendant, would not infer that there must have been such grant so as to be a breach of his covenant for title within the meaning of the covenant. *Id.*

—**Act of Government.**—A covenant in a conveyance of lands in America, during the time of the rebellion in that country, that the grantor had a legal title, and that the grantee might peaceably enjoy, without the let, interruption, &c., of the grantor and his heirs, or of any other person whomsoever, is not broken by the States of America seizing the lands as forfeited for an act done previously to the conveyance; notwithstanding the subsequent acknowledgment of their independence by this country. *Dudley v. Follitt*, 3 T. R. 584.

Such a covenant does not extend to the acts of wrongdoers, but only to persons claiming by a legal title. *Id.*

—**Non-Incumbrance.**—H. having mortgaged an estate to the defendant, H. as mortgagor, and the defendant as mortgagee, conveyed a part of the same to A. for building a house thereon, by deed, in which A. was empowered to erect a "porte cochère or projection" on one side of her proposed house, such projection to extend over the foot pavement of a certain road, and the plan thereof to be submitted to and approved of by H. Afterwards H. and the defendant conveyed other part of the same estate to the plaintiff by deed, in which was granted to the plaintiff and his friends, servants, &c., and all other persons for the benefit of the plaintiff, the right to pass and repass over and along certain roads, of which the road over which A. had been allowed to build the projection was one; and by the same deed the defendant for himself covenanted with the plaintiff that he, the defendant, "had not done, omitted, or knowingly suffered, or been party or privy to anything whereby the premises were or might be impeached, affected, or incumbered:"—Held, first, that upon the construction of the deeds the covenant of non-incumbrance was not broken by the defendant having been party to the deed whereby A. was allowed to erect the porte cochère or projection. *Clifford v. Hoare*, 9 L. R., C. P. 362; 43 L. J., C. P. 225; 30 L. T. 465; 22 W. R. 828.

Held, secondly, that the defendant having joined as mortgagee only, would not have diminished his liability upon the deeds if the court had construed them against him. *Id.*

—**Injunction to Prevent Breach of Covenant against User of Building—Threatened User.**—A person who has covenanted not to use a building for certain purposes will not be restrained from erecting a building seemingly adapted only for such purposes. *Worsley v. Swann*, 51 L. J., Ch. 576—C. A.

—**Mandatory Injunction.**—An estate was laid out for building and sold in lots, and the purchasers of the different lots executed a deed by which they covenanted with the vendor not to erect any buildings beyond a certain line, the covenant being subject to a proviso that it should not be personally binding on any one except in respect of breaches committed during his sole or joint seisin of the lot to which it related. In 1872, the purchaser of lot B. built upon it a bakehouse beyond the line. The plaintiff about the same time bought the opposite lot A. No complaint appeared to have been made by any one of the erection of the bakehouse until this action was commenced. In 1876 the defendant

purchased the residue of a mortgage term in lot B. and in 1877 commenced building upon that plot a wooden stable beyond the line. The plaintiff, as soon as he heard of this, wrote to complain on the 17th of March, 1877, at which time the stable was built up to the eaves. The defendant proceeded to complete the stable, which was finished on the day on which the plaintiff commenced an action for an injunction to restrain the defendant from allowing any buildings to continue on his land beyond the line:—Held, by Bacon, V.-C., that a mandatory injunction ought to be granted to compel the removal of all the erections on the defendant's plot beyond the line. Held, on appeal, that the injunction ought not to extend to the building which had been allowed to remain for five years without complaint, but must be confined to buildings erected since the defendant acquired his title. *Gaskin v. Balls*, 13 Ch. D. 324; 28 W. R. 552—C. A.

*Baxter v. Bower* (23 W. R. 805) explained. *Ib.*

The plaintiffs, the trustees of a chapel, were the owners in fee of a piece of land, and the defendant was the owner in fee of an adjoining piece of land, which together formed part of an estate that had been laid out for building under a general scheme. The conveyances of the pieces of land respectively contained a covenant that certain stipulations would be observed and performed, one of which stipulations was that "nothing is to be erected within fifteen feet of the high road, or within ten feet from any other road, except fences, and those not more than six feet high, and no house or part of a house is to be erected at a greater distance than fifty feet from the front building line." Before the plaintiffs' chapel was erected, a house was built on the defendant's land, the front of which was fifteen feet from the high road. Afterwards the defendant began building a shop on his land in advance of the front of his house. The plaintiffs objected on the ground of the covenant, but the defendant built his shop and brought forward the walls seven feet in advance of his house, so as to be only eight feet from the high road. The view of the plaintiffs' chapel was obstructed by the defendant's shop. The plaintiffs claimed an injunction to restrain the defendant, and damages. It appeared, however, that the plaintiffs' chapel was in advance of the lines mentioned in the above stipulation in some trifling respects, and that they had violated the stipulation that no house or part of a house was to be erected at a greater distance than fifty feet from the front building line, by carrying their chapel to a greater distance than fifty feet from the high road, and by erecting an iron building at the rear of their chapel, so as to occupy the entire space between the chapel and the extent in depth of their ground. The defendant contended that, under the circumstances, the plaintiffs were not entitled to the relief claimed by them:—Held, that the two covenants were essentially different (the one to observe the line of frontage being of a more important, and the other, as to building in the rear, being of a less important, character), and could be treated as separate covenants; that the plaintiffs were not prevented in equity from enforcing the covenant as to the frontage line, which they themselves had substantially observed; and that the injunction claimed must be granted, and the defendant's building re-

moved. *Chitty v. Bray*, 48 L. T. 860; 47 J. P. 695.

**Where no Damage resulting.**—It is no defence to an application for an injunction to restrain a breach of covenant to say that the covenantee sustains no damage from the breach, for if the covenantor derives any benefit therefrom, the covenantee may reasonably demand a share of it as the price of his consent. *Wells v. Attenborough*, 24 L. T. 312; 19 W. R. 465.

Where there is a clear breach of covenant the covenantees are entitled to an injunction and no damage need be shewn. *Manners (Lord) v. Johnson*, 1 Ch. D. 673; 45 L. J., Ch. 404; 24 W. R. 481.

**Alteration in Character of Property.**—A building estate was laid out in lots, which were sold by the owners of the estate to different purchasers, each of whom covenanted with the vendors, and with the owners of the other lots entitled to the benefit of the covenant, not to build a shop on his land, or to use his house as a shop, or to carry on any trade therein. The purchaser of one of the lots, who occupied his house as a private residence, brought an action against the purchaser of another lot, who was using his house as a beer shop with an "off" licence, to restrain him from breaking his covenant, and for damages. The defendant had, to the knowledge of the plaintiff, so used his house for three years before the action was commenced. There was evidence that several other houses built on others of the lots (one of them immediately opposite the plaintiff's house) had been for some time used as shops, notwithstanding the covenant, and that many of the houses adjoining the plaintiff's house were occupied, not each by a single tenant, but each by two families at weekly rents:—Held, that the character of the property had become so changed that the original purpose—the keeping the estate as a residential property—for which the covenant had been entered into, had failed, and that it would, under the circumstances, be inequitable to enforce the specific performance of the covenant. The principle of *Bedford (Duke) v. Trustees of the British Museum* (2 My. & K. 552) applied. And the plaintiff, not having proved any substantial damage, the action was dismissed with costs. *Sayers v. Collyer*, 24 Ch. D. 180; 52 L. J., Ch. 770; 48 L. T. 939; 32 W. R. 200; 47 J. P. 741.

**Injury to Adjoining Property.**—G., the owner of some land, sold it in lots, subject to conditions, by which the purchaser of lot 6 was required to covenant to build according to a certain elevation. The purchaser of the adjoining lot 7, altered, with G.'s consent, an old building standing on such lot by raising its wall several feet on the side next to lot 6. The purchaser of lot 6 excavated the land, as required, to build according to the conditions, and in consequence of this the purchaser of lot 7's building fell:—Held, that as the excavations were authorized by the conditions of sale, and were made therefore with the licence of G. the vendor, the purchaser of lot 7 could not sue for the injury he had sustained by his building being so deprived of the lateral support of the land in lot 6. *Murchie v. Black*, 19 C. B., N. S. 190; 34 L.

J., C. P. 337; 11 Jur., N. S. 608; 12 L. T. 735; 13 W. R. 896.

**To Maintain Walls.]**—Lands situated below the level of the sea in Broomhill Level, Guildford Level and Walland Marsh, were, previously to 1794, held in undivided shares. In that year these lands were partitioned by a deed containing a covenant that the expense of keeping and maintaining the walls and gutts of and belonging to the lands thereby divided, should be borne by the owners, and should be payable out of the lands by an acre-scut. Semble, that the covenant was one which would run with the land although the assigns of the covenantors were not named. *Morland v. Cook*, 6 L. R., Eq. 252; 37 L. J., Ch. 825; 18 L. T. 496; 16 W. R. 777.

**To build Wall—Absolute or Conditional.]**—In February, 1872, the defendant corporation purchased of W. a piece of land, parcel of his freehold estate at C., for the purpose of building thereon a blind school or asylum, and it was conveyed to them, their successors and assigns in fee, by a deed containing a proviso that "if the said corporation should not use or require the land for the purpose of building a school or asylum for the blind, and should at any time within ten years from the 11th August, 1872, desire to sell the same or such part of it as they should not use or require as aforesaid, then W., his heirs or assigns, should have a right of pre-emption at the price therein specified for the whole, or at the rate per acre therein specified, if for only a part of the said land; and that the corporation and their successors would not take proceedings for sale until after the expiration of six months' previous notice to W., his heirs or assigns, of their desire to sell, during which period of six months W., his heirs or assigns, might elect to exercise the right of pre-emption by giving notice to that effect to the corporation or their successors. By the same deed the defendants also covenanted for themselves, their successors and assigns, with W., his heirs and assigns, that the said piece of land "should be enclosed and kept enclosed by their corporation, their successors and assigns on all the sides abutting on the land belonging to W., with a brick wall or iron railing seven feet high at the least, and that the sides, front, and faces of all erections and buildings towards the land belonging to W. should be of a good architectural character, and consistent in design and appearance with the exterior of the principal building to be erected on the said land thereby conveyed." W. died in September, 1878, and no wall or railing having been erected by the defendants in his lifetime, the plaintiffs, as his executors and trustees, required them to erect the same, which they failed to do, but gave notice to the plaintiffs that they did not require the land for building a school or asylum thereon. Thereupon the plaintiffs gave notice to the defendants to enclose the land within a reasonable time with a wall or railing in accordance with their covenant; and upon the defendants neglecting so to do, the plaintiffs brought an action against them for damages sustained by W.'s estate, and by the plaintiffs as his representatives, through the defendant's breach of covenant; and on a special case for the opinion of the court, it was held, by the Exchequer Division (Kelly, C. B., and

Huddleston, B.), that the covenant by the defendants to enclose the piece of land in question "with a brick wall or iron railing seven feet high at the least," was an absolute covenant, and was not conditional upon the building by the defendants of a school or asylum upon the land; and that the damages to the plaintiffs in consequence of the non-erection of the said wall or railing should, in point of principle, be the amount which it would cost to erect the same in conformity with the covenant, and that they should be assessed upon that basis. *Wigsell v. Corporation of School for Indigent Blind*, 8 Q. B. D. 357; 51 L. J., Q. B. 330; 43 L. T. 218; 30 W. R. 474; 44 J. P. 555.

Held, also, by Kelly, C. B., that the defendants having failed to perform their covenant, an action for breach of it lay against them by the plaintiffs, who, as executors and trustees, or otherwise as representatives of W.'s real estate, were entitled to receive the damages as covenantees, or executors of the covenant in an action for breach of a covenant in a deed inter partes. *Id.*

By Huddleston B., that in construing covenants, the fulfilment of the evident intention and meaning of the parties to them must be looked at, not confining oneself within the narrow limits of a literal interpretation, but taking a more liberal and extended view, and contemplating at once the whole scope and object of the deed in which they are contained. *Id.*

**Erecting a Wall instead of House.]**—Land was sold, subject to a covenant entered into with a neighbouring landowner, that "no buildings, except dwelling-houses," to front a certain road, should be built thereon. The purchaser threw the land into his garden, and inclosed it, by erecting thereon, along the side of the road, a wall 8 ft. 6 in. high, for the greater part, but carried up in one part to the height of 11 ft. 6 in., for the purpose of forming the back of vineries and a greenhouse. In a suit for an injunction, to restrain the wall from continuing:—Held, that the boundary garden wall 8 ft. 6 in. high was no breach of covenant, but the raising it for the purpose of the vineries was; but no substantial injury being caused, the court awarded damages instead of granting an injunction in respect of the breach. *Bowes v. Law*, 9 L. R., Eq. 636; 39 L. J., Ch. 483; 22 L. T. 267; 18 W. R. 640.

**Erecting Stable instead of Houses.]**—A covenant to the effect that private houses only, of a certain minimum value, are to be built on certain plots of land, is not broken by the erection on one of them of a stable with a bed-room over it, of such dimensions and in such a position that it would still be possible to build a house of the stipulated value upon the plot. *Russell v. Baber*, 18 W. R. 1021.

**Charitable Institution.]**—The erection of a building, to be used for the education and lodging of 100 girls in connexion with a charitable institution for the daughters of missionaries, supported by voluntary contributions:—Held, to be a breach of a covenant entered into by the purchaser that "no house or other building to be erected or built upon the land shall be used or occupied otherwise than as and for a private residence only, and not for any purpose of trade." *German v. Chapman*, 7 Ch. D. 271; 47

L. J., Ch. 250; 37 L. T. 685; 26 W. R. 149—C. A.

Where all the purchasers of an estate were bound by restrictive covenants not to use their houses otherwise than as private residences, and the vendor had given permission to one of the purchasers to open a school in his house, this was held not to be a waiver of the covenant as to another purchaser whose house was at some distance. *Ib.*

**National School—Nuisance.**—The owner of one of the lots having made a free gift of the same to the committee of a district national school, for the purpose of having a national school erected thereon:—Held, that the word "nuisance" in the covenant must be restricted to its technical meaning; that the establishment of a national school is not a legal nuisance; and that the establishment of such a school on one of the above lots could not be restrained by the owner of a dwelling-house built on an adjoining lot, though his property would be depreciated thereby. *Harrison v. Good*, 11 L. R., Eq. 338; 40 L. J., Ch. 294; 24 L. T. 263; 19 W. R. 346.

**Bay Windows.**—The purchaser of a plot of land, part of an estate laid out for building, covenanted with the vendors, who were the mortgagees in fee in possession of the estate, their heirs and assigns, not to erect any building on his plot nearer to the road in which it was situate than the line of frontage of the then present houses in that road, which houses were about forty feet apart, and about eighty feet from the road. He then erected two houses on his plot, each of which had a bay window projecting three feet beyond the line of the existing houses, and carried from the foundation up to the roof. Upon a bill for an injunction by the transferee from the mortgagees, and by a subsequent purchaser from them of a contiguous plot, who had entered into similar covenants:—Held, first, that the bay windows were buildings within the meaning of the covenant and the erection of them a violation of it, that the invasion of privacy constituted damage, that the covenant being not to do an act the doing of which caused an invasion of privacy, it was not necessary for the covenant in terms to purport to preserve privacy, and that both the plaintiffs had material interests sufficient to support the suit. *Manners (Lord) v. Johnson*, 1 Ch. D. 673; 45 L. J., Ch. 404; 24 W. R. 481.

**Erecting Porch.**—A defendant having, after express notice, erected a porch in breach of a covenant entered into by him, was upon interlocutory motion ordered to remove the erection, although the same had been completed before the filing of the bill. *Morris v. Grant*, 24 W. R. 55.

**Covenant not to use Premises as a Public-house, Tavern or Beershop.**—A deed contained a covenant by the grantee of a piece of land that no building to be erected on the land should be used as a public-house, tavern or beershop. A lessee of the grantee obtained an off-licence, authorizing him to sell at his shop, on the land, beer not to be drunk on the premises, and sold beer there accordingly:—Held, that this was a breach of the covenant. *London and Suburban*

*Land and Building Company v. Field*, 16 Ch. D. 645; 50 L. J., Ch. 549; 44 L. T. 444—C. A.

A covenant by a purchaser of land not naming assigns, that no building on the land should be used for the sale of beer, does not run with the land. *Wilson v. Hart*, 2 H. & M. 551. Affirmed 1 L. R., Ch. 463; 11 Jur., N. S. 735; 12 L. T. 798; 13 W. R. 988.

A conveyance of an estate to a purchaser and his heirs, to the use that certain trades should not be carried on upon the premises, is a stipulation in the nature of a covenant running with the land. *Hodgson v. Coppard*, 29 Beav. 4; 30 L. J., Ch. 20; 9 W. R. 9.

See also cases under LANDLORD AND TENANT (Covenants).

**User of Roads.**—By a deed of partition of a freehold estate between S. and P., portions of the estate, which were laid out for roads, were conveyed to S. in fee, and he covenanted with P., his heirs and assigns, that P., his heirs and assigns, and all owners and occupiers for the time being of all or any parts of the lands limited to P., and of the house to be built thereon, should at all times for ever thereafter have right of passage over the roads, which was given in the most ample terms, and also the full use and enjoyment of the roads in as full, free, complete, and absolute manner to all intents and purposes whatsoever as if they were public roads: Thirty years afterwards, the occupiers of houses on these lands of P. applied to a gas company to supply them with gas, and the company proceeded to lay down pipes for the purpose in the above roads. It was admitted under the company's act this would have been lawful if the roads had been public roads. The devisees of S. filed a bill in equity to restrain the company from interfering with the roads. The Master of the Rolls having dismissed the bill:—Held, that the bill had rightly been dismissed, for that the covenant entitled the occupiers to the same use of the roads for the purpose of obtaining gas as if they had been public roads. *Scoby v. Crystal Palace Gas Company*, 4 De G., F. & J. 246.

—**Purchaser for Value without Notice of Contract with Vestry to dedicate to Public.**—In December, 1864, B., who was in possession of land adjoining the river Thames, under an agreement for a lease for eighty years, gave notice to the board of works for the district that he desired to divert a public footway which crossed the land, and that he proposed to substitute a better footway, and also to make a new roadway to the waterside between two points specified, and throw the same open to the public. The vestry agreed to the application, subject to the proposed new roadway being made and thrown open to the use of the public, and the new footway being properly made. In April, 1865, the justices made an order for the stopping up and diversion of the old footway. This was done by B., and he also constructed the new road. The owners of the fee, however, did not give their consent, and there was, in the opinion of the court, no sufficient evidence of any actual dedication of the way to the public. In May, 1866, a lease of the land to B. was executed, in which it was described as "All that piece of land, &c., as the same are more particularly delineated and described on the plan drawn in the margin hereof," and the habendum was made "subject

to the existing rights of way over the said land." In the plan the new road was shewn, but was marked "Private road." There were other rights of way over the land. In June, 1866, B. assigned the lease for value to the B. company, and there was nothing to shew that they had any notice of B.'s agreement, or of the existence of a right of way over the road, other than such notice as was given by the lease itself, there being, in the opinion of the court on the evidence, nothing, in the appearance of the road or in the extent of its user by the public, to convey to a person inspecting the property any notice that there was a public right of way. After other assignments the lease became vested in W., to whom the defendants were tenants. In the sale plan, by reference to which W. purchased, the road was marked "Private road," but appeared to terminate at the Thames at a point marked "Ferry from Blackwall stairs." The defendants stopped up the road. An information was filed by the attorney-general at the relation of the vestry of the parish to restrain the defendants during the remainder of their term from obstructing the road. The defendants, by their answer, alleged that W. was a purchaser for value without notice of the agreement between B. and the vestry:—Held, by Fry, J., that there was a valid contract between B. and the vestry for a licence to the public to use the new road during his term which the vestry could have enforced against B., and that probably W. ought to be held to have purchased with notice of it; but that, looking at the lease and the plan together, no notice of the existence of a right of way over the new road was given to the B. company, and that as they had no other notice of its existence, they were purchasers of the lease for value without notice of the right of way, and therefore entitled to hold the property free from it, and that the defendants, as claiming through them, stood in the same position, even if any of the intervening assignees had acquired the lease with notice of the right of way; and that the information must therefore be dismissed:—Held, on appeal, that as the defendants had not by their answer alleged that the B. company had no notice of the right of way, they could not avail themselves of the defence that the B. company were purchasers for value without notice; but that the defence that W. was a purchaser without notice was sustained, there not being enough on the sale plans to affect him with notice that there was a public right of way; and that, therefore, assuming the existence of an agreement which could have been enforced against B., it could not be enforced against the defendants. *Attorney-General v. Biphosphated Guano Company*, 11 Ch. D. 327; 49 L. J., Ch. 68; 40 L. T. 201; 27 W. R. 621—C. A.

—**Pleading.**—A. conveyed Whiteacre to B., his heirs, and assigns, together with all ways, paths, and passages, particularly the right and privilege to and for the owners and occupiers for the time being of Whiteacre, and all persons having occasion to resort thereto, of passing and repassing, with or without horses or carriages, for all purposes, in, over, along, and through Blackacre. B. conveyed Whiteacre, with the appurtenance, to C. In an action by A. against C. for trespassing on Blackacre, on a plea justifying an entry by C. for his own purposes generally, without reference to the occupation of Whiteacre, under these conveyances:—Held, that the right and

privilege exercisable over Blackacre granted by A. to B. were not confined to purposes connected with the occupation and enjoyment of Whiteacre, but that the right and privilege, as granted, did not run with the land, not being of such a nature as to inhere in the land, or to concern the premises conveyed, or the mode of occupying them, and that the plea was therefore bad. *Ackroyd v. Smith*, 10 C. B. 164; 19 L. J., C. P. 315; 14 Jur. 1047.

**Undertaking to Construct Roadway and Footpath.—Whether Requirements of Highway Authorities Included.**—In an action to recover from the defendant certain expenses paid to a highway authority for paving, &c., a new street prior to its being taken to by the parish, it was proved that the defendant had constructed the roadway and footpath in pursuance of an undertaking given by him to the plaintiff upon an assignment by him to the plaintiff of his interest in premises adjoining the street:—Held, that the fact of the parish authority having paved, &c., the roadway and footpath, prior to taking to it, was not evidence of the defendant not having fulfilled his undertaking; and that the defendant was not bound by his undertaking to construct the roadway and footpath, to the satisfaction of the highway authority, and keep it in repair until it became a street repairable by the inhabitants at large. *Read v. Bullen*, 46 J. P. 369.

**As to Mines.**—A covenant by the purchaser to the vendor of copyhold land, that the vendor shall be able to work mines underneath the land sold without incurring any liability for injury to the surface, does not run with the land. *Richards v. Harper*, 1 L. R., Ex. 199; 35 L. J., Ex. 130; 12 Jur., N. S. 770; 14 W. R. 643; 4 H. & C. 55.

**Novel Rights.**—A vendor cannot create rights not connected with the enjoyment of the land and annex them to it, nor can the owner of land render it subject to a new species of burden, so as to bind it in the hands of an assignee. *Ackroyd v. Smith*, *supra*.

**Covenant not to Build—Acquiescence in Breach by Vendor—Injunction to Pull Down.**—In 1867 the plaintiffs conveyed to a purchaser in fee simple certain hereditaments and appurtenances adjoining their railway, and by the deed of conveyance the purchaser covenanted "for himself, his heirs, executors, administrators, and assigns, that he (the said purchaser) would not erect or build any erections or buildings of any kind whatsoever within ten feet of the roadway or viaduct of the plaintiffs, without their permission in writing first had and obtained." In the following year the said purchaser conveyed the said hereditaments and appurtenances to a person since dead, the testator of the defendant Bull, and the said testator took and accepted the said conveyance without notice or knowledge of the said covenant other than such constructive notice (if any), as he might be deemed to have had by reason of the said deed of 1867, being a title deed of the premises. In 1869 the testator rebuilt the said hereditaments, and erected on the premises a hotel, part of which stood within ten feet of the roadway or viaduct of the plaintiffs, and he demised the said hotel and premises for fifty years upon a

certain rent to a woman, who assigned the lease to the second defendant Francis. A covenant was contained in the lease to the effect that the lessee should not make any alteration in the premises without the lessor's consent in writing, but neither the lessee nor the defendants had any notice of the covenant in the conveyance of 1867 other than such constructive notice (if any) as before mentioned in the case of the testator. In 1881 the defendant Francis increased the height of that part of the erection which was within ten feet of the plaintiffs' roadway or viaduct, having previously, in consideration of the payment of a sum of money, obtained the written authority of the defendant Bull for so doing. The plaintiffs had no knowledge of this erection by the defendant Bull, or the alteration by the defendant Francis, until they were both completed in 1881:—Held, upon a special case, that the plaintiffs were entitled to an injunction to both the defendants, requiring them to pull down the said erections; and that the defendant Francis was not entitled to be indemnified by the defendant Bull. *London, Chatham, and Dover Railway Company v. Bull*, 47 L. T. 413.

**Waiver of.]**—On the sale of an estate in building plots, purchasers were required to enter into a covenant with the vendors and with each other that plans of all buildings to be erected on the estate should be submitted for approval to the vendors or to a committee, and that no building should be erected the plan of which had not been approved. And it was provided, that, within seven days after the submission of such plan, the approval or disapproval should be signified in writing to the party submitting the plan; and that such approval should not be withheld unless for the sake of preserving uniformity of building or other good causes or considerations. On 23rd June, 1869, a purchaser of one plot began, without submitting a plan, to erect buildings, the plan of which would not have been approved had it been submitted. Remonstrances were made and notices served on him during July and August, and on 3rd September the vendors filed a bill on behalf of themselves and all other persons entitled to benefit of covenants (except the defendant), praying for mandatory injunction and damages:—Held, that the erection of a temporary hovel on another part of the estate, which had not been interfered with by the plaintiffs, was not a waiver of the covenant; and that the vendors were not bound to obtain the consent of all the parties entitled to the benefit of the covenant, in order to file such a bill. *Kilbey v. Haviland*, 24 L. T. 353; 19 W. R. 698.

Acquiescence in a trivial breach does not preclude a plaintiff from relief in respect of a breach of an important character. *Richards v. Revitt*, 7 Ch. D. 224; 47 L. J., Ch. 472; 37 L. T. 632; 26 W. R. 166.

On a sale of part of the C. estate, the purchasers entered into a covenant with the vendors, "their and each of their heirs and assigns, and also separately with the owners and owner, lessors and lessees for the time being, or others the persons or person for the time being entitled to the receipt of the rents and profits of any part of" the C. estate, against (inter alia) keeping a beer-shop on any part of the premises sold. In an action brought by subsequent purchasers of the C. estate to restrain a breach of this

covenant:—Held, on the evidence adduced, that they had lost their right to bring an action by long-continued acquiescence in breaches of the covenant both by the defendant and other similar covenantors, and consequently were not entitled either to an injunction or to any damages. *Kelley v. Dodd*, 52 L. J., Ch. 34.

Semble, also, that they were not entitled to sue on the covenant at law, even for nominal damages. *Id.*

**Effect of Merger.]**—A., being possessed of a piece of land for a term of ninety-nine years, laid it out in plots, and underleased one plot to the defendant for the residue of the term, less three days, the defendant covenanting not to build more than twenty feet in height on that side of his plot which adjoined a narrow passage. A. underleased another plot, which abutted on the other side of the passage, to the plaintiffs. On A.'s death, the estate was sold under conditions which provided that the purchaser of the largest lot in value should take an assignment of the whole, and grant fresh underleases to the various under-lessees, for the residue of the term of ninety-nine years less two days. The defendant purchased his own plot, and the plaintiffs purchased their plot, which was the largest in value. The plaintiffs took an assignment of the whole, and granted a fresh underlease to the defendant of his lot for the residue of the term less two days, at an apportioned ground rent:—Held, that though the defendant's original underlease was merged at law, he was still bound in equity to observe his building covenant; and that the plaintiffs could obtain an injunction to restrain him from infringing it. *Birmingham Joint Stock Company v. Lea*, 36 L. T. 843.

**Who may Sue on—Adjoining Proprietors.]**—A vendor of a piece of land took from the purchaser a covenant that he would not do, or suffer to be done, on the premises, anything which would be a nuisance to the vendor or his tenants, or the occupiers or owners of the adjoining property, or the houses to be built thereon. The purchaser, immediately after the sale, put up the piece of land again for sale by auction in lots, under conditions which required each purchaser to enter into a covenant in similar terms; and each of the purchasers did enter into a covenant with his vendor that he would not do, or suffer to be done, on any of the premises, anything which should, would, or might be deemed a nuisance to the original vendor, or the occupiers or proprietors for the time being of the adjoining property or the houses to be built thereon:—Held, that by the word "adjoining" in the last-mentioned covenant was meant the property adjoining each lot, and not merely the property adjoining the whole piece of land originally sold; and that the owner of any lot was entitled to enforce the covenant against the owner of any other lot. *Harrison v. Good*, 11 L. R., Eq. 338; 40 L. J., Ch. 294; 24 L. T. 263; 19 W. R. 346.

**Successors and Assigns.]**—The owner of land sold a part of it and entered into an agreement with the purchaser that an adjoining plot of land "should never be hereafter sold, but left for the common benefit of both parties and their successors":—Held, that this was merely an

agreement that the plot of land should be left open, in the state in which it then was, for the common advantage of both parties, and that such an agreement did not contravene any rule of law, but gave the person who might hold the vendee's land the right to enforce the obligation against the person who might hold the vendor's land. Thus the former might apply to a court of equity to order the removal of a structure that had been placed on the plot in violation of the agreement. *McLean v. McKay*, 5 L. R., P. C. 327; 29 L. T. 352; 21 W. R. 798.

The owner of an estate granted a lease of a plot of ground to A., who covenanted that he, his executors, administrators, or assigns, would not during the term do on the premises anything which should be an annoyance to the neighbourhood or to the lessor or his tenants, or diminish the value of the adjoining property, nor build, nor allow to be built, on the ground any building or erection without first submitting the plans to the lessor and obtaining his approval. The landlord some years afterwards granted a lease of an adjoining plot to B., who entered into a similar restrictive covenant. Within twenty years A. commenced, with the approval of the lessor, to build upon his ground so as to darken the windows of B.'s house. On a bill by B. to restrain A. from erecting and the lessor from approving the building objected to:—Held, that B. was not entitled to relief either on the principle that the lessor could not derogate from his grant, or on the ground that the restrictive covenants in A.'s lease enured for B.'s benefit. *Master v. Hannard*, 4 Ch. D. 718; 46 L. J., Ch. 505; 36 L. T. 535; 25 W. R. 570—C. A.

Where there are mutual covenants by owners of land, their heirs and assigns, with the owners of adjoining land, their heirs and assigns, to comply with certain stipulations, the subsequent lessee of one of the owners is entitled to the benefit of the covenants as an assign, and can sue to restrain a breach. *Taitte v. Gooling*, 11 Ch. D. 273; 48 L. J., Ch. 397; 40 L. T. 251; 27 W. R. 394.

The owners in fee of a residential estate and adjoining lands sold part of the adjoining lands to the defendants' predecessors in title, who entered into covenants with their vendors, their heirs and assigns, restricting their right to build on and use the purchased land. The same vendors afterwards sold the residential estate to the plaintiffs' predecessors in title. The conveyance contained no reference to the restrictive covenants, nor was there any contract or representation that the purchasers were to have the benefit of them:—Held, that the plaintiffs were not entitled to restrain the defendants from building in contravention of the restrictive covenants entered into by their predecessors in title. *Renals v. Cowlshaw*, 11 Ch. D. 866; 48 L. J., Ch. 830; 41 L. T. 116; 28 W. R. 9—C. A. Affirming 9 Ch. D. 125; 38 L. T. 503; 26 W. R. 754.

When the vendors of land have covenanted with the purchaser against the carrying on of certain trades upon other parts of the land, the purchaser is not prevented from obtaining an injunction against an assignee of other part of the land because he has not attempted to prevent previous unimportant breaches of the covenant. *Richards v. Reritt*, 7 Ch. D. 224; 47 L. J., Ch. 472; 37 L. T. 632; 26 W. R. 166.

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is subject to the same measure of relief as if he had been party to the covenant, and the covenantee suing on breach of the covenant is no more bound to prove substantial damage in one case than in the other. *Ib.*

Upon the sale in 1863, to A., for the purposes of a public-house, of part of an estate intended to be laid out for building, the trustees of the estate covenanted with A., his heirs and assigns, that they, their heirs and assigns, would not thereafter sell any portions of the estate without requiring the purchaser to enter into a covenant "not to erect thereon or use or permit to be used any building to be erected thereon as a tavern, public-house, or beershop." Further portions of the estate were sold in 1870 by the then trustees to G., who covenanted with the vendors not to use or permit to be used any building erected on the land and premises intended to be thereby assured as a tavern, public-house, or beershop. The rest of the estate was sold to other persons. In 1879, H. purchased from G. part of the land comprised in G.'s purchase of 1870, and entered into a covenant with G., in terms similar to those of the covenant in the deed of 1870. I., a yearly tenant under H. of one of the houses, having obtained an "off licence," sold under it beer which was not drunk upon the premises:—Held, that the property was bound by the restrictive covenant entered into by the vendors in 1863, and that B., an assign of A., was entitled to an injunction and damages against H. and I., in respect of the breach of covenant in selling beer under an "off licence." *Nicoll v. Penning*, 19 Ch. D. 258; 51 L. J., Ch. 166; 45 L. T. 738; 30 W. R. 95.

#### Immaterial Deviation on the Part of Plaintiff.]

—On the sale of an estate in plots for building purposes, a deed of covenant was executed by all the purchasers, whereby they covenanted with the trustees, each purchaser covenanting with regard to the plot purchased by him, to observe certain stipulations as to the number of houses to be built on the plots, the building lines, and other similar matters. The plaintiff was owner of certain of these plots, on which a house had been erected and grounds laid out. The defendant had contracted for the purchase of some adjoining plots, on which he was commencing to build more houses than were allowed by the deed of covenant, and in a position at variance with the building line therein laid down. The houses so built would overlook the plaintiff's grounds somewhat more than if built within the building line. The plaintiff claimed an injunction, and the defendant pleaded that in several other instances the original vendors, who were trustees under the deed of covenant for all the purchasers, had allowed considerable breaches of the covenants to be committed without interference, that they were therefore disentitled to enforce the covenants against the defendant, and that the plaintiff, as claiming under them, could not be in any better position. It also appeared that the plaintiff's own house was built two feet in advance of the building line:—Held, that as the breaches of covenant allowed by the trustees were committed in relation to other portions of the property, not affecting the plaintiff's enjoyment of his plots, they could not be set up against him, and that the deviation with regard to his own house was too trifling to affect his right. *Jackson v. Winniffrith*, 47 L. T. 243.

certain rent to a woman, who assigned the lease to the second defendant Francis. A covenant was contained in the lease to the effect that the lessee should not make any alteration in the premises without the lessor's consent in writing, but neither the lessee nor the defendants had any notice of the covenant in the conveyance of 1867 other than such constructive notice (if any) as before mentioned in the case of the testator. In 1881 the defendant Francis increased the height of that part of the erection which was within ten feet of the plaintiffs' roadway or viaduct, having previously, in consideration of the payment of a sum of money, obtained the written authority of the defendant Bull for so doing. The plaintiffs had no knowledge of this erection by the defendant Bull, or the alteration by the defendant Francis, until they were both completed in 1881 :—Held, upon a special case, that the plaintiffs were entitled to an injunction to both the defendants, requiring them to pull down the said erections; and that the defendant Francis was not entitled to be indemnified by the defendant Bull. *London, Chatham, and Dover Railway Company v. Bull*, 47 L. T. 413.

**Waiver of.]**—On the sale of an estate in building plots, purchasers were required to enter into a covenant with the vendors and with each other that plans of all buildings to be erected on the estate should be submitted for approval to the vendors or to a committee, and that no building should be erected the plan of which had not been approved. And it was provided, that, within seven days after the submission of such plan, the approval or disapproval should be signified in writing to the party submitting the plan; and that such approval should not be withheld unless for the sake of preserving uniformity of building or other good causes or considerations. On 23rd June, 1869, a purchaser of one plot began, without submitting a plan, to erect buildings, the plan of which would not have been approved had it been submitted. Remonstrances were made and notices served on him during July and August, and on 3rd September the vendors filed a bill on behalf of themselves and all other persons entitled to benefit of covenants (except the defendant), praying for mandatory injunction and damages :—Held, that the erection of a temporary hovel on another part of the estate, which had not been interfered with by the plaintiffs, was not a waiver of the covenant; and that the vendors were not bound to obtain the consent of all the parties entitled to the benefit of the covenant, in order to file such a bill. *Kilbey v. Haviland*, 24 L. T. 353; 19 W. R. 698.

Acquiescence in a trivial breach does not preclude a plaintiff from relief in respect of a breach of an important character. *Richards v. Revitt*, 7 Ch. D. 224; 47 L. J., Ch. 472; 37 L. T. 632; 26 W. R. 166.

On a sale of part of the C. estate, the purchasers entered into a covenant with the vendors, "their and each of their heirs and assigns, and also separately with the owners and owner, lessors and lessees for the time being, or others the persons or person for the time being entitled to the receipt of the rents and profits of any part of" the C. estate, against (inter alia) keeping a beer-shop on any part of the premises sold. In an action brought by subsequent purchasers of the C. estate to restrain a breach of this

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Where there are mutual covenants by owners of land, their heirs and assigns, with the owners of adjoining land, their heirs and assigns, to comply with certain stipulations, the subsequent lessee of one of the owners is entitled to the benefit of the covenants as an assign, and can sue to restrain a breach. *Tait v. Gosling*, 11 Ch. D. 273; 48 L. J., Ch. 397; 40 L. T. 251; 27 W. R. 394.

The owners in fee of a residential estate and adjoining lands sold part of the adjoining lands to the defendants' predecessors in title, who entered into covenants with their vendors, their heirs and assigns, restricting their right to build on and use the purchased land. The same vendors afterwards sold the residential estate to the plaintiffs' predecessors in title. The conveyance contained no reference to the restrictive covenants, nor was there any contract or representation that the purchasers were to have the benefit of them:—Held, that the plaintiffs were not entitled to restrain the defendants from building in contravention of the restrictive covenants entered into by their predecessors in title. *Renals v. Cowlishaw*, 11 Ch. D. 866; 48 L. J., Ch. 830; 41 L. T. 116; 28 W. R. 9—C. A. Affirming 9 Ch. D. 125; 38 L. T. 503; 26 W. R. 754.

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Upon the sale in 1863, to A., for the purposes of a public-house, of part of an estate intended to be laid out for building, the trustees of the estate covenanted with A., his heirs and assigns, that they, their heirs and assigns, would not thereafter sell any portions of the estate without requiring the purchaser to enter into a covenant "not to erect thereon or use or permit to be used any building to be erected thereon as a tavern, public-house, or beershop." Further portions of the estate were sold in 1870 by the then trustees to G., who covenanted with the vendors not to use or permit to be used any building erected on the land and premises intended to be thereby assured as a tavern, public-house, or beershop. The rest of the estate was sold to other persons. In 1879, H. purchased from G. part of the land comprised in G.'s purchase of 1870, and entered into a covenant with G., in terms similar to those of the covenant in the deed of 1870. I., a yearly tenant under H. of one of the houses, having obtained an "off licence," sold under it beer which was not drunk upon the premises:—Held, that the property was bound by the restrictive covenant entered into by the vendors in 1863, and that B., an assign of A., was entitled to an injunction and damages against H. and I., in respect of the breach of covenant in selling beer under an "off licence." *Nicoll v. Fenning*, 19 Ch. D. 258; 51 L. J., Ch. 166; 45 L. T. 738; 30 W. R. 95.

#### Immaterial Deviation on the Part of Plaintiff.]

—On the sale of an estate in plots for building purposes, a deed of covenant was executed by all the purchasers, whereby they covenanted with the trustees, each purchaser covenanting with regard to the plot purchased by him, to observe certain stipulations as to the number of houses to be built on the plots, the building lines, and other similar matters. The plaintiff was owner of certain of these plots, on which a house had been erected and grounds laid out. The defendant had contracted for the purchase of some adjoining plots, on which he was commencing to build more houses than were allowed by the deed of covenant, and in a position at variance with the building line therein laid down. The houses so built would overlook the plaintiff's grounds somewhat more than if built within the building line. The plaintiff claimed an injunction, and the defendant pleaded that in several other instances the original vendors, who were trustees under the deed of covenant for all the purchasers, had allowed considerable breaches of the covenants to be committed without interference, that they were therefore disentitled to enforce the covenants against the defendant, and that the plaintiff, as claiming under them, could not be in any better position. It also appeared that the plaintiff's own house was built two feet in advance of the building line:—Held, that as the breaches of covenant allowed by the trustees were committed in relation to other portions of the property, not affecting the plaintiff's enjoyment of his plots, they could not be set up against him, and that the deviation with regard to his own house was too trifling to affect his right. *Jackson v. Winnifrith*, 47 L. T. 243.

**Damages for Breach of Covenant—Cost of Performance not the Measure of.]**—The grantees of certain land had covenanted with the grantor, since deceased, that the land, except as to the entrance to be made by them towards an intended new road, should be and be kept enclosed on all the sides abutting on the land of the grantor with a brick wall seven feet high. The grantees not having erected a wall in pursuance of the covenant, an action was brought against them by the executors and devisees of the grantor for damages for the breach of covenant. It appeared that, in the events that had happened, the value of the adjoining land of the plaintiffs was not decreased by the non-erection of the wall to anything like the amount which it would have cost to build the wall:—Held, that the true measure of damages being the pecuniary amount of the difference between the position of the plaintiffs upon the breach of covenant and what it would have been if the covenant had been performed, under the circumstances of the case the amount that it would cost to build the wall was not the correct measure of the damages. *Wiggall v. School for Indigent Blind*, 8 Q. B. D. 357; 51 L. J., Q. B. 330; 46 L. T. 422; 30 W. R. 474. See also *S. C.*, ante, col. 438.

## VENUE.

1. *In Transitory Actions.*
2. *In Local Actions*, 448.
3. *In Penal Actions*, 449.
4. *Adjoining Counties*, 449.
5. *In Crown Cases*, 450.
6. *Allegation of Venue*, 450.
7. *Mode of taking Advantage of Wrong Venue*, 451.
8. *Abolition of Local Venue*, 452.
9. *Place of Trial*.—See PRACTICE (Trial).

### 1. IN TRANSITORY ACTIONS.

In transitory actions, the plaintiff has a right to lay the venue where he pleases. *Slaughter v. Bradock*, 4 Burr. 2447.

And all actions of a transitory nature which arise abroad may be laid to have happened in an English county. *Mostyn v. Fabrigas*, Cowp. 177.

Where the cause of action arises in two counties, the venue shall not be laid in a third. *Shirley v. Collis*, 2 W. Bl. 940.

In an action for not repairing, the venue is not local, though the contract is only implied from the situation of the parties. *Buckworth v. Simpson*, 1 C., M. & R. 834; 1 Gale, 38.

In an action for damages against an attorney for filing a bill in chancery, without any authority from, or even the knowledge of, the plaintiff, which was afterwards dismissed with costs, and the plaintiff obliged to pay those costs, the venue may be laid either in the county where the Court of Chancery is held, or the county where he actually paid the money. *Lyde v. Rodd*, 1 Bro. P. C. 65.

A practising attorney suing in person has an absolute privilege to lay and retain the venue in

Middlesex. The court refused to change the venue, though the cause of action arose elsewhere, and though the balance of inconvenience was against a trial in Middlesex. *Grace v. Wilmer*, 6 El. & Bl. 982; 26 L. J., Q. B. 1; 3 Jur., N. S. 64.

### 2. IN LOCAL ACTIONS.

The court will make a rule absolute for entering a suggestion on the record, to remove the trial of a cause from the county where the cause of action arose, and where the venue is laid, to an adjoining county, the action being for trespass on a close, and it being sworn that the defendant and others riotously and tumultuously assembled and broke down the fences, without imposing any terms upon the plaintiff. *Jones v. Price*, 7 D. P. C. 103.

An information in the nature of a quo warranto was filed against C. for exercising the office of town councillor of Liverpool. The venue was Liverpool. After issue joined, a suggestion was entered on the record that the trial might be more conveniently had in Middlesex than in Lancashire. The defendant appeared at the trial, and a verdict passed against him:—Held, that he had waived any objection he might have had to the suggestion as irregular, and it must be treated as a declaration that a trial could not be fairly had in Lancashire. *Clerk v. Reg.*, 9 H. L. Cas. 184; 81 L. J., Q. B. 175.

In an action on a recognizance of bail taken at Durham, the venue was laid in Middlesex, and it was averred in the record that the defendant, of Durham, came before G. L., then and there being a commissioner duly appointed to take recognizances for the county of Durham, and then and there became bail before the said commissioner:—Held, that this was a sufficient averment that the commissioner was duly authorized to take the recognizance in the county of Durham, and that the venue was properly laid in Middlesex; because the recognizance was filed and must ultimately be returned there. *Hartley v. Hodson*, 2 Moore, 66; 8 Taunt. 171.

In an action on a covenant against the assignee of the lessee of premises, described in the declaration as situate within the liberties of Berwick-upon-Tweed, the venue cannot be laid in Northumberland. *Berwick (Mayor) v. Shanks*, 3 Bing. 459; 11 Moore, 372.

In covenant by assignee of lessee against lessor, the plaintiff laid the venue in Middlesex, notwithstanding the lands to which the covenant applied lay in Surrey. The locality not appearing on the declaration, and no issue being raised on it:—Held, that the defendant was not entitled to a nonsuit. *Boges v. Hewetson*, 2 Bing. N. C. 575; 2 Scott, 831; 7 C. & P. 127.

An action upon a covenant against the personal representative of the lessee of a term, sued as assignee, in respect of the privity of estate, is a local action. *Tremeere v. Morrison*, 4 M. & Scott, 609.

But where the venue was laid in Middlesex, and the declaration alleged that the defendant "entered into the premises, and became possessed thereof, to wit, in the county aforesaid:"—Held, that it sufficiently appeared that the premises were situate in the county in which the venue was laid. *Id.*

Where a county had been divided, by order in council, under 3 & 4 Will. 4, c. 71, s. 3, for the

purpose of trial of causes, and a party suing in forma pauperis brought an action which was local, in the wrong division, discovering the mistake at the assizes, withdrew the record, and obtained leave to amend, the court ordered him (though not dispaupered) to pay costs of the day for not proceeding to trial. *Thompson v. Hornby*, 9 Q. B. 978; 16 L. J., Q. B. 162; 11 Jur. 169.

The plaintiff was fishing near a spot where A. had a private right of fishery. The defendant, who was the servant of A., acting under 7 & 8 Geo. 4, c. 29, and bona fide and reasonably believing A. to be the owner of a private fishery in the place where the plaintiff was fishing, although he was not in fact the owner, apprehended him and took away his net:—Held, that the defendant was entitled to the protection of the act, and therefore that the venue ought to be laid where the cause of action arose. *Hughes v. Buckland*, 3 D. & L. 702; 15 M. & W. 346; 15 L. J., Ex. 233; 10 Jur. 884.

A Trinity House pilot, who in navigating a vessel negligently runs against and damages another vessel, is not within the protection of the 4 Geo. 4, c. 125 (Pilot Act), s. 84, which enacts that all actions brought for anything done in pursuance of the act shall be brought in the county where the cause of action arises. *Lawson v. Dublin*, 9 C. B. 54.

The Municipal Corporations Act (5 & 6 Will. 4, c. 76), s. 133, which, for the protection of persons acting in the execution of that act, enacts that "all actions shall be tried in the county," &c., and entitles the defendant in case of success to his full costs as between attorney and client, applies to replevin, although one of the provisions of the section by which a month's notice of action is to be given, is not applicable to that form of action. *Jones v. Johnson*, 6 Ex. 133; 2 L. M. & P. 177; 20 L. J., Ex. 169.

The 7 & 8 Geo. 4, c. 30, s. 41, which directs that actions brought for anything done in pursuance of that statute shall be tried in the county where the fact was committed, applies only to the case of parties exercising particular powers conferred by the statute. *Thomas v. Saunders*, 5 B. & Ad. 462.

In a local action, a suggestion to try the cause in an adjoining county could not be granted before issue joined. *Tolson v. Carlisle (Bishop)*, 7 C. B. 79.

### 3. IN PENAL ACTIONS.

A declaration for a penalty given by statute, which makes the action local, need not aver that the penal act was done in the particular county, if that county is the venue in the margin of the declaration. *Cook v. Swift*, 14 M. & W. 235; 3 D. & L. 67.

An action under 1 & 2 Ph. & M. c. 12, s. 2, by the party aggrieved, is not a penal action within 13 Eliz. c. 5, s. 2, or 21 Jac. I, c. 4, s. 2, so as to require the venue to be local. *Fife v. Boussfield*, 2 D. & L. 481; 6 Q. B. 100.

But the 3 & 4 Will. 4, c. 42, s. 22, applies to penal actions within 31 Eliz. c. 5, s. 2. *Greenhow v. Parker*, 6 H. & N. 882; 31 L. J., Ex. 4; 4 L. T. 473; 9 W. R. 578.

### 4. ADJOINING COUNTIES.

The court has power, under 5 & 6 Will. 4, c. 76, VOL. VII.

s. 109, to direct an action, the venue of which is laid in the city of Bristol, to be tried in the adjoining county, the exception in 38 Geo. 3, c. 52, s. 10, being repealed as well in civil as in criminal proceedings. *Cole (or Colne) v. Gane*, 3 D. & L. 369; 15 L. J., Q. B. 22; 9 Jur. 942.

### 5. IN CROWN CASES.

In an information of intrusion, the crown may, as of its prerogative, lay the venue in any county, without regard to the local situation of the premises. *Att.-Gen. v. Parsons*, 2 M. & W. 23; 2 Gale, 227; 5 D. P. C. 165.

But the crown is not entitled by its prerogative, as matter of right, to change the venue in such an information. *Att.-Gen. v. Churchill (Lord)*, 8 M. & W. 171; 9 D. P. C. 772; 5 Jur. 803.

Semble, that the attorney-general for the Prince of Wales has in transitory actions the same powers with regard to laying and retaining the venue in causes arising within the duchy of Cornwall, as the attorney-general for the crown. *Att.-Gen. (Prince of Wales) v. Crossman*, 1 L. R., Ex. 381; 12 Jur., N. S. 712; 14 L. T. 856; 14 W. R. 996; 4 H. & C. 568.

### 6. ALLEGATION OF VENUE.

In an action by indorsee against indorser of a bill of exchange drawn payable in London, the venue stated in the margin was London:—Held, that an averment of presentment, not stating where, sufficiently alleged a presentment in London. *Boydell v. Harkness*, 4 D. & L. 179; 3 C. B. 168; 15 L. J., C. P. 233; 10 Jur. 479.

The venue in the margin was London, and a first count stated that the plaintiff was possessed of premises situate at Milton, in the county of Kent, abutting on the north on the River Thames, on the east upon another part of the river, called the Blockhouse Dock, in which premises the plaintiff and the previous occupiers had carried on the trade of mast and block makers for sixty years, and the plaintiff, as such occupier, ought to have the free use and navigation of the river, and of that part called Blockhouse Dock, for the more convenient carrying on his trade, and with boats, rafts, and timber to pass from the stream of the river to the side of the premises abutting on the Blockhouse Dock, either at high or low water, and also to pass from the premises and the Blockhouse Dock, either at high or low water, into the stream of the river, and to load and unload their boats, barges, and other vessels at the side of the premises; yet the defendant wrongfully placed upon the soil of the river, and upon the soil of that part called the Blockhouse Dock, piles, posts, and great quantities of earth, and therewith formed an embankment and obstructed the navigation of the river, and prevented the plaintiff having access from the stream of the river to the side of his premises, whereby he sustained special damage. The second count was in trover for goods and chattels. At the trial it appeared that the premises were situate, and the obstruction took place, in the county of Kent:—Held, that whether the cause of action in the first count was local in its nature or not, the defendant was not entitled to a verdict on that count, since the declaration contained no allegation which rendered it necessary for the plaintiff to

prove that the obstruction took place in the city of London. *Simmons v. Lillystone*, 8 Ex. 431; 22 L. J., Ex. 217.

The marginal statement of venue is incorporated with the declaration, and therefore in a local action it amounts to an averment that the cause of action arose in the county named, and if this fact is contradicted by the evidence, is a ground for a nonsuit. *Richardson v. Locklin*, 34 L. J., Q. B. 225; 11 Jur., N. S. 951; 12 L. T. 728; 13 W. R. 940.

The insertion of a venue in a declaration, contrary to the rule, is not cause of demurrer. *Fanner v. Champneys*, 1 C., M. & R. 369; 4 Tyr. 859; 2 D. P. C. 680; *Fisher v. Snow*, 3 D. P. C. 27.

Or a ground for setting aside the declaration; the proper course is to apply to a judge to strike it out. *Townsend v. Gurney*, 1 C., M. & R. 590; 3 D. P. C. 168; 5 Tyr. 214.

Where a request to the defendant to do an act was necessary to be alleged in order to give the plaintiff his cause of action; and it was alleged, but without a particular venue (there being a general venue laid in the preceding part of the declaration); such omission could not be taken advantage of in arrest of judgment since 4 Anne, c. 16, s. 1, being mere matter of form, available only upon special demurrer; and this, though judgment passed by default on which a writ of inquiry was executed. *Bowdell v. Parsons*, 10 East, 359.

It was not a matter of demurrer that there was no venue laid, if a place was stated in the count. *Pippin v. Sheppard*, 11 Price, 400.

In trespass quare clausum fregit, where the locus in quo was stated to be in the parish of A., it was enough if A. had a church and overseers of its own, and was reputed a parish, although, perhaps, strictly speaking, it might be only a hamlet. *Anon.*, 2 Camp. 5, n.

The plaintiff, after laying the venue in Middlesex, declared that defendant broke and entered plaintiff's apartment in a dwelling-house situate and being in London. Demurrer, that though plaintiff had laid his venue in Middlesex, he alleged the apartment entered to be in London, overruled. *Smith v. Smyth*, 10 Bing. 406; 4 M. & Scott, 190.

Where by consent of both parties the venue was laid in L.:—Held, that no objection could afterwards be taken to the venue, notwithstanding it ought, under an act of parliament, to have been laid in S. *Furnival v. Stringer*, 1 Bing. N. C. 68.

#### 7. MODE OF TAKING ADVANTAGE OF WRONG VENUE.

In a local action, if it appears on the face of the declaration that the venue is laid in a different county from that in which the premises are situate, the objection is a subject of demurrer. *Clayton v. Best*, 8 L. T. 502; 11 W. R. 888.

Nonsuit will not lie upon a wrong venue, if there is no issue in the pleadings upon the locality. *Hitchins v. Hollingsworth*, 7 Moore, P. C. C. 228.

A declaration alleged that the plaintiff wrongfully altered and diverted a footway through land over which the public had a right of way, whereby lawfully passing along the footway he was injured. The county in the margin was Surrey; the footway was in Essex:—Held,

first, that the action was local. *Richardson v. Locklin*, 6 B. & S. 777; 34 L. J., Q. B. 225; 11 Jur., N. S. 951.

Held, secondly, that the effect of Reg. Gen., H. T., 16 Vict. r. 4, was, that the declaration contained an allegation that the causes of action arose in Essex, and therefore there was a variance which entitled the defendant to a nonsuit. *Id.*

#### 8. ABOLITION OF LOCAL VENUE.

By Rules of Supreme Court, 1883, Ord. XXXVI. r. 1, *there shall be no local venue for the trial of any action, except where otherwise provided by statute.*

In an action of debt founded on privity of estate, the venue is local. *Whitaker v. Forbes*, 1 C. P. D. 51; 45 L. J., C. P. 140; 33 L. T. 582; 24 W. R. 241—C. A.

An executor of the grantee of a rent-charge on land situate in Australia, sued in England the devisee of the lands, in debt for non-payment thereof:—Held (there being no privity of contract between the parties), that the action was founded on privity of estate, and, in accordance with principle and settled authority, was a local action, and could only be brought in Australia. *Id.*

#### 9. PLACE OF TRIAL.—See PRACTICE (Trial).

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## VERDICT.

See PRACTICE.

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## VESTRY.

See ECCLESIASTICAL LAW.

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## VEXATIOUS INDICTMENT.

See CRIMINAL LAW.

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## VIADUCT.

See WAY.

**VICAR AND VICARAGE.***See* ECCLESIASTICAL LAW.**VICE-ADMIRALTY  
COURTS.***See* SHIPPING.**VIEWS.**I. IN ACTIONS.—*See* JURY.II. IN CRIMINAL MATTERS.—*See* CRIMINAL  
LAW.**VISITOR AND VISITATION.***See* ECCLESIASTICAL LAW.**VOLUNTARY CON-  
VEYANCE.***See* BANKRUPTCY—FRAUDULENT  
CONVEYANCES.**VOLUNTEER.***See* ARMY AND NAVY.**VOTE.**I. AT MUNICIPAL ELECTIONS.—*See* COR-  
PORATION.II. IN VESTRIES. — *See* ECCLESIASTICAL  
LAW.III. AT PARLIAMENTARY ELECTIONS.—*See*  
ELECTION LAW.IV. AT SCHOOL BOARDS.—*See* SCHOOL AND  
SCHOOL BOARD.V. UNDER PUBLIC HEALTH ACT.— *See*  
HEALTH.**WAGER.***See* GAMING AND WAGERING.**WAGES.**I. OF SERVANTS. — *See* MASTER AND  
SERVANT.II. OF SEAMEN.—*See* SHIPPING.III. PROOF IN BANKRUPTCY.—*See* BANK-  
RUPTCY.**WAIVER AND ACQUI-  
ESCENCE.**

**Principles of.]**—The doctrine of acquiescence is founded upon conduct with a knowledge of one's legal rights. The acquiescence which will deprive a man of his legal rights must amount to fraud. The following are necessary elements to constitute fraud of this description—(1) the plaintiff must have made a mistake as to his legal rights; (2) he must have expended money or done some act on the faith of his mistaken belief; (3) the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff; (4) the defendant must know of the plaintiff's mistaken belief of his rights; (5) the defendant must have encouraged the plaintiff in the expenditure of

money, or in the other acts which he has done, either directly or by abstaining from asserting his legal rights. *Willmot v. Barber*, per Fry, J., 15 Ch. D. at p. 105; 49 L. J., Ch. 792; 43 L. T. 95; 28 W. R. 911.

**Permission to use Water.—How far Right there-to arises.**—The defendant being the owner of a canal of which the plaintiffs were large customers, a mutual understanding was come to between the parties, that so long as the plaintiffs remained good customers of the canal, they should be allowed to use the superfluous water of the canal for the purposes of copper-works, of which they were occupiers under an agreement for a lease with the defendant. The use of the water of the canal, though convenient and economical, was not absolutely essential to the plaintiffs' works.—Held, that such an understanding did not form the foundation of an equitable right. Secus, if the plaintiffs, with the knowledge of the defendant, had incurred expense in establishing a manufacture for which the use of the water was absolutely necessary. *Bankart v. Tennant*, 10 L. R., Eq. 141; 39 L. J., Ch. 809; 23 L. T. 137; 18 W. R. 639.

**Where Right Unknown.**—Acquiescence in what has been done will not be a bar to relief when the person alleged to have acquiesced has acted, or abstained from acting, through being ignorant that he possessed rights which would be available against that which he permitted to be enjoyed. *Beauchamp (Earl) v. Winn*, 6 L. R., H. L. 223.

**Mere Silence.**—The mere fact that a judgment creditor, who is entered in the debtor's statement of affairs as having no security for his debt, is present in silence at the first meeting of the creditors, not proving his debt or taking any other part in the proceedings, will not raise an equity against him so as to prevent his levying an execution on his judgment, and thus acquiring a valid security for his debt before the registration of an extraordinary resolution accepting a composition. *McLaren, Ex parte, McColla, In re*, 16 Ch. D. 534; 50 L. J., Ch. 203; 44 L. T. 36; 29 W. R. 389—C. A.

Major E. died in India in September, 1810, having left his property between M. and H., and having appointed L. testamentary guardian. In December, 1810, J., being indebted to Major E., executed a bond for securing payment of the debt, and delivered it to the agent of Major E. L. died in January, 1870, and in July, 1871, M., with her husband, filed a bill against L.'s representatives, alleging that L. had neglected, by registration of the bond or otherwise, to realize J.'s debt for the benefit of Major E.'s representatives, by which neglect the debt became irrecoverable in 1831, owing to J.'s insolvency. M. and her husband first knew of the bond in 1833, but were unwilling to interrupt the friendly relations between themselves and L., and so declined taking proceedings during L.'s lifetime.—Held, without reference to other objections, that the plaintiffs had, by their own acquiescence, disentitled themselves to any relief in the matter. *Sleeman v. Wilson*, 13 L. R., Eq. 36; 20 W. R. 109.

**Of Mortgage.**—If, in an agreement, it is one of the stipulations that a mortgage is to be given on

a certain day, and it is not given till two days afterwards, and is then accepted by the creditor, such acceptance, though a waiver as to the mortgage, is not a waiver of the creditor's general rights on the contract. *Thompson v. Hudson*, 4 L. R., H. L. 1; 38 L. J., Ch. 431.

**Contract Enforced though no Agreement under Seal.**—A corporation passed a resolution in 1860, agreeing to let land to C. for 300 years, to be stumped out by a committee and himself at his expense. The corporation did not stump out the land, and C. afterwards stumped out the land himself, took possession of it, erected a terrace on the land, and paid rent to the corporation.—Held, that he was entitled to a decree for specific performance, the corporation having acquiesced in all that he had done. *Crook v. Seaford (Corporation)*, 6 L. R., Ch. 551; 25 L. T. 1; 19 W. R. 938.

**Tacit Acquiescence does not Satisfy Statutory Power to Consent in Writing.**—A board having statutory power to consent in writing to a particular act is not bound by tacit acquiescence. *Kerr v. Preston (Corporation)*, 6 Ch. D. 463; 46 L. J., Ch. 409; 25 W. R. 264.

**In Cases of Fraud.**—Fraud cannot be condoned unless there is full knowledge of the facts and of the rights arising out of those facts, and the parties are at arm's length. *Mozon v. Payne*, 8 L. R., Ch. 881; 43 L. J., Ch. 240.

The right of a person dealing with a company to set aside (as against the company) a contract, founded on the latter's unintentional misrepresentation, may be waived or released, expressly or indirectly; but cannot be easily waived by anything the person does or omits, while the falsehood of the misrepresentation remains doubtful. *Bank of Hindustan, China and Japan, In re, Campbell, Ex parte*, 42 L. J., Ch. 771; S. C., 9 L. R., Ch. 1; 29 L. T. 519; 22 W. R. 113.

**Submission to Wrongful Act.**—Semble, that mere submission to a wrongful act which has been completed without the knowledge or assent of the person whose right is infringed, cannot without some conduct amounting to accord and satisfaction, or a release under seal being shewn, bar his right of action; although, under the name of laches, it may afford a ground for refusing relief under some particular circumstances. *De Bussche v. Alt*, 8 Ch. D. 286; 47 L. J., Ch. 336; 38 L. T. 370.

**Conversion of Goods.**—See TROVER.

**Forfeiture—Acceptance of Rent.**—In an action of ejectment to recover possession of premises for breaches of covenants contained in certain leases, the defendant pleaded that after the bringing of the action the plaintiff, with the intention of waiving the breaches of covenant, accepted rent which accrued due after the bringing of the action, and that thereby the breaches of covenant were waived.—Held (on demurrer), a good statement of defence, for the facts pleaded amounted to an agreement for a new tenancy on the terms of the old lease. *Evans v. Wyatt*, 43 L. T. 176; 44 J. P. 767.

— **Building Agreement.**—A building agree-

ment between a landowner and a builder contained a stipulation that the landowner, upon the default of the builder in fulfilling his part of the agreement, might re-enter upon the land and expel the builder, and that on such re-entry all the materials then in and about the premises should be forfeited to and become the property of the landowner "as and for liquidated damages." Semble, that if the ground of forfeiture was the omission of the builder to complete the buildings on the day appointed by the agreement, and the landowner had after that day made advances of money to the builder for the purposes of the agreement, or had in any other way treated the agreement as still subsisting, he would have waived the forfeiture. Under such a stipulation, the interest of the builder in the materials being a defeasible one, the right of the landowner to seize is not defeated by the commission of an act of bankruptcy by the builder before the seizure is made. The trustee in bankruptcy of the builder takes subject to the right of the landowner under the agreement. *Newitt, Ex parte, Garrud, In re*, 16 Ch. D. 522; 44 L. T. 5; 29 W. R. 344—C. A.

See LANDLORD AND TENANT.

— **Conditional Agreement for Reduction of Debt.**—A creditor having issued a debtor's summons in respect of a judgment debt of 344*l.*, an agreement was made that the debtor should give the creditor a cheque for 50*l.* and three bills of exchange for 50*l.* each, accepted by a third person, and payable respectively in three, six, and nine months, and that upon payment of the cheque and the bills in due course, and a receipt for a debt due by the creditor to the debtor's brother being handed to the creditor, he should give a receipt in full satisfaction of the judgment debt. In default of payment of any or either of the cheque or bills, the creditor was to be at liberty to proceed for the full amount due. The cheque and the first two bills were paid in due course, but the third bill was not paid at maturity, the acceptor having forgotten to provide his bankers with funds to meet it. The creditor issued a writ against the acceptor, and he paid the dishonoured bill within a week after it became due. The creditor then issued a debtor's summons against the debtor for the unpaid balance of the original debt:—Held, that the provision in the agreement for the revivor of the original debt upon default being made in the performance of any of the conditions was not a penalty, but that on the dishonour of the third bill the creditor was remitted to his original right, and that he had not waived that right by suing the acceptor. *Burden, Ex parte, Neil, In re*, 16 Ch. D. 675; 44 L. T. 525; 29 W. R. 879—C. A.

— **Shares.**—At a meeting of the partners in a cost-book mine, held in 1874, it was stated that the mine was 2,003*l.* in debt, and a call of 25*l.* was made upon each of the six shares in the mine. Two of the partners did not pay this call, and were in arrear for other calls. At subsequent meetings in June, 1874, the shares of these partners were declared to be forfeited. These two partners took no steps as to the mine until July, 1879, when they made a claim, and in September, 1880, they brought an action alleging that the shares had not been regularly

forfeited, and claiming to be still partners. It appeared that the mine was in debt in 1878:—Held, that even assuming the shares not to have been regularly forfeited, the plaintiffs, under the circumstances, could not, after lying by for more than six years, successfully assert their claim to be partners. *Clarke v. Hart* (6 H. L. Cas. 633) distinguished. *Rule v. Jewell*, 18 Ch. D. 660; 29 W. R. 755.

**Payment of Money by Mistake.**—The plaintiff, by mistake, paid to the defendants, who were owners of the tithes of a parish, tithe rent-charge in respect of lands not in his occupation. The plaintiff did not discover the mistake until the two years, limited by 6 & 7 Will. 4, c. 71, for the recovery of a tithe-rent charge, had expired, and the defendants had lost their remedy for the arrears against the lands actually chargeable:—Held, that there was no duty cast on the plaintiff in relation to the defendants which made his delay in discovering the mistake laches on his part; and that he was entitled to recover back the amount paid as money paid under a mistake of fact. *Durrant v. Ecclesiastical Commissioners*, 6 Q. B. D. 234; 50 L. J., Q. B. 30; 44 L. T. 348; 29 W. R. 443; 45 J. P. 270.

**Of Want of Jurisdiction.**—A total want of jurisdiction cannot be cured by the assent of parties. *Jones v. Owen*, 5 D. & L. 669; 18 L. J., Q. B. 8; 13 Jur. 261; *S. P., Foster v. Underwood*, 3 Ex. D. 3; 47 L. J., Ex. 30; 37 L. T. 389; 26 W. R. 94; *Buse v. Roper*, 41 L. T. 457; *Wellesley v. Withers*, 4 El. & Bl. 759.

Before sessions were held appellants gave notice to the clerk of the justices that objection would be made "if any justices who were rated in Yarmouth heard the appeals." At the hearing this objection, and no other, was made, and it was overruled by the justices:—Held, that the appellants were not precluded by the form of their notice from contending, in support of the rule for a certiorari, that the chairman, even if not disqualified by reason of his being rated, was disqualified by reason of his being himself a litigant; although this latter objection was not specifically mentioned in the notice, or made before the justices. *Reg. v. Great Yarmouth (Justices)*, 8 Q. B. D. 525; 51 L. J., M. C. 39; 30 W. R. 460.

In an arbitration under the Lands Clauses Consolidation Act, 1845, Y., the arbitrator on behalf of the claimants, selected W. to act as umpire from the names of three persons submitted to him by R., the arbitrator on behalf of the respondents. On the 11th October, 1881, the parties went before the umpire. The award was made on the 22nd November, taken up by the respondents and served upon the claimants on the 10th December. W. had given evidence on behalf of the respondents on the 3rd and 30th November with respect to the value of other property in the same neighbourhood, on claims against the respondents. Y. saw in the newspapers that W. was giving evidence in the other cases, and on the 11th October, when the arbitrators and umpire went to view the premises, he had noticed that R. shewed W. other property in the same neighbourhood, but he did not know at the time he selected W. to act as umpire that he was about to be retained by the respondents to give evidence in other and similar cases. No objection was made by the claimants,

nor any one on their behalf, that W. was not a disinterested person until the 20th December:—Held, that the claimant had sufficient knowledge of the position of W. before the award was made, and having given no notice of objection until the 20th December, he must be taken to have consented to W. acting as umpire. *Clout and Metropolitan and District Railway Companies, In re*, 46 L. T. 141.

Where there has been an agreement between two parties giving power to a third to make, within a certain time, an award on a matter in difference between them, if the award is not made within the specified time, but one of the parties, not knowing that fact, takes it up and pays the charge for it, his doing so will not amount to a waiver of the condition as to time contained in the agreement. *Darnley (Earl) v. London, Chatham, and Dover Railway Company*, 2 L. R., H. L. 43; 36 L. J., Ch. 404; 16 L. T. 217; 15 W. R. 817.

If a party to a reference objects that the arbitrators are entering upon the consideration of a matter not referred to them, and protests against it, and the arbitrators nevertheless go into the question and receive evidence on it, and the party, still under protest, continues to attend before the arbitrators and cross-examines the witnesses on the point objected to, he does not thereby waive his objection, nor is he estopped from saying that the arbitrators have exceeded their authority by awarding on the matter. *Davies v. Price*, 34 L. J., Q. B. 8; *S. P., Ringland v. Loundes*, 17 C. B., N. S. 514; 33 L. J., C. P. 337; 10 Jur., N. S. 850; 12 W. R. 1010—Ex. Ch.

A count was for damages sustained by the plaintiff in consequence of the defendant's removing large quantities of hay off the premises held by him of the plaintiff, and selling the same, or consuming it elsewhere than on the premises, contrary to his agreement with the plaintiff. The sum indorsed on the writ was 8l. 18s. The jury returned a verdict for the plaintiff, with 3l. 14s. 2d. damages:—Held, that the sheriff had no jurisdiction under 3 & 4 Will. 4, c. 42 (Writ of Trial Act), s. 17, to try this cause, and that the objection was not taken too late, although an assent to try before the sheriff had been given by both parties. *Lawrence v. Wilcock*, 11 A. & E. 941; 3 P. & D. 536; 8 D. P. C. 681.

**Laches.**—There is no rule in equity, any more than at law, that the mere non-suing by a specialty creditor for any period within the statutory limit of twenty years is such negligence as deprives him of the right of requiring payment of the specialty debt. S. covenanted with B. for immediate payment of a sum of money in exoneration of B., and in substitution for a similar sum which B. was liable to pay within six months of his death. S. died without having paid, or been called on to pay that sum, leaving property amply sufficient to meet it, but her executor, instead of providing out of her estate funds to meet the liability on her covenant, left her estate, consisting entirely of shares in a bank, which afterwards failed, unconverted. The investment in bank shares was authorized by the will of S.:—Held, that the executors of B. were entitled, after a lapse of eighteen and a-half years, to enforce that covenant against the estate of S. *Baker, In re, Collins v. Rhodes, Seaman, In re, Rhodes v. Wish*, 20 Ch. D. 230;

51 L. J., Ch. 315; 45 L. T. 658; 30 W. R. 858—C. A. Reversing 44 L. T. 414.

**Breach of Trust.**—Although as between the cestui que trust and a stranger the claim of the cestui que trust is barred by lapse of time operating against his trustee, lapse of time is no bar as between cestui que trust and trustee. *Cross, In re, Harston v. Tenison*, 20 Ch. D. 109; 51 L. J., Ch. 645; 45 L. T. 777; 30 W. R. 376—C. A. Reversing 30 W. R. 313.

A testator devised to his granddaughter a plot of freehold land by the description of "the portion of meadow land received by me in exchange from S.," and other plots to the same granddaughter, describing them by reference to the tenants in whose occupation they then were. Portions of the plot of land which the testator had acquired by exchange from S., and of certain of the plots which had been in the occupation of the several tenants named in the descriptions, were, at the date of the will, under contract for sale to a railway company. The company had taken possession before the date of the will, but the conveyance was not completed until after the testator's death. At the time when the conveyance was completed, the trustee, who was a solicitor, took counsel's opinion as to the person to whom the purchase-money was payable, and who ought to join in the conveyance, and the opinion was given in favour of the devisee. The trustee accordingly paid the money to her, and informed the plaintiff of the result, but no settlement of accounts was come to between the plaintiff and the trustee up to the time of the institution of the action, and the plaintiff had not executed any release or discharge to the trustee. This action was brought to recover the money out of the trustee's estate, after his death, and nearly five years after the payment had been made:—Held, that no case of acquiescence was made out against the plaintiff, and that he was entitled to recover from the trustee's estate the moneys received from the railway company, the amount to be recouped to the trustee's representative by his co-defendant, the devisee. *Jackson, In re, Wilson v. Donald*, 44 L. T. 467.

**Onus probandi.**—Trustees placed money in the hands of their solicitors for investment, and the solicitors, by means of a fraud practised on A., induced him to execute a mortgage of property to the trustees, handed to them the deeds, and appropriated the money to their own use. No part of the consideration-money was paid to A. The solicitors became bankrupt. The trustees brought an action against A. on the covenant, who, in ignorance of the facts, allowed judgment to go by default:—Held, that A. was entitled to have the deeds cancelled. The onus of proving a case of acquiescence was on the mortgagees, and could not be discharged except by proving that the mortgagor was aware of the time and manner in which the mortgagees' money was deposited with the solicitors and of the fact that no part of it had been applied for the use and benefit of the mortgagor. *Wall v. Cockerell*, 10 H. L. Cas. 229; 32 L. J., Ch. 276; 9 Jur., N. S. 447; 8 L. T. 4; 11 W. R. 442.

**Effect on Family Arrangement.**—A father appointed his sons, J. and S., his executors, and bequeathed his property to them on trust for all his children as joint tenants, and not as tenants

in common. Ten years after his death questions arose as to the children entitled, on account of the illegitimacy of the eldest three children, of whom J. was one. To avoid litigation a deed was executed by all the adult children, by which it was agreed that all the children should share equally and should take as tenants in common. A bill was filed in 1872 by two of the children who had been infants at the date of the deed, but who came of age respectively in 1857 and 1861, to have the rights of all parties under the will declared:—Held, that the rights were as declared by the deed; that the arrangement came to between the members of the family to avoid litigation was a sufficient consideration to support it as between the parties to it, and that the children were bound by acquiescence. *Smith v. Mogford*, 21 W. R. 472.

**Parol Waiver of Agreement relating to Land.]—**Parol waiver of the date fixed by a written agreement to perform a contract relating to land:—Held, void, being in contravention of the Statute of Frauds. *Stowell v. Robinson*, 3 Bing. N. C. 928; 5 Scott, 196. And see *Harcey v. Grabham*, 5 A. & E. 61; 6 H. & M. 154.

**When Specific Performance not Granted.]—**A plaintiff filed a bill for specific performance of a contract to lease certain coal mines to him. The contract was entered into in February, 1872. There was delay in completion, not, however, as far as appeared, attributable to the plaintiff. In September, 1872, the defendant gave notice that he should rescind the contract unless the plaintiff complied with certain requisitions within fourteen days, and on the 29th of October, 1872, he stated his intention of abiding by that notice. The bill was filed on the 2nd of April, 1873. A demurrer allowed on the ground that, the notice having put the parties at arm's length, the plaintiff had been guilty of unreasonable delay in taking proceedings. *Huzham v. Llewellyn*, 28 L. T. 577; 21 W. R. 570.

When a plaintiff to a bill for specific performance has allowed five months to elapse after the defendant has rescinded the contract before filing his bill, it is not a sufficient explanation of the delay to state that the defendant's solicitor was suffering from mental alienation. Leave, however, to amend may be given. *Huzham v. Llewellyn*, 21 W. R. 766.

Delay, after the parties were at arm's length, of three calendar months and thirteen days, in filing a bill for specific performance of a contract for the sale and purchase of a colliery:—Held, a bar to relief. *Glasbrook v. Richardson*, 23 W. R. 51.

The fixed rule of equity that specific performance of an agreement for a lease will not be granted after a long lapse of time will not be relaxed merely on account of possession and payment of rent during the whole of such time. *Powie v. Dynevor (Lord)*, 35 L. T. 940.

If it is of the essence of the contract that an act should be completed by a fixed date, an extension of the time does not operate as an absolute waiver of that condition, but only substitutes the extended time for the original time. *Barclay v. Messenger*, 43 L. J., Ch. 449; 50 L. T. 350; 22 W. R. 522.

If the plaintiff in a suit for specific performance has delayed for a length of time to enforce the agreement, acquiescence in a breach of the

agreement, or in a misrepresentation on the faith of which the defendant entered into the agreement, will not be imputed to the defendant by reason of a similar delay on his part in repudiating it, though accompanied by possession. *Lamare v. Dixon*, 6 L. R., H. L. 414; 43 L. J., Ch. 203; 22 W. R. 49.

**Covenant running with Land—Acquiescence in Breach by Vendor—Injunction to Pull down.]**

—In 1867, the plaintiffs conveyed to a purchaser in fee-simple certain hereditaments and appurtenances adjoining their railway, and by the deed of conveyance the purchaser covenanted "for himself, his heirs, executors, administrators and assigns, that he (the said purchaser) would not erect or build any erections or buildings of any kind whatsoever within ten feet of the roadway or viaduct of the plaintiffs, without their permission in writing first had and obtained." In the following year the said purchaser conveyed the said hereditaments and appurtenances to a person since dead, the testator of the defendant Bull, and the said testator took and accepted the said conveyance without notice or knowledge of the said covenant other than such constructive notice (if any), as he might be deemed to have had by reason of the said deed of 1867, being a title-deed of the premises. In 1869 the testator rebuilt the said hereditaments, and erected on the premises a hotel, part of which stood within ten feet of the roadway or viaduct of the plaintiffs, and he demised the said hotel and premises for fifty years upon a certain rent to a woman, who assigned the lease to the second defendant Francis. A covenant was contained in the lease to the effect that the lessee should not make any alteration in the premises without the lessor's consent in writing, but neither the lessee nor the defendants had any notice of the covenant in the conveyance of 1867 other than such constructive notice (if any) as before mentioned in the case of the testator. In 1881 the defendant Francis increased the height of that part of the erection which was within ten feet of the plaintiffs' roadway or viaduct, having previously, in consideration of the payment of a sum of money, obtained the written authority of the defendant Bull for so doing. The plaintiffs had no knowledge of this erection by the defendant Bull, or the alteration by the defendant Francis, until they were both completed in 1881:—Held, upon a special case, that the plaintiffs were entitled to an injunction to both the defendants, requiring them to pull down the said erections; and that the defendant Francis was not entitled to be indemnified by the defendant Bull. *London, Chatham, and Dover Railway Company v. Bull*, 47 L. T. 413.

**Effect of, as Estoppel.]—**Nobody ought to be estopped from averring the truth or asserting a just demand, unless by his acts, or words, or neglect his now averring the truth or asserting the demand would work some wrong to some other person, who has been induced to do something, or to abstain from doing something, by reason of what he has said or done, or omitted to say or do. *Adamson, Ex parte, Collie, In re*, 8 Ch. D. 817; 47 L. J., Ch. 106; 38 L. T. 920; 26 W. R. 892.

See also cases under ESTOPPEL.

## WALES.

**Public-houses Sunday Closing (Wales) Act, 1881, Commencement of.**—By s. 3 of the Sunday Closing (Wales) Act, 1881 (44 & 45 Vict. c. 61), passed on the 27th of August, 1881, "This act shall commence and come into operation with respect to each division or place in Wales on the day next appointed for the holding of the general annual licensing meeting for that division or place:"—Held, that "the day next appointed" is the day which shall, after the passing of the act, be next appointed for the holding of the meeting. *Richards v. McBride*, 8 Q. B. D. 119; 51 L. J., M. C. 15; 45 L. T. 677; 30 W. R. 120; 46 J. P. 247.

**Endowed School.**—Wales is a district of England within the Endowed Schools Act, 1869; and if a college holds a fund in trust for exhibitioners to be selected from a particular district in England, and whose exhibitions are tenable at the university, such college must give the endowed schools commissioners any information they may require as to the fund. *Meyrick's Fund, In re*, 13 L. R., Eq. 269; 41 L. J., Ch. 187; 25 L. T. 787; 20 W. R. 258. Affirmed, 7 L. R., Ch. 500; 41 L. J., Ch. 553; 26 L. T. 596; 20 W. R. 715.

**Customs of.**—The 34 & 35 Hen. 8, c. 26, s. 101, did not interfere with the private rights claimed by the lords marchers of Wales, as lords of manors or owners of the land. *Beaufort (Duke) v. Smith*, 4 Ex. 450; 19 L. J., Ex. 97.

The custom of England for rectors and vicars to leave their vicarages in repair to their successors was transferred to Wales by 27 Hen. 8, c. 26. *Bunbury v. Hewson*, 3 Ex. 558.

By the laws of Howel Dda, whosoever owneth land on the side of the shore, he owneth the breadth of his land on the shore, and he may make a weir upon it if he will; but if the sea cast anything on the land or on the shore, the king owneth it, for the sea is a packhorse of the king. Quære, whether this law is still in force by virtue of 12 Edw. 1 and 27 Hen. 8, c. 26, s. 31. *Att.-Gen. v. Jones*, 2 H. & C. 347; 33 L. J., Ex. 249; 6 L. T. 655.

**Prince of Wales—Bond.**—The condition of a bond, after reciting the grant of an annuity by the Prince of Wales (afterwards Geo. 4) to C., an assignment of the same to the obligee with assent of the Prince, and an agreement that the obligor should give his bond as an additional security, was declared to be, that if the Prince or his treasurer, or any person for him, should pay the annuity quarterly to the obligee, the bond should be void:—Held, that upon failure of payment the obligee was entitled to sue the obligor, without having first presented a particular of his demand to the Prince's treasurer, pursuant to 35 Geo. 3, c. 125, s. 7. *O'Kelly v. Sparkes*, 2 N. R. 421; 10 East, 369.

—**Rights of in respect of Duchy of Cornwall.**—See CROWN.

**Highways of Wales.**—See WAY.

## WAR.

## I. IN GENERAL.

## II. PRIZE OF WAR.

1. *Rights as to.*
2. *Jurisdiction of Admiralty Court*, 466.
3. *Foreign Prize Courts*, 467.

## III. FOREIGN ENLISTMENT.

1. *Cases Decided under 33 & 34 Vict. c. 90*, 468.
2. *Cases Decided under 59 Geo. 3, c. 69*, 469.

## I. IN GENERAL.

**Existence of.**—A state of war may exist de facto between two countries, although there has been no formal declaration of war by their governments; but there must be an actual commencement of hostilities. *The Teutonia*, 3 L. R., Adm. 394; 24 L. T. 521. Affirmed, 4 L. R., P. C. 171; 41 L. J., Adm. 57; 26 L. T. 48; 20 W. R. 421; 8 Moore, P. C., N. S. 411.

When the property of a captive prince is taken by a hostile sovereign power in war, no court of justice has jurisdiction over such a transaction. *Rajah of Coorg or Veer Rajundur Wadeer v. East India Company*, 29 Beav. 300; 30 L. J., Ch. 226.

**Declaration of.**—To ascertain the date of a declaration of war, the declaration from the ambassador of the court abroad, transmitted by him to the secretary of state's office, is evidence. *Thelluson v. Coaling*, 4 Esp. 266. (Usually proved by the production of a copy of a royal proclamation, announcing its existence, printed by the printers of the crown, under 8 & 9 Vict. c. 113, s. 3.)

## II. PRIZE OF WAR.

## 1. RIGHTS AS TO.

**English Ship—Captured by Enemy—Sold to Englishman.**—If a British ship, captured by an enemy, is afterwards purchased by a subject of this realm, she is still the property of the person from whom she was captured. *Woodward v. Larking*, 3 Esp. 286.

**How Property may Pass.**—The property in a prize of war may pass to the captors without the prize being taken into a port belonging to the country of the captors, or being condemned by a prize court. *The Gauntlet*, 3 L. R., Adm. 381; 40 L. J., Adm. 34; 25 L. T. 69; S. C. reversed, 4 L. R., P. C. 184; 41 L. J., Adm. 65; 26 L. T. 45; 20 W. R. 497; nom. *Reg. v. Elliott or Dyke v. Elliott*. But not on this point.

**Ship of War—What is.**—A prize of war (a merchantman), with a prize crew on board, is not a ship of war. *Id.*

**Pleading as to.**—In an action for taking a steam-vessel, the defendant pleaded that he was an admiral in the Portuguese navy, and that he took the vessel as a lawful prize, which was condemned by the Supreme Tribunal of Marine, at Lisbon, and became forfeited to the queen of Portugal. In other pleas the trespass was justified under the authority of the queen of Portugal.

jure belli. Replication, that the defendant being a natural-born subject of this kingdom, in contravention of 59 Geo. 3, c. 69, accepted the commission of admiral, without the leave and licence of the king of England:—Held, that the pleas were a conclusive bar to the action, and that the replication afforded no answer to the pleas. *Dobree v. Napier*, 2 Hodges, 84; 2 Bing. N. C. 782; 3 Scott, 201.

**Distribution.**—As to the general principles and adjudication and distribution of booty and prize of war, see *The Banda and Kirwee Booty case*, 1 L. R., Adm. 109; 35 L. J., Adm. 17; 12 Jur., N. S. 819.

The admiral who is in command at the time when the prize is taken, is entitled to the flag-officer's share of prize. *Pigot v. White*, 1 H. Bl. 265, n.; 4 Dougl. 302.

Where, from a change in the command on a station, it becomes doubtful to which admiral the flag-officer's share of a prize taken by a ship detached for the purpose of cruising belongs, it is clear that it does not belong to the captain in command of such ship. *Taylor v. Paulett (Lord)*, 1 H. Bl. 264, n.

A captain of marines who happens to be on board a man-of-war when she takes a prize, but does not belong to her complement, shares only as a passenger. *Wemyss v. Linsyee*, 1 Dougl. 324.

The captain of a ship actually on board at the time of the capture is entitled to prize-money though under arrest at the time, and though another officer had been sent on board to command the ship. *Lundley v. Sutton*, 8 T. R. 224.

If a prize is taken by two or more privateers, they are to share proportionally according to the number of men of which their respective crews consist. *Roberts v. Martley*, 1 Dougl. 311.

— **Right to Assign before Condemnation.**—

A captor of a prize may legally assign his share therein before condemnation. *Morrrough v. Comyns*, 1 Wils. 211.

— **Payment into Court by Prize Agent.**—

Claims being made on a prize agent by several persons for the prize money due to a sailor, he was permitted, as a public officer, to pay the money into court for the benefit of that claimant who should prove his authority to receive it. *Edwards v. Minett*, 1 Taunt. 166.

— **Condemnation Reversed.**—

The plaintiffs, together with others, being owners of one ship, and the defendant of another, a prize as taken, condemned and shared by agreement between them; afterwards the sentence of condemnation was reversed, and restitution awarded with costs, which were paid solely by the plaintiffs; an action cannot be brought by the plaintiffs alone for their share of the restitution money and costs, because it was either a partnership transaction, when the other parties ought to be joined, or not, when separate actions should be brought by each of the persons paying. *Graham v. Robertson*, 2 T. R. 282.

— **Grant of, by Royal Warrant, to Secretary of State "in Trust" to Distribute amongst Persons entitled thereto.**—The crown, by royal

warrant, "granted to the Secretary of State for India in Council for the time being" certain booty taken in war "in trust for the use of" certain persons, who had been adjudged entitled to it upon a reference to the Court of Admiralty, to be distributed among them, with a further provision that in case any doubts should arise in the course of the distribution the decision of the Secretary of State should be final, unless the crown should otherwise order:—Held, (1) That the Secretary of State for India in Council could only sue or be sued as a corporation under 21 & 22 Vict. c. 106, s. 65, in proceedings which might have been taken by or against the late East India Company; (2) That the royal warrant constituted the Secretary of State for India in Council an agent of the crown for the purpose of the distribution of the fund under the control of the crown, but did not constitute him a trustee for the persons interested subject to the control of a court of equity. *Alexander v. Worlington (Duke)* (2 Russ. & My. 35) discussed. *Brown v. Harris* (13 Ves. 552) distinguished. *Kinloch v. Secretary of State for India in Council*, 7 App. Cas. 619; 51 L. J., Ch. 885; 47 L. T. 133; 30 W. R. 845—H. L. (E.). Affirming 15 Ch. D. 1; 49 L. J., Ch. 571; 42 L. T. 667; 28 W. R. 619—C. A.

**Parties who may bring the Suit.**—The actual captors, though they may institute the suit, are plaintiffs only in name, as the burthen of proof rests with those claiming a right to share in the booty. *Banda and Kirwee Booty case*, *infra*.

**Proof of Title.**—If any doubt exists as to the character of a ship claimed to be the property of a neutral, being still enemy's property, the rule of the prize court is, that the claimant shall be put to strict proof of ownership, and any circumstance of fraud, or contrivance or attempt at imposition on the court, in making out his title, is fatal to the claimant; condemnation of the ship as enemy's property necessarily follows. *Batten v. Reg.*, 11 Moore, P. C. C. 271.

**Imprisonment consequent on taking Prize—No Action.**—No action at common law lies for false imprisonment, where the imprisonment was merely in consequence of taking a ship as prize, although the ship has been acquitted. *Le Cune v. Eden*, 2 Dougl. 594.

## 2. JURISDICTION OF ADMIRALTY COURT.

**None as to Booty till 3 & 4 Vict. c. 65.**—The Court of Admiralty had no jurisdiction with respect to booty until the 3 & 4 Vict. c. 65, the 22nd section of which, enacting that the court "shall proceed as in cases of prize of war," must be understood to mean, not that in all respects the distribution of booty should be assimilated to that of prize, but that the ordinary course of proceeding in prize should be adopted. See *Banda and Kirwee Booty case*, 1 L. R., Adm. 109; 35 L. J., Adm. 17; 12 Jur., N. S. 819.

**As to Capture—Exclusive.**—The jurisdiction over all matters of prize, and everything consequential to a capture, belongs exclusively to the Court of Admiralty. *Lindo v. Rodney*, 2 Dougl. 613, n.

The Court of Admiralty has jurisdiction to entertain prize proceedings commenced after the

cessation of war. *Cargo Ex Katharina*, Lush. 142; 30 L. J., Adm. 21.

The question of prize or no prize, or by whom taken, cannot be tried at common law, but must be decided by the judge of the Court of Admiralty; and the jurisdiction depends not upon the locality, nor upon the parties, but upon the nature of the question, which is such as cannot be tried by any rules of common law, but by the general law of nations, which is there administered by forms best adapted to the subject of its jurisdiction, and the interests of the parties. *Mitchell v. Rodney*, 2 Bro. P. C. 423.

The prize courts and courts of Lords Commissioners of Appeals have the sole and exclusive jurisdiction over the question of prize or no prize, and who are the captors, notwithstanding any of the prize acts; and if they pronounce a sentence of condemnation, adjudging also who are the captors, the courts of common law cannot examine the justice or propriety of it. *Camden (Lord) v. Home*, 6 Bro. P. C. 243; 2 H. Bl. 533; 4 T. R. 382.

Where a ship is bona fide seized as prize, the owner cannot sustain an action in a court of common law for the seizure, though she is released without any suit being instituted against her; his remedy, if any, being in the Court of Admiralty. *Faith v. Pearson*, 2 Marsh. 133; 6 Taunt. 439; 4 Camp. 357; Holt, 113.

**Ally.]**—If an ally actually co-operates in effecting a capture, he cannot recover any proportion of the prizes in the common law courts of this country; he must sue in the prize courts. *Duckworth v. Tucker*, 2 Taunt. 7.

### 3. FOREIGN PRIZE COURTS.

**Sentence—Effect of.]**—The sentence of a court of admiralty, sitting under a commission from a belligerent power, in a neutral country, will not be recognized in our courts; and that is to be considered a neutral country for this purpose, in which the forms of an independent neutral government are preserved, although the belligerent may have such a body of troops stationed there as in reality to possess the sovereign authority. *Donaldson v. Thompson*, 1 Camp. 429. And see *Smith v. Surridge*, 4 Esp. 25.

A sentence of a foreign court of prize is conclusive evidence upon every matter within the jurisdiction of such court upon which it has professed to decide. *Bolton v. Gladstone*, 5 East, 155; 1 Smith, 372; 2 Taunt. 85.

And if it can be discerned on the face of the sentence that the court condemned on the ground that the property was enemy's property, the sentence is conclusive evidence in the courts here that the property was not neutral. *Ib.*

A sentence of a foreign court of admiralty is only conclusive here as to the express ground of the sentence, but not as to any of the premises (noticed in the consideration part of the sentence) that led to the adjudication. *Christie v. Secretan*, 8 T. R. 192.

The sentence of a foreign court of admiralty is evidence only of what it positively and specifically affirms in the adjudicative part of it, not of what may be gathered from it by way of inference. *Fisher v. Ogle*, 1 Camp. 418.

The sentence of a foreign court of admiralty, condemning a vessel for attempting to violate a blockade, is not conclusive, unless the fact upon

which the condemnation proceeded appears, on the face of the sentence, free from doubt and ambiguity; it cannot be collected by mere inference, nor can it be left to uncertainty, whether the vessel was condemned upon one ground, which would be a just ground of condemnation by the law of nations, or on another ground which would only amount to a breach of the municipal regulations of the condemning country. *Dagleish v. Hodgson*, 5 M. & P. 407; 7 Bing. 495.

A sentence of condemnation of a prize taken by a French privateer and carried into Spain by a French court sitting there (Spain being then a belligerent ally of France in the war against Great Britain) was valid: and such condemnation, proceeding on the ground of the property being enemy's and British, is conclusive in an action on a policy against the underwriter by the assured, who had insured it as Danish, which in fact it was, Denmark being then neutral. *Oddy v. Bovill*, 2 East, 473.

In an action on a policy of insurance on goods warranted American on board a ship from London to Virginia, a sentence of a foreign court, which, after reciting that "forasmuch as the true destination of the vessel was for the English islands, having been hired and loaded at London, and having on board eighty barrels of gunpowder," declared the ship and cargo a good prize, is not conclusive evidence against the warranty of neutrality; because the special grounds assigned for the sentence do not necessarily lead to such a conclusion. *Calvert v. Bovill*, 7 T. R. 523.

The sentence of a prize court condemning a vessel is not conclusive as to any matter of fact which was the ground of condemnation, unless that matter of fact is clearly and certainly stated in the judgment as a ground of condemnation. *Hobbs v. Henning*, 17 C. B., N. S. 791; 34 L. J., C. P. 117; 11 Jur., N. S. 223; 12 L. T. 205; 13 W. R. 431.

Although the finding of a matter of fact in the judgment of a prize court may, when adduced in evidence, be conclusive evidence of the fact so found, it cannot be pleaded as an estoppel. *Ib.*

### III. FOREIGN ENLISTMENT.

#### 1. CASES DECIDED UNDER 33 & 34 VICT. C. 90.

**Towing Prize.]**—The employment of an English steam-tug for the purpose of towing a prize to the captor's waters, is a despatching a ship from the United Kingdom for the purpose of being employed in the naval service of a foreign state, within the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90), s. 8. *Reg. v. Elliott or Dyke v. Elliott, The Gauntlet*, 4 L. R., P. C. 184; 41 L. J., Adm. 65; 26 L. T. 45; 20 W. R. 497. Reversing 3 L. R., Adm. 381; 40 L. J., Adm. 34; 25 L. T. 69.

**Laying Telegraph Cable.]**—By 33 & 34 Vict. c. 90, s. 8, if any person within her Majesty's dominions, without her Majesty's licence, despatches any ship with intent that the same shall be employed in the military or naval service of any foreign state at war with any friendly state, the ship in respect of which any such offence is committed and her equipment shall be forfeited to her Majesty:—Held, that a vessel despatched to furnish and lay a submarine telegraph cable along the French coast between Cherbourg and Verdun was not despatched to be employed in

the military service of France. *The International*, 3 L. R., Adm. 321; 40 L. J., Adm. 1; 23 L. T. 787.

**Release of Ship.**—Application to release such a vessel granted, but without costs and damages. *Ib.*

When a cause is instituted against a ship in respect of which an offence against the Foreign Enlistment Act, 1870, is alleged to have been committed, the court may, with or without the consent of the crown, order the ship to be released on bail. *The Gauntlet*, 3 L. R., Adm. 319; 24 L. T. 597.

When such order is made, bail will be required for the full value of the ship and her equipment, but not for any further sum for costs. *Ib.*

**Indemnity for Detention.**—In an application to the Court of Admiralty for indemnity by the crown in respect of the detention of vessels under s. 24, where the secretary of state has released the vessels without issuing his warrant stating reasonable and probable cause for the detention, the proper form of procedure is by motion upon affidavit. *The Great Northern and The Midland*, 26 L. T. 201.

The crown is entitled to time to answer the affidavits in support of the application, so as to raise any questions of law and fact. *Ib.*

## 2. CASES DECIDED UNDER 59 GEO. 3, c. 69.

**What Governments.**—The 59 Geo. 3, c. 69, s. 7 (repealed), provided that if any person shall, without the leave, &c., equip, furnish, or fit out, any ship or vessel with intent or in order that such ship or vessel shall be employed in the service of any foreign prince, or of any person or persons exercising or assuming to exercise any powers of government in or over any foreign state as a transport, &c., every such person shall be guilty of a misdemeanor, and every such ship shall be forfeited. A ship was fitted out as a transport for the service of certain persons in the island of Cuba, who had revolted from Spain, and had assumed to exercise government, and were conducting hostilities against Spain. It did not appear who the persons were or over what part of Cuba they assumed to exercise government:—Held, that, inasmuch as the persons in whose service the ship was employed assumed to exercise government, there was a breach of the provisions of the act, and the ship was liable to forfeiture. *Reg. v. Carlin, The Salvador*, 3 L. R., P. C. 218; 39 L. J., Adm. 33; 23 L. T. 203; 18 W. R. 1054.

**Building Ship.**—If a British shipbuilder builds a vessel of war in an English port, and arms and equips her for war *bonâ fide* on his own account as an article of merchandize, and not under or by virtue of any agreement, understanding or concert with a belligerent power, he may lawfully, if acting *bonâ fide*, send the ship so armed and equipped for sale as merchandize in a belligerent country, and will not in so doing violate the provisions or incur the penalties of the Foreign Enlistment Act, 59 Geo. 3, c. 69 (repealed). *Chatasse, Ex parte, Grazebrook, In re*, 4 De G., J. & S. 655.

The building, in pursuance of a contract, with intention to sell and deliver to a belligerent

power, the hull of a vessel suitable for war, but unarmed, and not equipped, furnished, or fitted out with anything which enables her to cruise or commit hostilities, or do any warlike act whatever, is not a violation of the 59 Geo. 3, c. 69 (repealed). *Att.-Gen. v. Sillem, The Alexandra*, 2 H. & C. 431; 33 L. J., Ex. 92; 10 Jur., N. S. 262; 11 L. T. 223; 12 W. R. 257; *S. C.*, at nisi prius, 3 F. & F. 646.

**Serving on board Ship.**—Serving on board a vessel used as a store-ship in aid of a belligerent ship, the fitting out of which to be so used is an offence within 59 Geo. 3, c. 69, s. 7 (repealed), is a serving on board a vessel used or fitted out for a warlike purpose in the service or in aid of a foreign state within s. 2. *Burton v. Pinkerton*, 2 L. R., Ex. 340; 36 L. J., Ex. 137; 17 L. T. 15.

In an action for taking a steam-vessel, the defendant pleaded that he was an admiral in the Portuguese navy, and that he took the vessel as a lawful prize, which was condemned by the Supreme Tribunal of Marine, at Lisbon, and became forfeited to the queen of Portugal. In other pleas the trespass was justified under the authority of the queen of Portugal, *jure belli*. Replication, that the defendant being a natural-born subject of this kingdom, in contravention of 59 Geo. 3, c. 69 (repealed), accepted the commission of admiral, without the leave and licence of the king of England:—Held, that the pleas were a conclusive bar to the action, and that the replication afforded no answer to the pleas. *Dobree v. Napier*, 2 Hodges, 84; 2 Bing. N. C. 782; 3 Scott, 201.

On an indictment, that at Liverpool the defendants engaged and procured men to enlist as sailors in the service of a belligerent state, the evidence being that the men were engaged by the defendants at Liverpool to enter themselves as the crew of a vessel lying there for a voyage to China, and that afterwards, when the vessel was off the coast of France, the men were, in the presence of one of the defendants, enlisted in the belligerent service, the jury was directed, that if the defendants engaged the men with the intention that they should afterwards be enlisted abroad in the belligerent service, the indictment was sustained. *Reg. v. Jones*, 4 F. & F. 25.

On an indictment against a British subject, it appeared that he engaged men in this country to serve on board a vessel which he then took to Madeira, and there met and signalled a ship of the belligerent power, and went with it to anchor off an island which belonged to a foreign state, and there received on board the former vessel an officer of the belligerent power, to whom he handed over the command, and who in his presence used incitements to his men to induce them to enlist, all of them, however, refusing to do so except one or two, not proved to have been British subjects. The jury was directed to find whether, when the defendant originally engaged the men, he had the intention not only to take the vessel out to deliver her over to the belligerent commander, but also to enable him to incite and induce them to enlist, the question being reserved whether that would constitute an offence under the statute. *Reg. v. Corbett*, 4 F. & F. 555.

On an indictment for causing men to enlist or engage in the Confederate service as sailors, and

also for counselling men here to enlist in such service abroad, and for assisting in the equipment of a vessel for such service, the evidence shewing that an old gunboat, dismantled of all warlike equipments, was purchased at Sheerness, with a view to her being engaged in the Confederate service; that the defendant took an active part in repairing her, and fitting her for sea, and also in engaging men to go in her as firemen or stokers for a trial trip: that she went over to Calais, and that there the Confederate flag was hoisted, and a Confederate captain came on board, who attempted to enlist the men; and that, after this, the defendant was on board, and still used his endeavours to send men on board the vessel as stokers:—Held, that the material point was his knowledge of the ultimate destination of the vessel; that his acts after knowledge of it were evidence of his having had such knowledge before the acts of engagement in this country; that the acts abroad were evidence of the intention of the acts in this country; that the mere repairing of the vessel for a trial trip was not an equipping; and that the clause as to enlistment applied to the engagement of men in any capacity connected with the navigating of the vessel, as firemen, stokers, or engineers. *Reg. v. Rumble*, 4 F. & F. 175.

**Capture—Running Blockade.**—Notwithstanding the 59 Geo. 3, c. 69 (repealed), a British subject, who, in the service of a foreign state at peace with Great Britain, captures a British vessel, which is lawfully condemned as a prize for breaking blockade, is not liable to an action at the suit of the owner of the vessel. *Dobree v. Napier*, 2 Bing. N. C. 781; 3 Scott, 201.

## WARD.

See INFANT.

## WAREHOUSEMEN, WHARFINGER AND WHARF.

1. *Wharfs.*
2. *Rights and Liabilities.*—See BAILMENT.
3. *Delivery Orders.*—See SALE—NEGOTIABLE INSTRUMENTS.

### 1. WHARFS.

**Nature of.]**—Where the London Dock Company having built warehouses in which wines were deposited, upon payment of such a rent as they and the owners agreed upon, accepted afterwards a certificate from the Board of Treasury, under 43 Geo. 3, c. 132, whereby it became lawful for the importers to lodge and secure the wines there without paying the duties for them in the first instance; and it did not appear that there was any other place in the port of London where the importers had a right to bond their wines:—Held, that such a mono-

poly and public interest attaching upon their property, they were bound by law to receive the goods into their warehouses for a reasonable hire and reward. *Allnutt v. Inglis*, 12 East, 527.

Wharfs must be assigned in open places only. *London Wharf's case*, 1 W. Bl. 581.

In justifying in a plea to an action for the use of a crane in a public wharf, it is sufficient to say, that "it is a public, open, and lawful wharf," without claiming the right by immemorial usage; for the public has a right to use the cranes erected on public quays. *Bolt v. Stennett*, 8 T. R. 606.

**Market Overt.]**—If the owner of goods sends them to a wharf in the borough of Southwark, where goods of the same sort are usually sold; and the wharfinger, without any authority, sells them to a bona fide purchaser, who duly pays for them; this is not a sale in market overt to change the property, and trover lies for the goods at the suit of the owner against the purchaser. *Wilkinson v. King*, 2 Camp. 335.

**Landing Goods at Sufferance Wharfs.]**—The acts relating to landing goods at a sufferance wharf were intended for the protection of the shipowner. *Barber v. Meyerstein*, 4 L. R., H. L. 317; 39 L. J., C. P. 187; 22 L. T. 808; 18 W. R. 1041.

**Nuisance at.]**—Keeping wood naphtha in a warehouse near to streets, highways, and dwelling-houses, in such large quantities as to endanger the lives and properties of the Queen's subjects therein, is indictable as a nuisance at common law. *Reg. v. Lister*, Dears. & B. C. C. 209; 26 L. J., M. C. 196; 3 Jur., N. S. 570.

And see HEALTH.

**Rights of Wharfinger of Access to River.]**—The owner of land abutting on a tidal navigable river has, jure naturæ, a right of access to and from the stream wholly distinct from the right of navigation which he enjoys in common with the rest of the public. *Lyon v. Fishmongers' Company*, 1 App. Cas. 662; 46 L. J., Ch. 68; 35 L. T. 569; 25 W. R. 165.

There is no distinction between the position of a riparian owner of land abutting on a tidal and that of an owner of land abutting on a non-tidal stream, as far as regards right of access from the stream to his own land, and vice versa. *Id.*

Such right of access is a private right distinct from the right of navigating the stream, which is common to the riparian owner and the rest of the public, and it is not to be interfered with by a licence to embank, under a 53 of the Thames Conservancy Act, 1857 (20 & 21 Vict. c. cxlvii.), but is protected by s. 179 of that act. *Id.*

A riparian owner has a right to moor a vessel of ordinary size alongside his wharf for the purpose of loading or unloading at reasonable times and for a reasonable time. *Original Hartlepool Collieries Company v. Gibb*, 5 Ch. D. 713; 46 L. J., Ch. 311; 36 L. T. 433. See also *Bell v. Quebec (Corporation)*, 5 App. Cas. 84; 49 L. J., P. C. 1.

— **Other Easements.]**—A dock and an adjoining strip of land and a coal wharf were held in fee

by the same person, and whenever a ship of any size was taken into the dock to be repaired her standing bowsprit projected over and across the adjoining strip of land. All the properties were put up for sale by auction under particulars of sale which stated that the dock was capable of holding two vessels of large size, and that at low water several vessels or a steamer of the largest class would safely lie on the ways for repairs; and wherein the strip of land was described as a freehold coal wharf, capable of being rendered worth a very large rental by a comparatively small outlay; but nothing was stated to shew that the dock or its owners either had or were intended to have any right or privilege over the adjoining premises. The strip of land and coal wharf were sold and conveyed to the purchaser in fee absolutely and in the most unqualified manner, and under such purchaser the defendant claimed. Afterwards the dock was sold and conveyed to the purchaser thereof, under whom the plaintiff claimed:—Held, on a bill for an injunction to restrain the defendant from preventing or interfering with the plaintiff's full use and enjoyment of the dock as the same had theretofore been used by allowing the bowsprit of any vessel in the dock to overlie or overhang the strip of land and coal wharf: first, that there was no legal ground for holding that the owner of the dock retained or had, in respect of that tenement, any right or easement over the adjoining tenement of the strip of land and wharf after the sale and alienation of the latter. *Suffield v. Brown*, 4 De G., J. & S. 185; 35 L. J., Ch. 249.

Held, secondly, that the purchaser or grantee of the wharf was not to be considered as having been bound to know, at the time of his purchase, that the use of the dock would require that the bowsprits of large vessels received in it should project over the land he bought, or as having bought with notice of this necessary use of the dock, and the absolute sale and conveyance to him was not to be cut down and reduced accordingly. *Ib.*

Held, thirdly, that the easement claimed by the plaintiff was neither continuous, apparent, nor necessary. *Ib.*

A. was possessed of a wharf, and had a mast projecting therefrom over the river. B. moored his vessel at the adjoining wharf, with her bowsprit overhanging the front of A.'s wharf, and on the falling of the tide, the bowsprit of B.'s vessel, coming in contact with A.'s mast, broke it:—Held, that B. was not responsible. *Dalton v. Denton*, 1 C. B., N. S. 672.

The plaintiff was possessed of a wharf on the Thames, in front of which was a pile which had more than twenty years ago been driven into the bed of the river by the then occupiers of the wharf, and had remained there without interruption from the crown or the conservators of the river, and which was essential to the use and enjoyment of the wharf:—Held, the fact of the ownership not being disputed, that the court was justified in presuming that the pile had been placed there in virtue of an easement, with the consent of the owners of the soil, and that a sufficient possession remained in the plaintiff to entitle him to maintain an action against the defendant for negligently running against and destroying the pile. *Lancaster v. Eve*, 5 C. B., N. S. 717; 28 L. J., C. P. 255; 5 Jur. N. S. 683.

## WARRANT.

- I. JUSTICES.—See JUSTICE OF THE PEACE.
- II. OF APPREHENSION. — See CRIMINAL LAW.
- III. OF ATTORNEY. — See WARRANT OF ATTORNEY AND COGNOVIT.

## WARRANT OF ATTORNEY AND COGNOVIT.

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### I. WHO MAY GIVE.

**Infants.**—A warrant of attorney given by an infant is absolutely void. *Saunderson v. Marr*, 1 H. Bl. 75.

A cognovit given by a minor, authorizing an attorney to appear for him and confess an action brought against him for a precise sum for necessities provided for him by the plaintiff, with an undertaking "not to bring any writ of error, nor do any act to prevent the plaintiff from entering up judgment or suing out execution," is bad, on three grounds: first, because an infant cannot appoint nor appear by attorney, but only by guardian; secondly, because he cannot state an account; and thirdly, because he cannot deprive himself of his right to bring a writ of error, or

any right to which he is entitled. *Oliver v. Woodroffe*, 4 M. & W. 650; 7 D. P. C. 166; 1 H. & H. 474.

And where a joint warrant of attorney is given by two or more persons, one of whom is an infant, the court will order it to be vacated as against the latter, and to stand against the other parties. *Ashlin v. Langton*, 4 M. & Scott, 719; *S. P., Mottens v. St. Aubin*, 2 W. Bl. 1133.

To entitle a defendant to relief from a judgment signed on a warrant of attorney, given by him for the price of goods, on the ground of infancy, he at the time keeping a shop, and acting as if of age, he ought to make out a clear case; merely swearing that he is an infant of the age of twenty years, and giving an extract from a register of births, is not sufficient for the court to act upon. *Weaver v. Stokes*, 4 D. P. C. 724; 1 M. & W. 203; 1 Gale, 380.

**Married Women.**—The court refused to set aside, upon a summary application, a judgment entered up on a warrant of attorney given by a feme covert. *M'Lean v. Douglass*, 3 B. & P. 128.

The separate estate of a married woman, which she is restrained from anticipating, cannot, either directly or indirectly, be made the subject of a security. *Stanley v. Stanley*, 7 Ch. D. 589; 47 L. J., Ch. 256; 37 L. T. 777; 26 W. R. 310.

A warrant to confess judgment given to the person entitled to a mortgage debt by a husband and wife is of no effect so far as regards the separate estate of the wife, and a charging order cannot be obtained upon funds in court constituting the separate estate after judgment recovered against the husband and wife upon the warrant. *Ib.*

Where a feme covert, sole trader, gave a bond and a warrant of attorney, to enter up judgment, on which the plaintiff afterwards took out execution, the court set the judgment aside, as entered up without authority. *Read v. Jewson*, 4 T. R. 362.

— **When Divorced.**—The court on motion set aside a judgment on a warrant of attorney given by a feme covert, although she had been divorced a mensâ et thoro. *Faithorne v. Blaquiere*, 6 M. & S. 73.

— **Before Marriage.**—The court allowed judgment to be entered up against husband and wife, on a warrant of attorney given by the latter dum sola. *Hartford v. Mattingly*, 2 Chit. 117; *S. P., Anon., Loft*, 329; *Perrier v. Henchey*, 1 Alcock & Napier, 185.

Judgment may be entered up against a husband on a warrant of attorney given by his wife dum sola. *Higginbottom v. Higginbottom*, 8 D. P. C. 126; 1 W., W. & H. 407.

Where judgment is signed by mistake against a married woman alone, on a warrant of attorney given by her dum sola, a rule nisi only will be granted for vacating that judgment and signing another against the husband and wife. *Pocock v. Fry*, 8 D. P. C. 126; 1 W., W. & H. 408.

## II. OPERATION OF.

**When it may be Given.**—A cognovit may be given after process sued out, and before it is served. *Kerby v. Jenkins*, 2 Tyr. 499.

It is not necessary to declare previously to signing judgment. *Morley v. Hall*, 2 D. P. C. 494; *S. P., Webb v. Aspinall*, 7 Taunt. 701; 1 Moore, 428.

A cognovit given by a defendant who is in custody in execution on a judgment for debt and costs, in consideration of his discharge, is valid, if a writ has been sued out to support it; and it lies upon the party impeaching its validity to shew that no writ has been sued out. *Shanley or Shawdy v. Colwell*, 6 M. & W. 543; 8 D. P. C. 373.

**As an Answer to Action for Money secured on it.**—A warrant of attorney is an answer to an action for money secured by it only when judgment has been entered upon it. *Davidson v. Overend*, 6 C. & P. 222.

**When Waived.**—A subsequent assignment of goods for the sum secured by a warrant of attorney is not a waiver of such warrant. *Anon.*, 2 Chit. 423.

**When given, coupled with Condition not to bring Action.**—Where, after the arrest, a party applied to a judge at chambers to be discharged out of custody; and it being represented, that by his continuing in prison he would commit an act of bankruptcy, the judge, on the 4th of December, 1827, ordered him to be discharged out of custody as to the action, upon giving a fresh warrant of attorney, with a defeasance for payment of part on the 4th of January, and the remainder, with the interest, on the 4th of August, with liberty to issue execution for the first sum if not duly paid, and afterwards for the latter sum if default made in the payment; and upon giving such warrant of attorney the judgment be set aside, and a mortgage to remain as security, the defendant undertaking not to bring any action for the imprisonment; and the prisoner did not avail himself of the order:—Held, that this order embodied an absolute agreement of the parties, founded upon good consideration, that he should be forthwith discharged out of custody, and that he should bring no action for false imprisonment, and, therefore, that such an action was not maintainable. *Wentworth v. Bullen*, 9 B. & C. 840.

**Merger.**—A promissory note was made by A. and B. payable to C., to secure advances from C. to A. After the note became due, it was agreed between C. and A., without the privity of B., that A. should execute a warrant of attorney to D., as a trustee for C., to secure the amount of the note, and a further advance made by C. to A.:—Held, that the note was not merged in the warrant of attorney. *Bell v. Banks*, 3 M. & G. 258; 3 Scott, N. R. 497.

**Giving—How far a Breach of Covenant "not to Incumber."**—A lease of the Opera House contained covenants by the lessee, first, that he would not convert the same to any other use than for performing operas, but would use his utmost endeavours to improve the same for that use and purpose; secondly, that he would not grant, let or charge the boxes for a longer period than one year or season, nor charge nor incumber the theatre, or the term thereof, by mortgaging or granting rent-charges, or any other incumbrance:—Held, that the latter part of covenant

2 was not broken by giving bonâ fide warrants of attorney, the defeasance of which disclosed that they were given with the intention that judgments should be entered thereon, and that such judgments should be registered, and should stand as securities for debts, upon default in payment of which by a day named execution should issue, although, by 1 & 2 Vict. c. 110, s. 13, on registration, such a judgment operates in all respects as a charge upon the lease, and also although this might be taken in execution under the judgment confessed. *Croft v. Lumley*, 6 H. L. Cas. 672; 27 L. J., Q. B. 321; 4 Jur., N. S. 903.

Aliter, if the intention of the parties was clear and manifest to evade the covenant, and charge the lease in a circuitous manner. *Id.*

Trust during the life of H. "to pay and apply the interest and annual produce of trust property to him for his own benefit if he did not make any assignment or mortgage of, or charge upon the same, or any part thereof, by any mode of anticipation, or do any act whereby such interest, if made payable to him without any restriction, would become payable to any other person or persons," with a gift over on the happening of any such event. H. having executed a warrant of attorney under which judgment was entered up against him:—Held, that this, being a proceeding in invitum, did not work a forfeiture of his life interest. *Avison v. Holmes*, 1 Johns. & H. 530; 30 L. J., Ch. 564; 7 Jur., N. S. 722; 9 W. R. 550.

### III. VALIDITY OF.

**When obtained by Fraud.**—The court has summary jurisdiction over a warrant of attorney alleged to be fraudulent, on the application of any person interested in impeaching it, although such person may not be a party to the warrant of attorney itself. *Harrod v. Benton*, 2 M. & R. 130; 8 B. & C. 217.

A cognovit obtained by fraud will be set aside on motion. *Anon.*, 1 Chit. 268.

A. being indebted for rent to her landlord, the latter proposed to C., her son-in-law, to take his promissory note as security. C. said he would give an answer in a week or ten days. The landlord then asked him whether A. owed him anything; he replied that she did not, or what she did owe he considered as a gift. Within the ten days A. executed a warrant of attorney to C., upon which judgment was entered up, execution issued, and C. took possession of the goods. The court, considering the representations and conduct of A. to have been intended to defraud the landlord, set aside the warrant of attorney at his instance. *Martin v. Martin*, 3 B. & Ad. 934.

An action will not lie by the party against whom a f. fa. has issued on a subsisting judgment, to recover the sum levied under it, on the ground that such judgment was signed on a warrant of attorney which was obtained by fraud or duress. *De Medina v. Grove*, 10 Q. B. 152; 15 L. J., Q. B. 287; 10 Jur. 428.

**Given without Consideration.**—Where a party gives a warrant of attorney to another without consideration, in order that the latter may protect the goods of the former from execution, and judgment and execution are signed

and issued against good faith, a court of law will not interfere. *Dukes v. Saunders*, 1 D. P. C. 522.

Where goods were vested in trustees for the benefit of infant children, the trustees refusing to act, upon which the grandmother, with whom the infant children were living, took part away and suffered a portion to remain in the possession of the stepfather on his giving a warrant of attorney, the court refused to set aside the warrant of attorney on the ground of want of consideration. *Gay v. Hill*, 2 B. C. Rep. 322; 5 D. & L. 422; 18 L. J., Q. B. 12; 13 Jur. 124.

**Other Cases of Illegality.**—A warrant of attorney, given by an attorney to induce a party to stay proceedings against him on a rule for striking him off the roll, is illegal and void, and the court will direct it to be taken off the file and cancelled. *Kirwan v. Goodman*, 9 D. P. C. 330; 5 Jur. 293.

The court refused to set aside a warrant of attorney given to secure a debt, on the ground that it was obtained from the defendant by a threat of prosecution for felony, it not distinctly appearing that there was an agreement by the plaintiff either express or necessarily implied, to abstain from prosecuting upon the security being given. *Ward v. Lloyd*, 6 M. & G. 1066; 1 D. & L. 763; 7 Scott, N. R. 499; 13 L. J., C. P. 5.

But where a charge of embezzlement was pending before a magistrate, who entertained doubts whether a partnership did not exist between the prosecutor and the accused party:—Held, that a warrant of attorney given to secure the payment of the moneys charged to be embezzled, the charge being afterwards withdrawn, was invalid, as at the time of giving it there was a charge of a criminal nature pending, which it was calculated to bring to an end. *Critchley, Ex parte*, 2 D. & L. 527; 1 B. C. Rep. 7; 15 L. J., Q. B. 124; 10 Jur. 112.

**Filling in, after Execution.**—Does not avoid the instrument. *Keane v. Smallbone*, 17 C. B. 179; 25 L. J., C. P. 72.

### IV. FORM AND EXECUTION OF.

#### 1. GENERALLY.

**When Deed is Necessary.**—It seems that a warrant of attorney to release errors requires to be under seal. *Brutton v. Burton*, 1 Chit. 707.

A warrant of attorney need not be by deed. *Kinnersley v. Mussen*, 5 Taunt. 264.

**— Must be Attested.**—It is absolutely essential that there should be an attesting witness. *Id.*

**Signing Judgment.**—A warrant of attorney to confess judgment generally of a term, is regular if the judgment is signed on a particular day of term. *Todd v. Gompertz*, 6 D. P. C. 296. See *Cobbold v. Chilver*, 1 D., N. S. 726.

**Mistake in Name of Parties.**—A., as surety for B., executed a joint bond and warrant of attorney to secure an annuity to C. After the execution by A. and B. it was discovered that part of A.'s christian-name had been omitted in the body of those instruments, and he re-executed them after such name had been inserted, without

the knowledge of B. In an action brought against A., in K. B., on the bond, he pleaded a judgment recovered against him and B. The Court of C. P. afterwards refused to set aside a joint judgment entered up on the warrant of attorney, on the application of A., as that instrument was not defeated by the insertion of his christian-name, and as he had recognized the validity of the judgment in the action brought against him on the bond. *Coke v. Brummell*, 2 Moore, 495.

A mistake in the defendant's name in a judgment upon a warrant of attorney is not amendable. *Sale v. Compton*, 1 Wils. 61; 2 Stra. 209.

**Evidence to Prove that Cognovit was Conditional.]**—Parol evidence is inadmissible to prove that a cognovit, absolute in its terms, was given upon a condition that the defendant should have three months' time. *Woodman v. Ford*, 2 Jur. 11.

**Need not be Read to Party giving it.]**—It is not necessary that a warrant of attorney to confess a judgment should be read over to the party giving it. *Taylor v. Parkinson*, 2 H. Bl. 383.

**Filling in, after Execution.]**—Filling in the date of a warrant of attorney when it is left in blank after execution is not such an alteration as will avoid the instrument. *Keane v. Smallbone*, 17 C. B. 179; 25 L. J., C. P. 72.

**To release Errors.]**—A warrant of attorney in the ordinary form authorizing the attorney to enter up judgment in the principal's name, and as his act and deed to execute a release of all errors, &c., does not authorize a release of errors in process of outlawry. *Solomon v. Graham*, 5 El. & Bl. 309; 24 L. J., Q. B. 332; 1 Jur., N. S. 1070.

## 2. GIVEN IN IRELAND TO CONFESS JUDGMENT IN ENGLAND.

Where judgment has been obtained in Ireland against a public officer, a warrant of attorney, under 6 Geo. 4, c. 42, s. 12, to confess a judgment in England for a less sum than that for which judgment was obtained in Ireland, is a nullity. *Walker v. McDowall*, 3 Jur., N. S. 1078.

By 11 & 12 Vict. c. 45, ss. 50 and 57, the official manager was brought within 6 Geo. 4, c. 42, s. 12, so that upon a judgment against him obtained in Ireland, a warrant of attorney to confess judgment in England might be given, in pursuance of 6 Geo. 4, c. 42, s. 12, which has the same effect as a judgment against the public officer. *S. C.*, 7 El. & Bl. 960.

## 3. BY JOINT AND SEVERAL PARTIES.

**Generally.]**—Judgment cannot be entered up against two on a warrant of attorney, purporting to be an authority to confess judgment against three persons one of whom refused to execute. *Harris v. Wade*, 1 Chit. 322.

A warrant of attorney, under seal, executed by one person for himself and his partner, in the absence of the latter, but with his consent, is a sufficient authority for signing judgment against both. *Brutton v. Burton*, 1 Chit. 707.

Where a joint warrant of attorney was entered

into by two persons, with an unconditional defeasance; and the plaintiff, by letter, stipulating that the money should be payable by instalments, pledged himself not to proceed against the parties unless he apprehended failure:—Held, that if he was apprehensive of the failure of one, he might enter up judgment against the other, before the first instalment became payable. *Partridge v. Herbert*, 1 Moore, 54; 7 Taunt. 307.

On a joint and several warrant of attorney, given by two, judgment was signed against one only; but, as the attorneys were authorized to enter up judgment against both, the court allowed it to be done. *Storey v. Eade*, 2 M. & Scott, 361.

A joint warrant of attorney, given to enter up judgment upon a joint and several bond, will not authorize the entering up judgment against the survivor only. *Gee v. Lane*, 15 East, 592.

**What is Joint and Several.]**—A warrant of attorney executed by two authorizing attorneys to appear "for us and each of us," and to receive a declaration "for us and each of us," in an action, and after judgment entered up, "for us and in our name, and as our act and deed," to execute a release of errors, &c., is joint only, and not joint and several, and does not authorize a judgment against one of the parties executing it, but only against both. *Dalrymple v. Fraser*, 2 C. B. 698; 3 D. & L. 818; 15 L. J., C. P. 193.

**One Party to Cognovit signing after the Others—Relation back.]**—Where one of several parties to a cognovit signs after the others, his signing relates back to the time of their signing. *Perry v. Turner*, 1 D. P. C. 300; 2 C. & J. 89; 2 Tyr. 128.

## 4. IN THE CASE OF THE DEATH OF PARTIES.

**As a Rule becomes a Nullity.]**—A warrant of attorney is a personal authority, and dies with the person, and his executors cannot put it in force. *Short v. Coglein*, 1 Anst. 225.

Where a warrant of attorney authorizes a person to enter up judgment against the defendant, and the defeasance states that the warrant of attorney is given to secure payment to that person, his heirs, &c., judgment cannot be entered up upon it by his executrix, as it only authorizes the testator himself to enter up judgment. *Henshall v. Matthew*, 1 D. P. C. 217; 5 M. & P. 157; 7 Bing. 337.

The court will not allow judgment to be entered up at the instance of an executor, where the testator only has been mentioned in the warrant, although it is stated in the defeasance that his executors and administrators might enter up judgment in the event of a certain sum not being paid. *Foster v. Clagget*, 6 D. P. C. 524.

Where a warrant of attorney gives to an individual, and his executors and administrators, power to enter up judgment, it cannot be objected that such individual was the registered officer of a banking company under 7 Geo. 4, c. 46, s. 9; and that, therefore, the debt not surviving to his personal representative, judgment could not be entered up by the latter. *Edwards v. Holiday*, 9 D. P. C. 1023; 5 Jur. 989.

**To more than one—Judgment may be Entered up by Survivors.]**—A warrant of attorney to confess a judgment to two, may be entered up for the survivor. *Fletcher v. Smith*, 2 W. Bl. 1301; *S. P., Spring v. Tucker*, 1 Y. & J. 206; *Johnson v. Jenkins*, 1 D. P. C. 367.

For a judgment on a warrant of attorney may be entered up at the suit of, but not against, a survivor. *Raw v. Alderson*, 1 Moore, 145; 7 Taunt. 453.

Where a warrant of attorney is executed to two persons, and one dies, the survivor may enter up judgment in his own name. *Hind v. Kingston*, 6 D. P. C. 523.

A warrant of attorney to confess a judgment to three, and one dies, the court will permit judgment to be entered up by the survivors. *Fendall v. May*, 2 M. & S. 76; *S. P., Harper v. Jackson*, 1 H. & W. 214.

Where a warrant of attorney is given to three, for a joint debt due to them, though no mention is made, either in the warrant or defeasance, of survivors, judgment may be entered up at the suit of the survivors. *Build v. Wightman*, 1 D. P. C. 545.

### 5. DEFEASANCE.

**What is.]**—The defeasance of a warrant of attorney is not a contract, but merely a description of the object of the security and of the means of enforcing payment. *Cook v. Fowler*, 7 L. R., H. L. 27; 43 L. J., Ch. 855.

**Not Correctly Stated.]**—Where judgment had been signed on a warrant of attorney, the defeasance of which did not contain the true terms of the agreement upon which it was to be void, and the judgment appeared to have been signed before certain bills of exchange, for which it was given as collateral security, had become due, the court referred it to the master to ascertain what was due to the plaintiff, and ordered that, upon payment of that sum and the costs of the proceedings, the bills of exchange should be delivered up to the defendant, and satisfaction should be entered on the judgment. *Joel v. Dieker*, 5 D. & L. 1; 2 B. C. Rep. 127; 16 L. J., Q. B. 359; 11 Jur. 589.

An understanding between the parties that a warrant of attorney is to operate to a greater extent than the terms of the defeasance imply, cannot be allowed to be of any avail. *Bell v. Tidd*, 6 Jur. 59.

It is not sufficient that the defeasance shews the amount of the sum secured by the judgment; it must also notice all collateral securities by which it is secured. *Marell v. Dubost*, 3 Taunt. 235.

A warrant of attorney to confess judgment is not void for omitting to state in the defeasance a collateral security for the same debt. *Sansom v. Goode*, 2 B. & A. 568; 1 Chit. 311.

**When Indorsement of Necessary.]**—If a warrant of attorney is given to confess judgment absolutely for a certain sum, although it is understood between the parties that it is given only to indemnify the plaintiff against his suretyship for a smaller sum, that is not such a defeasance as needs to be indorsed, and the plaintiff needs not to defer execution till the contingency happens. *Barber v. Barber*, 3 Taunt. 465.

More than a year having elapsed after judgment entered up on a warrant of attorney, the defendant agreed to waive the necessity of a scire facias:—Held, that such agreement was no part of the defeasance or condition, and did not render the warrant of attorney void as against his assignees for want of enrolment. *Harmer v. Johnson*, 3 D. & L. 38; 14 M. & W. 336.

**Annexed on separate Paper.]**—It is no objection that part of the defeasance is written on a separate sheet of paper annexed. *Burdekin v. Potter*, 1 D., N. S. 134.

**Not Inserted—Negligence of Solicitor.]**—Neglect of the attorney employed to prepare a warrant of attorney to insert the defeasance on the warrant, does not avoid the security against the innocent party; but the attorney is guilty of a breach of duty imposed on him by the court, and answerable for it on motion. *Shaw v. Evans*, 14 East, 576; *S. P., Partridge v. Fraser*, 7 Taunt. 307; 1 Moore, 54.

**Implied Contract contained in—Right of Action on.]**—An action will not lie upon the implied contract contained in the defeasance of a warrant of attorney. *Sherborn v. Huntingtower (Lord)*, 13 C. B., N. S. 742; 11 W. R. 344.

An attempt to enforce a warrant of attorney nearly twenty years old by a motion to enter up judgment thereon, having been defeated by the bankruptcy and certificate of the defendant, an action was afterwards brought upon the implied contract contained in the defeasance:—The court set aside the proceedings as being against good faith. *Id.*

### 6. ATTESTATION.

**Validity.]**—A defendant employed an attorney to prepare a bond and warrant for entering judgment thereon in favour of the plaintiff, who, being present, employed the same attorney to enter judgment on the warrant, and the latter consented to do so; the attorney subsequently prepared the bond and warrant, and duly witnessed and attested the execution thereof by the defendant, for which he was paid by the latter; and afterwards entered judgment on the warrant for the plaintiff:—Held, that there was non-compliance with 35 & 36 Vict. c. 57, s. 23, and that the warrant and judgment entered thereon should be set aside. *Walsh v. Nally*, 11 Ir. R., C. L. 337.

**Form of—Statement that Witness is Solicitor for Party giving.]**—A cognovit attested by an attorney thus:—"Witnessed by J. B., one &c., attending for the said W. N., at his request, to, and did, inform him of the nature and effect of the above cognovit, before the execution thereof by him," is insufficient; the attestation not declaring him to be the attorney for the party, and that he subscribed his name as such. *Potter v. Nicholson*, 8 M. & W. 294; 9 D. P. C. 808.

An attorney, proposed by the plaintiff, prepared a warrant of attorney to confess judgment, explained its nature and effect to the defendant, and subscribed it as a witness, but omitted to state that he did so as "attorney for the defendant:—The court set aside the judgment which had been entered on the warrant. *Lacey v. Murphy*, 7 Ir. R., C. L. 494.

It is not requisite that the attorney of the defendant, in the attestation of a cognovit, should state himself to be an attorney, named by the defendant; it is sufficient, if he declares himself to be an attorney for the defendant; nor need the attorney be originally named by the defendant; it is sufficient, if the latter adopts the attorney named by the plaintiff. *Olicer v. Woodroffe*, 7 D. P. C. 166; 4 M. & W. 650.

A cognovit attested thus:—"Witnessed by me, W. P., as the attorney of the said W. B., attending at the execution hereof at his request, and expressly named by him. W. P., attorney, Prescott, Lancashire," is insufficient, as not containing an express declaration that the attesting witness was the attorney for the party executing the instrument. *Hibbert v. Barton*, 10 M. & W. 678; 2 D., N. S. 434; 12 L. J., Ex. 70.

The attestation to a warrant of attorney or a cognovit must contain words which shew with certainty that the subscribing attorney is the attorney of the person executing it, and that he attests or subscribes the execution as the attorney of such person. *Elkington v. Holland*, 9 M. & W. 659; 1 D., N. S. 643.

A warrant of attorney attested as follows:—"Signed, sealed and delivered by the above-named A. B. in the presence of me, the attorney expressly named by him, and acting at his request, and by whom the above written warrant of attorney was read over, and the nature and effect thereof explained to A. B. before the execution thereof by him," and subscribed merely with the name of the attorney, is not sufficient, for not containing an express declaration that the attesting witness subscribed his name as the attorney for the party executing the instrument. *Eccard or Edwards v. Poppleton*, D. & M. 322; 5 Q. B. 181; 13 L. J., Q. B. 1; 7 Jur. 991.

In an attestation it is not necessary that the precise words of 1 & 2 Vict. c. 110, s. 9, should be followed; it is enough if it appears by necessary inference that the witness attended as the attorney for the party, at his request, and that he subscribed his name as such attorney. *Lewis v. Kensington (Lord)*, 2 C. B. 463; 3 D. & L. 637; 15 L. J., C. P. 100.

A warrant of attorney attested in the following form:—"Signed in the presence of me, A. J. C., and I declare myself to be the attorney of the said R. G., expressly named by him, and attending at his request, and subscribe myself accordingly," is sufficient. *Lindley v. Girdler*, 1 D. & L. 699; 13 L. J., Q. B. 53; 8 Jur. 61; *S. P., Knight v. Hasty*, 12 L. J., Q. B. 293.

So the following attestation is sufficient:—"Duly executed by the above-named R. G., in the presence of me, the undersigned S. B., attorney on behalf of R. G., expressly named by him and attending at his request; and I hereby declare, that I subscribe my name as witness to the due execution hereof by R. G., and as his attorney; and that, previous to the execution thereof by R. G., I informed him of the nature and effect thereof. Signed, S. B." &c. *Phillips v. Gibbs*, 16 M. & W. 208; 4 D. & L. 275; 16 L. J., Ex. 48; 10 Jur. 971; *S. P., Holt v. Kershaw*, 5 D. & L. 419.

A cognovit signed by W. T., and attested thus: "Witness, J. B., of &c., attorney at law." "Signed in the presence of me, the undersigned; and I hereby certify and declare, that I am the attorney of the said W. T., and that I attended at his re-

quest, to inform him of this cognovit, and that I have informed him of the nature and effect thereof; and I hereby subscribe my name as his attorney. R. R." is sufficiently attested, and the words "signed in the presence," &c., must be taken to refer to the signature of W. T. *Ledgard v. Thompson*, 11 M. & W. 40; 2 D., N. S. 766; 12 L. J., Ex. 229; 7 Jur. 239.

An attestation in the following form:—"Signed, sealed and delivered by the said H. H." (the defendant). "in my presence; and I declare myself to be attorney for the said H. H., and that I subscribe my name as such attorney. (Signed) G. O., solicitor," is sufficient. *Gay v. Hall*, 5 D. & L. 422; 2 B. C. Rep. 322; 18 L. J., Q. B. 12; 13 Jur. 124.

Held, also, that it need not appear on the face of the attestation, in express words, that the attorney attesting the defendant's signature attended at the defendant's request, and that he was named by him. *Id.*

An attestation as follows, "Signed, sealed and delivered in the presence of me, H. C., who, at the request and in the presence of the said J. H. B., J. C. and J. H. P., have set and subscribed my name as the attorney on their behalf attesting the execution hereof, having first read over and explained to them, and each of them, the nature and contents thereof," is insufficient, inasmuch as it does not by necessary implication declare the witness to be attorney for the parties executing the warrant of attorney. *Pocock v. Pickering*, 18 Q. B. 789; 21 L. J., Q. B. 365; 16 Jur. 760.

**After Alteration in the Instrument.]**—A warrant of attorney to confess judgment for 1,000*l.* was executed by the defendant, and an attestation of the execution was subscribed by an attorney. An alteration was afterwards made, by consent, in the sum, by substituting 2,000*l.*; and the defendant retraced his signature with a dry pen, and re-delivered the instrument. The attorney, who was present, wrote his initials opposite to the alteration, and drew a dry pen over the attestation, and over each letter of his own signature:—Held, that it was not duly attested. *Bailey v. Bellamy*, 9 D. P. C. 507.

**Double Attestation.]**—A double attestation (the first being insufficient) does not invalidate a cognovit. *Ledgard v. Thompson*, 11 M. & W. 40; 2 D., N. S. 766; 12 L. J., Ex. 229.

**When Instrument Executed Abroad.]**—If a warrant of attorney executed abroad is intended to be enforced in this country, it must be attested by an attorney, according to the form prescribed by statute. *Daris v. Treanion*, 2 D. & L. 743; 14 L. J., Q. B. 138; 9 Jur. 492.

**Effect of Insufficient Attestation.]**—Where a warrant of attorney is not attested in the manner required by 1 & 2 Vict. c. 110, s. 9, the objection can only be made by the party executing the instrument, or some person authorized by or claiming under him. *Lewis v. Tankerville (Earl)*, 11 M. & W. 109; 2 D., N. S. 754; 12 L. J., Ex. 234; *S. P., Hume v. Wellesley (Lord)*, 8 Q. B. 521.

The provision in 1 & 2 Vict. c. 110, s. 9, is for the benefit of the defendant only, and therefore a third party, who may be prejudiced by a judgment against his debtor, cannot object that no attorney attested the execution of the warrant of

attorney on which such judgment is founded. *Chipp v. Harris*, 5 M. & W. 430.

— **Objections to, when to be Raised.**—

In applying to set aside judgment and execution on a warrant of attorney, on the ground of an invalid or informal attestation, delay is immaterial, for the warrant is a nullity; and the application may be made by the assignees of a defendant. *Cocks v. Edwards*, 2 D., N. S. 55; 7 Jur. 199. See *Hirst v. Hannan*, 17 Q. B. 383.

After verdict for the plaintiff, the court refused to entertain an objection to the warrant of attorney, that it was not attested. *Kemp v. Finden*, 12 M. & W. 421; 13 L. J., Ex. 137; 8 Jur. 65.

**By what Solicitor.**—In order to make a cognovit valid, its execution must be attested by an attorney attending on behalf of the defendant, other than the attorney acting for the plaintiff. *Mason v. Kiddle*, 5 M. & W. 513; *S. P., Rising v. Dolphin*, 8 D. P. C. 309.

Where a warrant of attorney was attested, on behalf of the defendant, by an attorney, who, besides practising on his own account, was acting at the time as clerk to another attorney, and the latter was acting as attorney both for the plaintiff and defendant in the transaction:—Held, not a sufficient attestation within 1 & 2 Vict. c. 110, s. 9. *Durrant v. Blurton*, 9 D. P. C. 1015.

An attorney acting on behalf of the plaintiff cannot validly attest the execution of a warrant of attorney, although named by the defendant himself, who knows him to be the plaintiff's attorney. *Cocks v. Edwards*, 2 D., N. S. 55; 7 Jur. 199.

The country agent of the plaintiff's attorney is not a competent witness to the execution of a cognovit, though expressly named by the defendant. *Mason v. Riddle*, 8 D. P. C. 207.

Where an attorney who attested the execution of a warrant of attorney was London agent to the plaintiff's attorney (who mentioned the name and address in town), and acted as such in filing the instrument, and made charges against the country attorney, with which he was debited:—Held, that the attorney so attesting was in substance the plaintiff's attorney, and that he could not, therefore, stand in that independent situation which the statute requires. *Pryor v. Swaine*, 2 D. & L. 37; 13 L. J., Q. B. 214; 8 Jur. 423.

A warrant of attorney was attested by an attorney introduced by the plaintiff, and who had on one former occasion acted professionally for the plaintiff, and who afterwards acted as the plaintiff's attorney in entering up judgment and issuing execution upon the warrant of attorney. The court set it aside. *Cooper v. Grant*, 12 C. B. 154; 21 L. J., C. P. 197.

If three defendants go to a particular attorney, named by the plaintiff, and give him instructions to prepare a joint warrant of attorney from them to the plaintiff, and each freely recognizes the attorney as acting for him, the warrant is good. *Haigh v. Frost*, 7 D. P. C. 743.

Where a defendant was about to give a cognovit, and was unacquainted with any attorney, and, at his request, the plaintiff's attorney sent

his clerk for one, who came and acted in that capacity for the defendant, a request to that effect being written by the plaintiff's attorney in the margin of the cognovit, the court set aside that instrument. *Barnes v. Poudrey*, 7 D. P. C. 747.

When there was but one attorney present who had previously acted for the plaintiff, and who, on that occasion, made out his bill to the plaintiff, but delivered it to the defendant, and was paid by him:—Held, that he was not such an attorney, acting on behalf of defendant, as required by 1 & 2 Vict. c. 110, s. 9. *Sanderson v. Westley*, 8 D. P. C. 412; 6 M. & W. 98.

The defendant having agreed to give the plaintiff a warrant of attorney to secure his debt to him, the plaintiff employed P., an attorney, to prepare it. P. called with it on the defendant, and told him it must be signed in the presence of some professional man, and that he should procure Mr. S. to attest it; and the defendant accordingly went to procure S.'s attendance, but met him in the street, when P. told him they were coming to his, S.'s, office, that he might witness the execution of a warrant of attorney by the defendant. The defendant then suggested that they had better go to P.'s office, which was nearer. They went there accordingly; P. placed the paper in S.'s hands, and S. then read over and explained the warrant of attorney to the defendant, and asked him whether he wished him to witness the execution of it as his attorney. The defendant replied that he did, and then signed it, and S. attested it. P. offered to pay S. for his attendance, but he said, as it would come out of the defendant's pocket, he should make no charge; for which the defendant expressed himself obliged:—Held, that S. was not expressly named by the defendant and attending on his behalf, so as to satisfy the statute; and the warrant of attorney and judgment signed thereon were set aside. *Gripper v. Brintow*, 6 M. & W. 807; 8 D. P. C. 797.

A warrant of attorney to confess judgment as a security for advances was attested in due form by an attorney acting for the defendant, and as his attorney and at his request, but who also acted for the plaintiff in the transaction. The defendant was informed that the attorney had been consulted by the plaintiff. The warrant was executed on the 6th of March, 1847, and a fi. fa. shortly after issued, but was not executed. The plaintiff, after the judgment was signed, gave fresh credit to the defendant in the way of his trade. On the 28th of June, 1850, a levy was made. None of these facts were concealed. The defendant was adjudged a bankrupt on the 29th of July, 1850. A rule to set aside the warrant of attorney and all subsequent proceedings was obtained in Trinity Term, 1851:—Held, that by 1 & 2 Vict. c. 110, s. 9, the attorney acting for the plaintiff could not act as attorney for the defendant, and that the objection being made must prevail. *Hirst v. Hannan*, 17 Q. B. 383.

Where a cognovit had been attested on behalf of the defendant by an attorney, who accompanied the plaintiff's son to the defendant's residence, and who subsequently carried the instrument to the Queen's Bench office to be filed, and there subscribed his name upon the back of it, as the plaintiff's attorney's agent, the court set aside the instrument. *Rice v. Linstead*, 7 D. P. C. 153; 6 Scott, 895.

— **Uncertificated.**—A warrant of attorney is sufficiently attested by an uncertificated attorney. *Holgate v. Slight*, 2 L., M. & P. 662; 21 L. J., Q. B. 74.

**Nomination and Attendance of Solicitor.**—A warrant of attorney is not vitiated by the fact that the name of the attorney who attests it on behalf of the defendant was first suggested by the plaintiff's attorney, if he was expressly adopted by the defendant as his attorney for that purpose. *Taylor v. Nicholls*, 6 M. & W. 91; 8 D. P. C. 242.

It is not necessary that the party executing a cognovit should first name the attorney to attest the execution thereof, nor is it necessary that such attorney should be the regular attorney of the party giving the cognovit: it is sufficient if he is merely employed for the occasion, provided the person giving the cognovit shall ultimately exercise a free discretion in the adoption of him. *Pease v. Wells*, 8 D. P. C. 626.

Where a defendant, who is about to execute a warrant of attorney, declines the attendance of his own usual attorney, but adopts freely an attorney suggested by the plaintiff's attorney, that is a sufficient nomination of an attorney by the defendant. *Hale v. Dale*, 8 D. P. C. 599.

To constitute an express naming of attorney, it is sufficient if the attorney is named by another party, and adopted by the defendant, who calls upon him to request him to attest the execution of the cognovit; and it is not necessary that he should be in the first instance named by the defendant. *Oliver v. Woodroffe*, 4 M. & W. 650; 7 D. P. C. 166.

It is not necessary that the defendant should actually nominate the attorney attesting a warrant of attorney on his behalf: it is sufficient if, of his own free will, he adopts an attorney suggested by the plaintiff. *Joel v. Dicker*, 5 D. & L. 1; 2 B. C. Rep. 127; 16 L. J., Q. B. 359; 11 Jur. 589.

A warrant of attorney, prepared by a law stationer, according to the instructions of the defendant himself, was attested by an attorney introduced to the defendant by the plaintiff. The defendant had written and signed an authority to the attorney to act as his attorney on the signing and executing the warrant. The attorney was named in the warrant as having authority to enter up judgment thereon, and had subsequently done so, and issued execution upon the judgment:—Held, that the attestation was good. *Lerinsan v. Syer*, 2 L., M. & P. 557; 21 L. J., Q. B. 16; 15 Jur. 1011.

Where a defendant who was about to execute a warrant of attorney, not having an attorney of his own, was introduced to one by the plaintiff's attorney, and repeated after the plaintiff's attorney these words, which occurred in the body of the warrant, "I have expressly named W. J. M., and requested him to attend on my behalf:"—Held, in the absence of fraud, to be a sufficient nomination. *Walton v. Chandler*, 1 C. B. 307; 2 D. & L. 802; 14 L. J., C. P. 149; 9 Jur. 267.

**Duty of Solicitor.**—If a defendant informs the attorney attending on his behalf that the warrant has been read over to him, and that he understands it, the attorney need not read it over and explain it to the defendant. *Taylor v. Nicholl*, 8 D. P. C. 242.

A cognovit need not be read over to the defendant before execution, if he is informed of its nature and effect. *Oliver v. Woodroffe*, 4 M. & W. 660; 7 D. P. C. 166.

Nor is it necessary that the attorney should be cognizant of the facts under which a warrant of attorney is given, or that he should consult with the defendant in private previously to signing; it is enough if the attorney is there, willing to give the defendant the advice if he asks it; and he cannot complain afterwards that his interests were not protected, if he withholds from the attorney the necessary information. *Joel v. Dicker*, 5 D. & L. 1; 2 B. C. Rep. 127; 16 L. J., Q. B. 359; 11 Jur. 589.

If an attorney, properly appointed by a defendant on his behalf, neglects his duty to his client (if without collusion with the plaintiff), it is no objection to the instrument: if, therefore (without collusion), he neglects to inform his client of the nature and effect of the warrant, that is not an objection available to the defendant. *Haigh v. Frost*, 7 D. P. C. 743.

## V. STAMPING.

**When Necessary.**—A mere cognovit need not be stamped. *Amea v. Hill*, 2 B. & P. 160; 8 S. P., *Clarke v. Jones*, 3 D. P. C. 277.

Unless it contains some terms of agreement, and the money to be paid exceeds 20*l.* (now 5*l.*, by 23 Vict. c. 15), in which case the same stamp is required as on an agreement. *Heardon v. Sooby*, 4 East, 187.

A cognovit which merely gives the defendant time does not require an agreement stamp. *Jay v. Warren*, 1 C. & P. 532.

Although the plaintiff, at the time of its execution, undertakes on a separate paper to give the defendant time. *Morley v. Hall*, 2 D. P. C. 494.

Though containing a stipulation not to take advantage of its being before declaration. *Green v. Gray*, 1 D. P. C. 350.

But a cognovit containing terms of agreement must be stamped. *Rose v. Tomlinson*, 3 D. P. C. 49.

A defeasance upon a warrant of attorney does not require a separate stamp from that upon the warrant of attorney. *Cawthorne v. Holben*, 1 N. R. 279.

**Amount Necessary.**—A warrant of attorney, dated 9th November, 1840, to secure 1,000*l.* principal, and interest at 5*l.* per cent., from the 1st July, 1840, required only an ad valorem stamp of 5*l.*, which only covered the principal sum secured of 1,000*l.*, the interest already accrued from July till November not being considered by the court to be a sum of such a nature as to raise the principal above 1,000*l.* *Pierpoint v. Gover*, 5 Scott, N. R. 605; 2 D., N. S. 652; 4 M. & G. 795; 12 L. J., C. P. 55; 6 Jur. 952.

**Effect of not Stamping.**—A judgment signed on an unstamped warrant of attorney is not available against subsequent judgments, and will be set aside on the application of a judgment creditor. *Semple v. Nicholson*, 4 H. & N. 293; 28 L. J., Ex. 217.

The court will not permit a warrant of attorney to be taken off the file for the purpose of being stamped on payment of the penalty, until the judgment signed on it is first set aside. *Id.*

No warrant of attorney will henceforth be permitted to be filed without being properly stamped. *Id.*

Where a rule nisi was obtained to set aside the judgment and execution on a warrant of attorney, on the ground of a fraudulent preference, and where, at the time of obtaining the rule, the instrument was not properly stamped, but the defect had been remedied by affixing a proper stamp before shewing cause, the court discharged the rule without costs. *Bainbridge v. Wildman*, 1 D., N. S. 774.

## VI. FILING.

### Within Twenty-one Days.—Calculation of.]—

The twenty-one days are to be counted exclusively of the day of the execution of the warrant of attorney; and therefore a warrant executed on the 9th day of the month may be filed on the 30th. *Williams v. Burgess*, 9 D. P. C. 544; 4 P. & D. 443; 12 A. & E. 635.

It was not necessary under 3 Geo. 4, c. 39, s. 3, to file a cognovit within twenty-one days, if judgment was signed within that period. *Bushell v. Boord*, 1 B. C. Rep. 260; 4 D. & L. 359; 16 L. J., Q. B. 57; 11 Jur. 268.

So in the case of a warrant of attorney, it was sufficient if judgment was signed within twenty-one days. *Green v. Wood*, 7 Q. B. 178; 14 L. J., Q. B. 217; 9 Jur. 756.

But under 12 & 13 Vict. c. 106, s. 136, a warrant of attorney to confess judgment thereon was void as against the assignees of a bankrupt, if the warrant of attorney had not been filed in the Queen's Bench within twenty-one days after the execution, with an affidavit of the time of execution, although judgment was signed within twenty-one days. *Acraman v. Herniman*, 16 Q. B. 999; 20 L. J., Q. B. 355; 15 Jur. 1008. See *Parker v. Watson*, 8 Ex. 404; 22 L. J., Ex. 167.

**Affidavit of Execution.]—**If a warrant of attorney is filed with an affidavit made by the attesting witness, which states that he "saw the warrant of attorney, bearing date the 25th April, 1827, duly signed, sealed, and delivered," but does not specify the day on which it was executed, the affidavit is not in conformity with the directions of the statute; and the warrant of attorney, and the judgment and execution thereon, are void as against the assignees of the defendant. *Dillon v. Edwards*, 2 M. & P. 550.

Where a warrant of attorney is filed in twenty-one days after execution, with an affidavit made by the attesting witness, stating that the deponent "was present on the 4th of April, 1844, and saw the within-named W. H. R. sign, seal, and as his act deliver the warrant of attorney," it is sufficiently shewn that the deponent saw the defendant execute the warrant on the day and year named. *Robinson v. Robinson*, 3 D. & L. 134; 14 L. J., Q. B. 303; 10 Jur. 356.

**Omission to File.]—**By an agreement between bankers, a customer and a surety, the surety guaranteed the balance due or to become due from the customer, subject to a limit and to a proviso empowering the surety at any time to determine by notice his liability as to subsequent dealings. The customer afterwards obtained a loan from the bank beyond the limit of the guarantee on a warrant of attorney, and simul-

taneously with it a second agreement was entered into between the bankers, the customer and surety, that the warrant of attorney should not prejudice or affect the former agreement, and that the bank would, at any time when requested by the surety, enter up judgment and issue execution. The bank omitted to file the warrant of attorney, and the customer became bankrupt:—Held, that by the omission to file the warrant of attorney the surety was discharged. *Watson v. Allcock*, 4 De G., M. & G. 242; 22 L. J., Ch. 858; 17 Jur. 568.

Where a cognovit not having been filed nor judgment signed or execution issued thereon within twenty-one days, pursuant to 3 Geo. 4, c. 39, and 1 & 2 Vict. c. 110, s. 60, the cognovit and the judgment and execution thereon were void as against assignees; and the latter were consequently entitled to recover the whole of the proceeds of the levy, deducting only the sum paid for taxes. *Biffin v. Yorke*, 5 M. & G. 428; 6 Scott, N. R. 222; *S. P., Bittleston v. Cooper*, 14 M. & W. 399.

Where an indenture, by virtue of which the judgment was entered up, was, in legal effect, a cognovit, or if not, was a contrivance to defeat the provisions of 3 Geo. 4, c. 39, and not having been filed with the proper officer within twenty-one days after its execution, and judgment not having been entered up within that period, as required by the statute, the court, upon application by the assignees of the obligor, who had become bankrupt, ordered the execution to be withdrawn. *Hurst v. Jennings*, 5 B. & C. 650; 8 D. & R. 424.

**Copies.]—**Where a copy of a warrant of attorney has been filed, such copy is good evidence, without proof of collation of the contents with the warrant of attorney, at least against the party filing it, and all claiming under him. *Sylvester v. Anthony*, 3 M. & Scott, 191; 9 Bing. 746.

## VII. AMOUNT SECURED.

### 1. INSTALMENTS.

**Default in Payment of.]—**Where defendants gave a warrant of attorney to secure a sum certain to be paid half-yearly by instalments, with interest on specified days, and that the plaintiff should be at liberty to enter up judgment thereon immediately, out no execution to be issued till default made in payment of the said sum, with interest, by the instalments and in the manner thereinbefore mentioned:—Held, that the plaintiff might issue execution for the whole on default in payment of the first instalment. *Leveridge v. Forty*, 1 M. & S. 706.

Under a cognovit, by which it is agreed that no judgment is to be signed or execution issued, unless default made in payment of a certain sum, with costs, by instalments, the plaintiff may sign judgment and issue execution for the whole sum, if default is made in one instalment. *Rose v. Tomlinson*, 3 D. P. C. 49.

Where in a cognovit it was provided that judgment should not be entered up until default should be made in the due payment of the debt, which it was subsequently declared should be paid by instalments, together with costs, to be taxed by the master as between attorney and client:—

Held, that the plaintiff was entitled to enter up judgment on default being made in the payment of one of the instalments, although he had not taxed his costs, but that the taxation must take place before issuing execution. *Barrett v. Partington*, 7 D. P. C. 447; 5 Bing. N. C. 487; 7 Scott. 595; 2 Arn. 30.

## 2. CONDITIONS AS TO.

**Performance of—What is.]**—A. gave a cognovit for 37l., payable by monthly instalments; but if default was made in payment of any instalment, judgment was to be entered up for the whole sum, or so much as remained due; and B. agreed that A. should attend at the office of C. on the seventh day after "any notice," so that if any instalments were not paid, A. might be taken on a ca. sa. The first instalment was not paid, and judgment was entered up for the whole sum, and a ca. sa. sued out. Notice was given to B. for A. to attend at C.'s office at a certain time. A. did so, but C. gave him a week's time:—Held, that this was a complete performance of B.'s agreement; and that, if after this another notice was given for A. to attend on another day, and A. did not attend, no action would lie against B. *Turner v. Pyne*, 6 C. & P. 310; 3 N. & M. 354; 1 A. & E. 34.

A cognovit was given, with a condition that if the ultimate decision of certain chancery suits between the parties should be for the plaintiff, the defendant should pay him 500l. within one month after such decision, or else execution should issue. The vice-chancellor made his decree in those suits for the plaintiff, who, at the end of a month, issued execution, the 500l. being unpaid. The decree had not been passed by the registrar, though the minutes had been settled; and the defendant had lodged a caveat, intending, as he stated, to appeal to the lord chancellor:—Held, that the chancery suits had not been ultimately decided within the meaning of the condition, and that the execution, consequently, was irregular. *Dummer v. Pitcher*, 3 B. & Ad. 347.

Where in a cognovit it is stipulated that judgment shall not be entered up until after the final hearing of a chancery suit, and the final decree or order thereupon, when, in the event of the final decree or order being in favour of the plaintiff, the judgment and execution upon the cognovit are to operate in accordance with the decree or order, and the plaintiff is to be entitled to levy for the amount decreed, and no more; the plaintiff is not authorized to enter up judgment, pending an appeal to the lord chancellor, against a final decree at the Rolls dismissing the defendant's bill. *Jones v. Reynolds*, 3 N. & M. 465; 1 A. & E. 384.

A defeasance to a warrant of attorney, dated 5th June, 1824, stated that it was given to secure the payment of 420l. (with costs of judgment, if signed) on the 5th December, 1826, and that it was agreed that the plaintiff should enter up judgment thereon at his pleasure, and issue execution:—Held, that the plaintiff was restrained by this defeasance from suing out execution before the 5th December, 1826. *Hiscocks v. Kemp*, 5 N. & M. 113; 3 A. & E. 676; 1 H. & W. 384.

A defendant gave a warrant of attorney to the plaintiff to secure the payment of a debt by instalments. Shortly before the first instalment was due, the defendant told the plaintiff that he

feared he could not meet it, and that unless time was given him, he would make over his effects for the benefit of his creditors. An agreement was then entered into between them, that the defendant should give his acceptance for a part, and pay the rest by instalments according to his ability, so as to discharge all before April 1, 1836, and that the plaintiff should not enter up judgment, unless the defendant should dispose of his business, or become bankrupt or insolvent. The defendant paid the acceptance when due. Afterwards, and before April 1, 1836, the defendant asked the plaintiff to make him a bankrupt, in order to relieve him from his difficulties, and said that he could not pay 20s. in the pound, and that his assets were 200l. and his debts 300l.:—Held, that the plaintiff might enter up judgment and take out execution, the defendant appearing to be insolvent in the sense contemplated in the agreement; and that the facts stated did not shew that the plaintiff, at the time of the agreement, knew the defendant to be insolvent in that sense. *Buddicombe v. Bond*, 4 A. & E. 332; 1 H. & W. 612.

A defendant gave a cognovit, whereby it was stipulated that no judgment should be entered up thereon, unless default should be made in payment of the debt, with interest and costs, on the 9th November; and in case the defendant made default in payment as aforesaid, the plaintiff was to be at liberty to enter up judgment and proceed to execution, and take the whole of the debt and costs, together with the costs of such judgment and execution:—Held, that no default could be made until the plaintiff had furnished the defendant with a bill of the costs, and given her notice of taxation; and not having done so, the judgment signed on the 10th November was irregular, although the defendant had paid no part of either the debt or costs. *Booth v. Parker*, 3 M. & W. 54; 6 D. P. C. 87.

**Necessity of Demand before Entering up Judgment.]**—Where a defeasance on a warrant of attorney stated that it was given to secure the payment of a sum on demand, and that, in case default should be made, judgment was to be entered up, an actual demand must be made, and a proposal to settle amicably does not amount to such a demand. *Nicholl v. Bromley*, 5 Moore, 307; 2 B. & B. 464.

When a defeasance requires anything to be done on demand before judgment can be entered up, there must be an actual demand upon a person capable of giving a substantial answer; therefore, a demand made upon an insane person is not sufficient to authorize the judgment to be entered. The only remedy is by an application to equity. *Capper v. Dando*, 2 A. & E. 458; 4 N. & M. 335; 1 H. & W. 11.

## 3. THE AMOUNT ITSELF.

**Not more than Penalty in Warrant.]**—Judgment cannot be entered up for more than the penalty in the warrant of attorney. *Nicholas v. Merrett*, 1 W. P. C. 3; 9 D. P. C. 101.

**Signing Judgment for more than is mentioned in Warrant.]**—Signing judgment for a sum larger than that mentioned in the warrant, is only an irregularity, which may be waived by the laches of the defendant. *Stopford v. Fitzgerald*, 4 D. & L. 725; 16 L. J., Q. B. 310; 11 Jur. 454.

**Costs.**—A warrant of attorney empowered the plaintiff to sign judgment and issue execution for the amount of the debt, but omitted the words "together with costs of suit." A judgment was signed for the amount of the debt and costs:—Held, that such judgment was not authorized by the warrant and was irregular. *Page v. South*, 2 D. & L. 108; 13 L. J., Q. B. 291.

Where a plaintiff brought an action upon an annuity deed, and afterwards took a warrant of attorney for the sum due, with a provision, that, if within a certain time the annuity was not paid, he should be at liberty to take out execution for the sum specified, together with all costs incurred for or by reason of the non-payment of the annuity:—Held, that he was not at liberty to issue execution for the costs of the action. *Delane v. Mott*, 2 Chit. 423.

**Interest.**—A judgment creditor is entitled to interest on his debt, where the warrant of attorney authorizes the judgment to be entered up for double the amount actually due. *Tunstall v. Trapper*, 3 Sim. 299.

Where the warrant makes no mention of interest on the principal, but the defeasance does, the court will allow execution to be issued for the principal and interest. *Shipton v. Shipton*, 1 D. P. C. 518. See *Atkinson v. Jones*, 2 A. & E. 439.

Where a warrant of attorney had been given to secure a debt and interest, the sum for which judgment was to be confessed being for the amount of the debt only, the court granted a rule to enter up judgment for the debt, and so much for interest as the masters should find to be due thereon. *Chalk v. Walton*, 5 M. & G. 573; 6 Scott, N. R. 693; 1 D. & L. 39.

A memorandum indorsed on a warrant of attorney stated that it had been given to secure the payment on the 2nd of June, 1864, of a sum of money, with interest thereon at the rate of 5l. per cent. per month; that judgment was forthwith to be entered up, and that if the debt and interest were not paid on the day aforesaid, execution was to issue. The debt was not paid at the time appointed, and judgment was not entered up:—Held, that after the day named for payment the debt carried interest at 4l. per cent. per annum only. *Robinson v. Wood*, 18 W. R. 32.

**To whom Payment may be made.**—Where a cognovit is given for the payment of a sum generally, the defendant may pay either the plaintiff or his attorney. *Anon.*, 1 D. P. C. 173.

Payment of an instalment to a clerk of the plaintiff's attorney after it has become due does not bind the plaintiff. *Perry v. Turner*, 2 C. & J. 189; 2 Tyr. 128; 1 D. P. C. 300.

#### 4. CONTINUING SECURITY.

**What is.**—Where there was a running account between A. and B., and the former gave the latter a warrant of attorney, with a defeasance, stating it to be given as a security for 4,000l. and lawful interest thereon:—Held, that it was a continuing security, applicable to any balance which might at any time be due, and was not discharged by payments exceeding 4,000l. between the date of the warrant of attorney and the time of entering up judgment thereon. *Woolley v. Jennings*, 7 D. & R. 824; 5 B. & C. 165; 2 C. & P. 144.

Where a trader contracted a debt, gave a warrant of attorney to secure its payment specifically, and the creditor sought to enforce that security against goods of the debtor, in respect of subsequent advances made by the creditor, the court, at the instance of the assignees, set aside the proceedings of the creditor. *Bett v. Tidd*, 9 D. P. C. 949; 6 Jur. 59.

A., a feme sole, being about to marry B., lent him 300l. upon his warrant of attorney, the warrant being given to her and C., who was to act as her trustee. The defeasance shewed the loan to be in contemplation of marriage, and stipulated that B. was to be possessed of the money so long as A. should please, paying interest for the same to C.; and also, that upon the request of A., C. might require payment of the principal on giving a week's notice; judgment was to be forthwith entered up, and execution was to issue on default of payment after such notice. Judgment was accordingly entered up, and the marriage solemnized. After several years had elapsed, notice was given in pursuance of the warrant, and on default a fi. fa. issued, under which the goods of B. were taken and assigned by the sheriff. B. was then adjudged bankrupt, and a rule was obtained to set aside the execution, and for the delivery of the goods to his assignee, upon the grounds that the judgment should have been revived, and that it was discharged by the subsequent marriage of A. and B.:—Held, that the execution having been suspended by the consent of the parties, the judgment did not require reviving; and that, under the circumstances of the case, the warrant of attorney, being in the nature of a marriage settlement, remained a good security for the loan, and that the execution thereupon was valid. *Dolling v. White*, 1 B. C. C. 170; 22 L. J., Q. B. 327; 17 Jur. 505.

#### Evidence to shew that Security is continuing.]

—A defeasance to a warrant of attorney stated that it was for securing 1,300l., with interest, on the 15th April, and authorized the plaintiff, in default of payment, to issue execution for the whole amount, with costs, interest, &c. At the time the warrant was given, the plaintiff was a creditor of the defendant for 514l., and liable to a further sum of 237l. as surety. At the period of the issuing of execution, the amount of the debt was 1,110l. 14s., a portion of which sum consisted of bills accepted by the plaintiff for the accommodation of the defendant after the warrant of attorney had been given. The sum actually levied was 1,085l.:—Held, that affidavits were admissible to shew that the intention was, that the warrant of attorney should be a security not only for existing debts, but also for all future advances by the plaintiff, or payments to which he should become liable, not exceeding 1,300l. *Robinson v. Robinson*, 3 D. & L. 134; 14 L. J., Q. B. 303; 10 Jur. 356.

### VIII. JUDGMENT.

#### 1. LEAVE OF JUDGE TO ENTER.

**Application—When Necessary.**—Where the defeasance contains a provision that it shall not be necessary to apply to the court for judgment on the instrument after the lapse of a year and a day, it is not (as such a condition is valid) necessary to make an application for judgment on the warrant. *Sherran v. Marshall*, 1 D. & L. 689; 13 L. J., Q. B. 66; 8 Jur. 469.

A plaintiff may enter up judgment on a cognovit given before appearance, and upon which no step has been taken for more than a year, without first giving a term's (now a calendar month's) notice, or obtaining leave. *Thompson v. Langridge*, 1 Ex. 351; 5 D. & L. 213; 17 L. J., Ex. 4.

— **Where Made.**—Application must be made to a judge at chambers, and not to the court. *Handley v. Roberts*, 17 Jur. 460.

**When Rule for Judgment will be Granted.**—A tenant from year to year having given a warrant of attorney authorizing his landlord to determine the tenancy by a notice to quit, and in default of such notice being given to sign judgment in ejectment and issue execution, the court, upon affidavit of the service of the notice, and of the expiration of the tenancy, and that the tenant refused to quit the premises, granted a rule for judgment on the warrant of attorney. *Doe d. Beaumont v. Beaumont*, 2 D., N. S. 972; 7 Jur. 854.

Though judgment cannot be entered up on a warrant of attorney more than one year old without leave, yet none but the defendant himself can object to any irregularity in this respect. *Jones v. Jones*, 1 D. & R. 558.

The court refused to allow judgment to be entered up on an old warrant of attorney, it appearing by the plaintiff's affidavit that she was resident in an enemy's country. *De Lunerville v. Phillips*, 2 N. R. 97.

The court set aside a judgment on a warrant of attorney, entered up, even before the rule of H. T. 4 Will. 4, where the defendant was dead at the time of signing judgment, although in the defeasance it was stipulated that the plaintiff should, without leave of the court, be at liberty to enter up judgment, notwithstanding the defendant's death. *Heath v. Brindley*, 4 N. & M. 235; 2 A. & E. 365.

Where an instalment on a cognovit became due after the death of the defendant, the court refused to allow judgment to be entered up on the cognovit nunc pro tunc. *Blackburn v. Goodrick*, 9 D. P. C. 337.

It is no objection to entering up judgment, that the defendant, since the execution of it, has become insane. *Piggott v. Killeck*, 4 D. P. C. 287; 1 H. & W. 518.

**At what Time or of what Term.**—A warrant of attorney, dated 25th May, 1842, authorized certain attorneys to appear as "of Easter Term last past, Trinity Term now next, or any other subsequent term," "and then and there" to receive a declaration, and thereupon to confess the action, or to suffer judgment by nil dicit, or otherwise, &c. On the 27th of November, 1846, a judge's order was obtained for leave to sign judgment, and judgment was accordingly signed on the following day:—Held, that the judgment was regularly signed in pursuance of the authority by warrant of attorney, notwithstanding the Reg. Gen. H. T., 4 Will. 4, Part XI., r. 3, requiring all judgments to be "entered up of record, of the day and month, whether in term or vacation, when signed." *Alcock v. Sutcliffe*, 4 D. & L. 612; 1 B. C. Rep. 313; 16 L. J., Q. B. 129; *S. P., Jarvis v. South*, 13 M. & W. 152; 2 D. & L. 962; 13 L. J., Ex. 319; 8 Jur. 519.

**In what Court.**—A warrant of attorney was directed to two attorneys of the Queen's Bench, and, after authorizing an appearance to be entered for the defendants, the instrument omitted the words "in the said court:"—Held, that it sufficiently appeared, from the terms of the warrant, no other court being mentioned, that the proceedings were to be taken in the Court of Queen's Bench. *Harris or Harrison v. Peck*, 2 D. & L. 106; 13 L. J., Q. B. 295; 8 Jur. 929.

**Names of Parties.**—A judgment was entered up against Mr. H. under a warrant of attorney. In the judgment and warrant of attorney, he was named W. H., his proper name being W. B. H.:—Held, that the judgment was valid. *Hotham v. Somerville*, 9 Beav. 63; 9 Jur. 702.

Where a warrant of attorney is given to three trustees of a joint-stock bank, to secure a debt due to the bank, the judgment thereon is properly entered up in the name of the public officer under 7 Geo. 4, c. 46. *Bell v. Fisk*, 12 C. B. 493.

A warrant of attorney was given to A. B. and C. D., "public officers of the Yorkshire Banking Company," but not to them as public officers. The defeasance shewed that the object of warrant of attorney was to secure to the plaintiffs, as public officers, money therein expressed to have been lent by them as public officers to the defendants, and such further sum as the company might advance. The affidavits shewed the original debt to be unpaid, and a further sum to have been advanced by the company, but did not allege the debt to be still owing to the plaintiffs, one of them having ceased to be a public officer. The court permitted the company to enter up judgment in the names of A. B. and C. D., as individuals. *Howard v. Batho*, 5 D. & L. 396.

A cognovit having been given in an action brought by a public officer of a banking company, under 7 Geo. 4, c. 46, by which it was provided, that, upon default in payment of a sum of money, the plaintiff should be at liberty to enter up judgment and issue execution:—Held, to be sufficient to authorize signing judgment in the name of another public officer, upon a suggestion being entered of the removal of the original plaintiff. *Webb v. Taylor*, 1 D. & L. 676; 13 L. J., Q. B. 24; 8 Jur. 39.

**Husband and Wife.**—A judgment on a warrant of attorney given to a wife *dum sola*, cannot be entered up after her marriage, without leave, though less than a year old. On application for such leave, the court requires an affidavit proving not only the marriage, but the due execution of the warrant of attorney, and the non-payment of the debt. *Metcalfe v. Boote*, 6 D. & R. 46.

It is necessary to obtain leave to enter up judgment against husband and wife, on a warrant of attorney executed by the wife *dum sola*. *Staples v. Purser*, 2 D. P. C. 764; 3 M. & Scott, 800.

And judgment entered up against husband and wife, upon a warrant given by wife while sole, without leave, was set aside, but not with costs. *Marder v. Lee*, 3 Burr. 1469.

## 2. AFFIDAVIT.

**Title.**—Upon a motion to enter up judgment upon an old warrant of attorney, the affidavit is

properly intitled in the cause in which the judgment is entered. *Bell v. Fisk*, 12 C. B. 493; *S. P., Sowerby v. Woodroff*, 1 B. & A. 567.

If given when no suit is pending, it need not be intitled in any cause. *Davis v. Stanbury*, 3 D. P. C. 440.

An affidavit intitled "in the King's Bench," but not in any cause, is sufficient. *Gregory, Ex parte*, 8 B. & C. 409.

Where a warrant of attorney was given to three persons, one of whom died, judgment was allowed to be entered up on an affidavit intitled with the names of the survivors, but not naming them survivors. *Lambert v. Lambert*, 5 Jur. 54.

**Swearing.**—It is no objection to an affidavit sworn in Scotland, that it was taken before a justice of the peace, and not before a lord of session. *Watson v. Williamson*, 1 D. P. C. 607.

**Must shew that Defendant is Alive.**—It is necessary to shew that the defendant was "alive," and not merely "seen" within a reasonable time before the application. *Chell v. Oldfield*, 4 D. P. C. 629.

There must be a positive affidavit that the defendant is alive, or has been seen alive within a reasonable period; mere inference is not sufficient, even though it appears that the defendant keeps out of the way. *Croft v. Egmont*, 8 D. P. C. 95.

**What is Sufficient Proof.**—It is sufficient proof of the party being alive, to shew that a cheque of his had been paid, dated thirteen days before the application. *Jacobs v. Griffith*, 5 D. P. C. 577.

It is insufficient to swear that the deponent believes the defendant to be alive, from information which he has received, unless he also swears that he believes the information to be true. *Reeder v. Whip*, 5 D. P. C. 576.

It is not sufficient to shew by the hearsay statement of a deponent that the defendant was alive within a reasonable time previously to the application. *Key v. Mountagur*, 1 D., N. S. 853.

It is not sufficient "to swear that the defendant is now living, the deponent having seen him on the 16th instant;" for the affidavit should state that he saw him alive on the 16th instant. *Watson v. Mathews*, 2 D., N. S. 670; 12 L. J., Q. B. 139; 7 Jur. 627.

But an affidavit stating that the deponent believed the defendants to be alive, having seen and conversed with two of them, and "been in company" with the third on a recent day, is sufficient. *Howard v. Batho*, 5 D. & L. 396; *S. P., Powell v. Howard*, 6 Scott, 826.

Where a defendant was seen alive on the 24th of March, and a motion to enter up judgment was made on the 15th of April, the court granted the application. *O'Neill v. Coghlan*, 2 D. & L. 5; 13 L. J., Q. B. 204; 8 Jur. 361.

**Several Parties.**—Where a warrant of attorney is joint, and not joint and several, and it is sought to enter up judgment against one of the parties giving the warrant, the affidavit must shew that both are alive, and not merely the one against whom it is sought to enter up judgment. *Lot v. Anderson*, 1 D., N. S. 305.

**Waiver.**—A party may by the terms of

the warrant of attorney waive the necessity of an affidavit being made of his having been recently seen alive, in order to obtain leave to enter up judgment after a year and a day have elapsed. *Tripp or Chipp v. Stanley*, 5 D. & L. 262; 17 L. J., Q. B. 19; 11 Jur. 1062.

**Defendant Abroad.**—Where a defendant is resident in the West Indies, judgment may be signed against him on a warrant of attorney, if seen alive four months before. *Fursey v. Pilkington*, 2 D. P. C. 452.

The court allowed judgment to be signed on an old warrant of attorney, the application being made on the 5th of November, although the defendant had not been seen alive since two or three days before the 1st of March previously, and then in New South Wales. *Johnson v. Fry*, 5 D. P. C. 215; 2 H. & W. 293.

On an affidavit stating that the last time the plaintiff had been able to obtain any intelligence of the defendant was eight months back, when he was at Newfoundland, but about to leave that island for America, and that his son and mother, who lived in this country, had declined to give any information respecting him, and that there was no other person to whom the plaintiff could apply, the court allowed judgment to be entered up against him. *Pemberton v. Browning*, 9 Moore, 389; 2 Bing. 204.

The court will not allow judgment to be signed against a defendant who is abroad, and has not been seen for three weeks, unless it is sworn that "it is believed that he is still alive." *Richardson v. Scholefield*, 2 D., N. S. 36; 6 Jur. 646.

An affidavit that the deponent has seen the defendant alive within three months, and that he is now residing in Paris, is insufficient, unless it also states that his residence there is unknown. *Tripp or Chipp v. Stanley*, 5 D. & L. 262; 17 L. J., Q. B. 19; 11 Jur. 1062.

**Defendant Transported.**—A joint warrant of attorney having been given by two, and one of them having been transported for life, the court permitted judgment to be entered up against both, on an affidavit stating the conviction and a certificate from the Home Office certifying the transportation, and that no return of the convict's death had been made, and that by the practice of that office no return was made of a convict continuing alive, it being also sworn that the other person was still living. *Dalrymple v. Fraser*, 3 D. & L. 611.

**Must shew Debt Unpaid.**—An affidavit in support of a rule nisi, for entering up judgment on a warrant of attorney more than twenty years old, must shew affirmatively either that the debt still remains unsatisfied, or some other facts rebutting the presumption of payment. *Hulke v. Pickering*, 4 D. & R. 5; 2 B. & C. 555.

An affidavit that the money is still due is necessary, unless its absence is accounted for, although the defendant has agreed that judgment shall be entered up. *Barton v. Turner*, 8 D. P. C. 122.

**What Sufficient Proof.**—Where a warrant of attorney is given as a security to a person giving a guarantee, it is not necessary to swear that any sum is owing upon it, if it is sworn that

the guarantee is still in force. *Pickering v. Carnell*, 8 D. P. C. 300.

An affidavit by the plaintiff's attorney, that the debt is unpaid, is sufficient, where the attorney swears that he has been employed in managing the money, and receiving and paying over the interest. *Ashman v. Bowdler*, 2 C. & M. 212; 4 Tyr. 84.

It is sufficient to prove that the money is still due, to produce an affidavit by the plaintiff's attorney's clerk that it is so due, he having received different payments on account of the warrant of attorney, and having lately seen the defendant, when he promised to pay a further instalment upon it. *Middleton v. Stockdale*, 1 D. N. S. 776.

Where the attorney negotiating the loan for which the warrant of attorney was given, still continuing the attorney of the plaintiff, deposed "that the defendant was indebted to the plaintiff in 150*l.*, for money lent by the deponent on account of the plaintiff to the defendant, and that the defendant had not paid to the deponent or to the plaintiff, or, to the best of his knowledge and belief, to any person on behalf of the plaintiff, any portion of the money," and positively swore that there yet remained due and owing 150*l.*, the court allowed judgment to be entered up without any affidavit from the plaintiff. *Hill v. Enow or Enoe*, 13 L. J., Q. B. 65; 7 Jur. 1038.

#### Discharge by Bankruptcy—Consideration.]—

On an application for leave to enter up judgment on a warrant of attorney more than ten years old, it is for the plaintiff to satisfy the court that there was good consideration. And if the defendant shews a bar, *prima facie* valid, as a certificate of discharge by bankruptcy, it is for the plaintiff to shew sufficient ground for believing it can be avoided or defeated. *Sherburne v. Huntington* (Lord), 11 W. R. 145. See *N. C.*, 13 C. B., N. S. 742; 11 W. R. 344.

Where the plaintiff himself made an affidavit of the consideration, or that he had not had notice of the bankruptcy, and his attorney only made an affidavit of mere hearsay, as to gaming, which the defendant denied, the court refused leave to enter up judgment. *Id.*

**Proof of Execution of Instrument.]—**On motion to enter up judgment, the subscribing witness, if any, must make affidavit of the execution. It is not sufficient for him to sign the affidavit in the character of the commissioner before whom it was sworn. *Field v. Bearcroft*, 2 C. & J. 217; 1 D. P. C. 308; 2 Tyr. 283.

Where a warrant of attorney refers to the plaintiff, "his executors and administrators," but the affidavit of execution makes no mention of "executors or administrators," the court will not allow judgment to be entered up. *Baldwin v. Thompson*, 2 D. P. C. 591.

**— When Sufficient.]—**An affidavit by the plaintiff that the defendant was indebted to him on an old warrant of attorney, and that he had not paid the sum secured by it, that he saw the defendant execute it, and that the attesting witness was also present, but was now residing in France, and that the defendant was alive, is sufficient. *Taylor v. Leighton*, 3 M. & Scott, 423; 2 D. P. C. 746.

**— Only Copy Filed.]—**A copy of an old warrant of attorney having been filed instead of the original, and search for the instrument itself proving ineffectual, the court, upon an affidavit of the due execution of the instrument by the attesting witness since dead, granted a rule for judgment. *Doe. d. Beaumont v. Beaumont*, 2 D., N. S. 972; 7 Jur. 854.

On motion to set aside a judgment on the ground that the original warrant of attorney on which the judgment was founded had not been filed, in compliance with the rule of court, but a copy only:—Held, that it was incumbent on those who sought to set aside a judgment (which was of old standing) to shew clearly that the omission to file the original warrant was the fault of the plaintiff or his attorney; and that, as it was consistent with the circumstances of the particular case, that the original had been tendered to the officer of the court, and that the copy, instead of the original, had been filed through his inadvertence, the application was refused. *James v. Heward*, 3 Q. B. 948; 3 G. & D. 264; 12 L. J., Q. B. 58; 7 Jur. 14.

**— By Office Copies.]—**In order to obtain judgment on warrant of attorney, which has been filed pursuant to 3 Geo. 4, c. 39, ss. 1, 2, it is sufficient to prove the execution by an office copy of the affidavit of execution. *Bland v. Wilson*, 1 D., N. S. 260; *S. P.*, *Webb v. Webb*, 4 D. P. C. 599.

**— Affidavit verifying Handwriting of Attesting Witness.]—**Judgment cannot be entered up without an affidavit of an attesting witness, or an affidavit verifying his handwriting. *Jones v. Knight*, 1 Chit. 743.

And the acknowledgment of the defendant does not obviate the objection; but where the attesting witness is out of the jurisdiction of the court, an affidavit verifying his handwriting would be sufficient. *Appleton v. Bond*, 1 Chit. 744.

It is not a sufficient excuse for not producing an affidavit of the attesting witness, that an application to a person, acquainted with the witness's address, has been unsuccessful in obtaining it, although the handwriting of the defendant and of the witness to the warrant of attorney is verified. *Cope v. Lee*, 9 D. P. C. 102; 1 W. P. C. 37.

Where the attesting witness could not be found, judgment was allowed to be entered up on an affidavit that the defendant had acknowledged his liability, and admitted the handwriting of the witness, being informed of the purpose for which such admission was required. *Reid v. Forge* or *Ford*, 4 Scott, N. R. 330; 1 D., N. S. 187; 3 M. & G. 546.

Where the attesting witness had been transported seven years previously to an application to sign judgment, and no information respecting him could be obtained, the court allowed judgment to be signed on producing an affidavit of his handwriting, as well as of that of the defendant. *Edwards v. Penkey* or *Penny*, 2 D., N. S. 425; 7 Jur. 200.

**— When Proof will be Dispensed With.]—**The affidavit of the attesting witness cannot be dispensed with merely on the ground of his illness. *Owen v. Hoiles*, 4 D. P. C. 572.

If the attesting witness cannot be found, his absence must be accounted for by affidavit, before the court will admit secondary evidence. *Waring v. Bowles*, 4 Taunt. 132.

If A. agrees to acknowledge an old warrant of attorney given by him, so as to enable B. to enter up judgment thereon, judgment may be entered up under a judge's order, without an affidavit of the subscribing witness. *Laing v. Kaine*, 2 B. & P. 85.

The court refused to enter up judgment where the attesting witness, an attorney of the court, refused from malice to make the necessary affidavit. *Mills v. Donoughoo*, 1 H. & W. 184.

### 3. SIGNING.

**Production of Warrant.**—In order to sign judgment, it is indispensably necessary that the warrant itself should be produced. *Jacobs v. Neville*, 8 D. P. C. 125; 1 W., W. & H. 408.

But if a person who has given a warrant of attorney afterwards obtains possession of it, and refuses to give it up, judgment may be entered up on the copy of it which was filed under the statute. *Worthington v. Worthington*, 5 Jur. 320.

**Appearance.**—The defendant gave a cognovit authorizing the plaintiff's attorney to appear for him if necessary. The plaintiff's attorney signed judgment, and then entered an appearance nunc pro tunc. Judgment was set aside for irregularity. *Watson v. Dore*, 5 D. P. C. 584; 2 M. & W. 386.

It is no objection to a judgment on a warrant of attorney, that no appearance has been entered. *Burcham v. Tucker*, 8 Scott, 469.

**Suggestion of Breaches Unnecessary.**—No suggestion of breaches under 8 & 9 Will. 3, c. 11, is necessary on a judgment by warrant of attorney. *Kinnerley v. Mussen*, 5 Taunt. 264; *S. P.*, *Shaw v. Worcester (Marquis)*, 4 M. & P. 21; 6 Bing. 385.

And even though a bond also is given. *Austerbury v. Morgan*, 2 Taunt. 195.

Nor upon a warrant of attorney conditioned for payment by instalments. *Cox v. Rodbard*, 3 Taunt. 74.

### IX. EXECUTION.

**Issuing.**—The defeasance to a warrant of attorney contained an agreement, that no execution or executions should be issued upon the judgment entered up thereon until default in payment of an annuity; but that, in case of default, it should be lawful for the grantee, his executors, administrators or assigns, to sue out execution or executions thereon,—not saying from time to time. The defeasance also contained a proviso for entering satisfaction after the death of the grantor, and full payment of the annuity up to the day of his death:—Held, that the grantee was not restrained by this defeasance from issuing successive executions for arrears. *Cuthbert v. Dobbin*, 1 C. B. 278.

Where a warrant of attorney was given, bearing date on the face of it the 24th February, 1847, but was not in fact executed till the 20th March following, and the defeasance stated that it was given to secure the repayment of 285l. "on the 20th day of March next," judgment having been signed, and execution issued on the 30th March, 1847:—Held, that execution issued too soon; that

the warrant of attorney must be taken to speak from the time of the execution, and not the date apparent on the face of it, in accordance with the rule laid down in *Clayton's case* (5 Co. Rep. 1), and therefore would not become due till the 20th March, 1848. *Browne v. Burton*, 5 D. & L. 289; 17 L. J., Q. B. 49; 12 Jur. 97.

**Setting aside.**—An execution for more than the sum really due, but not for more than the sum authorized by the warrant of attorney, will only be set aside pro tanto for the excess. *Browne v. Burton*, 5 D. & L. 289; 2 B. C. Rep. 220; 12 Jur. 97.

**Injunction to Restrain.**—An injunction to restrain a vendor from taking out execution on a warrant of attorney to confess judgment for the amount of the purchase-money continued till the hearing. *Drake v. Plaistowe*, Romilly's Notes of Cases, 145.

### X. SETTING ASIDE.

**In what Cases Application for, can be made.**—A defendant may apply to set aside a warrant of attorney, and the judgment thereon, on the ground of a non-compliance with the requisitions of the 1 & 2 Vict. c. 110, s. 9, although he has become bankrupt since the execution of the warrant. *Taylor v. Nicholls*, 6 M. & W. 91.

Where judgment has been entered up, and execution issued on a warrant of attorney, but a fiat in bankruptcy has issued against the defendant, and is still in operation, he is not therefore disqualified by want of interest from moving to set aside the execution on the ground of bad faith, though the debt, warrant and judgment are unimpeached. *Pinches v. Harvey*, 1 Q. B. 868; 1 G. & D. 236.

A. executed at Brussels, in 1843, a warrant of attorney to confess judgment, and judgment was entered on it. In 1846, a rule was obtained to set the warrant and judgment aside. There was nothing to shew that A. authorized the application, except that the affidavit in support of the rule was made by a party who styled himself clerk to L., attorney for the defendant:—Held, that it ought to have appeared more expressly that the application was made on behalf of A.; and the court discharged the rule, but without costs. *Hume v. Wellesley (Lord)*, 3 Q. B. 521.

Where a judgment had been irregularly signed, the court would not grant a rule absolute in the first instance, to set it aside and sign a new judgment. *Bennett v. Simons*, 13 L. J., Q. B. 308. See *Coulson v. Clutterbuck*, 2 D., N. S. 391.

Where a defendant applied to set aside a warrant of attorney, judgment and execution, on the ground of usury, but the rule was discharged upon an objection that the applicant did not produce a verified copy of the instrument:—Held, that it was incompetent for him to come a second time, with a like motion upon the same materials, with the addition only of an affidavit verifying the warrant of attorney. *Leri v. Coyle*, 2 D., N. S. 932.

An application may be made at the instance of the defendant's assignees, where a warrant of attorney has not been attested according to the requirements of the 1 & 2 Vict. c. 110, s. 9; as the warrant is a nullity, and delay is immaterial in applying to set aside a judgment and execution

signed and issued thereon. *Cocks v. Edwards*, 2 D., N. S. 55; 7 Jur. 199. See *Hirst v. Hannan*, 17 Q. B. 883.

Upon motion by assignees to set aside a warrant of attorney given by the bankrupt, the court will not enter upon the question whether the same was given by way of fraudulent preference. *Browne v. Burton*, 5 D. & L. 289; 2 B. C. Rep. 220; 17 L. J., Q. B. 49.

A warrant of attorney, as security for 560*l.* and interest, was executed by C., and by K. and F. as his sureties. Upon default in payment of interest, judgment was entered up and execution issued against K. for the principal and interest, which, with the costs, were paid by him; and he afterwards, in an action against F., recovered one-half of the sums so paid. Subsequently F. obtained a rule to shew cause why the warrant of attorney and subsequent proceedings should not be set aside on the ground that his signature was not duly attested. The court discharged the rule, on the ground that the objection should have been taken in the action for contribution. *Price v. Carter*, 14 L. J., Q. B. 140; 9 Jur. 637.

A woman, before her marriage in 1837, lent her future husband a sum, the repayment of which he secured to her by a warrant of attorney to confess judgment to her and S. The defeasance provided that the husband should hold the money as long as the wife pleased, paying her interest; but that S. might, upon her request, demand payment on one week's notice. Judgment was to be entered up forthwith, and execution to issue, on failure to pay after notice. Judgment was accordingly entered up, but was not afterwards revived. A demand was made in 1853, and execution issued; a few days after the sheriff's levy the husband was declared a bankrupt. The court refused on motion of the assignees to set aside the judgment, although it was insisted that the judgment was discharged or suspended by the marriage, and that, even if it was not, the execution was irregular, because the judgment had not been revived. *Dolling v. White*, 1 B. C. C. 170; 22 L. J., Q. B. 327; 17 Jur. 505.

**When Condition attached to.]**—The application for setting aside a warrant of attorney and the judgment and execution thereon, for want of the provisions of the 1 & 2 Vict. c. 110, s. 9, having been complied with, is in debito justitiæ, and the court has therefore no power to impose on the defendant, as a condition for setting it aside, that he should bring no action. *Adlam v. Noble*, 9 D. P. C. 322.

**Staying Proceedings in Action against Sheriff.]**—The court will not, on an application to set aside a warrant of attorney, and the judgment and execution thereon, direct a stay of proceedings in an action against the sheriff for an alleged false return to the execution sought to be set aside. *Cassell v. Glengall (Lord)*, 5 D. P. C. 269; 2 H. & W. 313.

**Affidavits supporting Application for.]**—An affidavit to support a rule to set aside a warrant of attorney, intitled as in a cause, with the words "plaintiff" and "defendant" added to the names of the parties, is good. *Thompson v. Vaux*, W. & D. 386.

In an application for the delivering up of a warrant of attorney, the affidavit may be intitled in a cause. *Thompson v. Vaux*, 5 D. P. C. 691.

## WARRANTY.

- I. OF HORSE.—See HORSE.
- II. OF SHIPS.—See SHIPPING.
- III. ON INSURANCE.—See INSURANCE.
- IV. IN OTHER CASES.—See SALE.

## WARREN.

See GAME.

## WASTE.

**Ploughing up Garden Produce.]**—It is waste for an out-going tenant to plough up strawberry beds in full bearing, although when he entered he paid for them on a valuation to the person who occupied the premises before him; and although it may have been usual for strawberry beds to be appraised and paid for as between out-going and in-coming tenants. *Wetherell v. Howells*, 1 Camp. 227.

**Old Meadows.]**—Ploughing up an old meadow and converting it to arable is waste, and the tenant cannot give evidence, under the general issue of no waste done, that the meadow was ploughed according to the custom of the country, and to ameliorate; as the reason for altering the character of the land must be pleaded by way of justification. *Simmons v. Norton*, 5 M. & P. 645; 7 Bing. 640.

A tenant for life, punishable for waste, had power to lease for twenty-one years ancient pasture land, which he afterwards, and before any lease, had converted into garden allotments in a manner amounting to waste. The leasing power provided against "any fine, premium or forfeit being taken for the making thereof," and that "none of the lessees should be, by any clause or words therein contained, authorized to commit waste, or exempted from punishment for waste." In a lease reciting this power, the tenant for life demised the premises for twenty-one years, reserving a rent payable half-yearly. The lease contained a covenant by the lessee not to break up any of the pasture land demised, "except for the purpose of carrying out the allotment system" introduced by the tenant for life:—Held, that the exception in the covenant did not amount to a licence or an authority to the lessee to commit waste by carrying out the allotment system, and that if any implication could be made so as to construe that exception as justifying a permission to the lessee to do anything, it could not be inferred that it per-

mitted him to do more than to carry out the allotment system during the life of the tenant for life, so far as the tenant for life had power to permit it, and not otherwise. *Doe d. Hopkinson v. Ferrand*, 20 L. J., C. P. 202; 15 Jur. 1061.

In an action of waste, on the 6 Edw. 1, c. 5, against a tenant for years, for converting three closes of meadow into garden ground, if the jury gives only one farthing damages for each close, the court will give him leave to enter up judgment for himself. *Harrow School v. Alderton*, 2 B. & P. 86. And see *Pindar v. Wadsworth*, 2 East, 155.

— **Rabbit Warren.**—To break up a rabbit warren, unless a warren by charter or prescription, is not waste at common law. *Lurting v. Conn*, 1 Ir. Ch. Rep. 273.

**To Mines.**—An action in the nature of waste will lie against a lessee of a mine for an injury to the reversion by the removal of a barrier or a boundary between it and an adjoining mine, although the act complained of might also be the subject of an action for the breach of an express covenant. *Marker v. Kenrick*, 13 C. B. 188; 22 L. J., C. P. 129.

**Taking Turf.**—A tenant for life of farming lands let parts at low rentals, with liberty for the tenants to get turf, but under the obligation to level and prepare the surface for agricultural purposes. Large quantities of the turf, to the value of over 1,000*l.*, were taken away, but the value of the land was thereby increased for agricultural purposes:—Held, that the tenant for life was not liable to any proceedings for waste. *Harris v. Elkins*, 26 L. T. 827; 20 W. R. 999.

**Taking Flints.**—A custom to remove flints which come to the surface of the land during ordinary agricultural operations, where not prohibited by the terms of the lease, is good. *Tucker v. Linger*, 21 Ch. D. 18; 51 L. J., Ch. 713; 46 L. T. 894; 30 W. R. 578. Affirmed, 8 App. Cas. 508; 52 L. J., Ch. 941; 49 L. T. 273; 32 W. R. 40; 48 J. P. 4.—H. L.

Where the action of the tenant amounts to technical waste, if the court is satisfied it is waste which does not injure the inheritance, it is no answer for the landlord to say that it benefits the tenant and puts money into his pocket.—Per Kay, J. *Id.*

**Leaving Land Uncultivated.**—It is not waste at common law, either wilful or permissive, to leave the land uncultivated. *Hutton v. Warren*, 1 M. & W. 472.

**Farming contrary to Custom.**—Although the court has jurisdiction, after a decree in a partition suit, to grant an injunction restraining a tenant in common in possession from committing destructive waste, it will not interfere to restrain a tenant in common in possession merely from farming contrary to the custom of the country, as between landlord and tenant (that relation not existing between him and the other tenants in common). *Bailey v. Hobson*, 5 L. R., Ch. 180; 39 L. J., Ch. 270; 22 L. T. 594.

**Erecting New Building.**—The erection of a new building which increases the value of the property is not waste, unless it destroys the

identity of the property, or impairs the evidence of title. *Jones v. Chappell*, 20 L. R., Eq. 639; 44 L. J., Ch. 658.

**Altering Premises.**—Premises were demised in 1808 for a term of years, by lease, described as "all that dwelling-house No. 1, Merriion-square, in the city of Dublin, and also the coach-house and stable belonging thereto." The lease contained a covenant on the lessee's part to keep the demised premises in good repair, and so deliver them up at the end of the term. The coach-house and stable lay to the rear of the dwelling-house, but were separated therefrom by intervening buildings. There were no restrictive covenants in the lease, although the landlord had been himself lessee of the premises, as well as of the ground covered by the buildings, under a lease of 1806, which contained restrictive covenants against, amongst other trades, that of a butcher, involving, at the option of the head landlord, forfeiture, or an additional rent whilst the trade was carried on. The lease of 1808 contained a reservation to the head landlord of all royalties, but made no other reference to the lease of 1806. In 1876, the owner of the lessee's interest in the lease of 1808 made a sub-lease of the coach-house and stable, authorizing the conversion of them into a butcher's shop. The sub-lessee altered the structure of the coach-house and stable, and converted them into a butcher's shop:—Held, that these acts were waste, and that the owners of the reversion on the lease of 1808 were entitled to a perpetual injunction to prevent the use of the altered premises as a butcher's shop, although some of the intervening buildings had been used as shops, but not as butcher's shops, for a number of years. *Maunsell v. Hort*, 11 Ir. R., Eq. 478.

To an action by a reversioner against the defendant, for pulling down a wall, and building and incumbering a close in the occupation of his tenant, and putting other buildings thereon, a plea that he was the occupier of a dwelling-house adjoining the close and wall, and, in repairing his dwelling-house, accidentally threw down the wall, and afterwards, and in a reasonable time, and before action, rebuilt the wall, and committed the grievance in such rebuilding, &c.:—Held, ill. *Taylor v. Stendall*, 3 D. & L. 161; 7 Q. B. 634; 14 L. J., Q. B. 301; 9 Jur. 1096.

**Non-Repair.**—A house was devised to X. for life, subject to a condition to keep it in repair, with remainder to A. for life, with remainders over, the estates being all legal:—Held, that A. had no remedy in equity against X. for breach of the condition. *Kinnersley v. Williamson*, 39 L. J., Ch. 788; 23 L. T. 39; 18 W. R. 1016.

Moneys directed by a will to be laid out in the purchase of land to be settled to the same uses as those declared concerning estates thereby devised, and moneys arising from the sale of parts of the devised estates under a power conferred on the trustees by a private act of parliament, may be ordered by the court to be applied in erecting new buildings on the devised estates, or in rebuilding such as are actually in a ruinous condition; but, as it is the duty of the tenant for life to keep the buildings in repair, and to restate the mansion-house if damaged by fire, the

court will not order any of the moneys to be applied for either of these purposes. *Drake v. Trefusis*, 10 L. R., Ch. 364; 33 L. T. 85; 23 W. R. 762.

The testator at the time of his death was under liability under covenants in leases to repair, and a sum of 91l. 6s. 8d. was found due from him in respect of dilapidations:—Held, that the tenant for life was not bound to pay that sum out of her income, but that it was payable out of the corpus of the residuary personal estate. *Pinfold v. Shillingford*, 46 L. J., Ch. 491; 25 W. R. 425.

**Unroofing.**—The words "without impeachment of waste" will not permit a tenant for life to unlead a house and pull down the tiles. *Vane v. Parnard (Lord)*, 1 T. R. 56, n.

**Reasonable User of Tenant.**—Semble, that an injury to or the destruction of demised premises, resulting from the use of them by the tenant in a reasonable and proper manner, having regard to the class of tenement to which they belong, is not waste. *Saner v. Bilton*, 7 Ch. D. 815; 47 L. J., Ch. 267; 38 L. T. 281; 26 W. R. 394.

In a lease of a newly-constructed grain warehouse, there was a covenant by the lessor that he would during the term "keep the main walls and the main timbers of the warehouse in good repair and condition." The lessee entered under the lease and stored grain in it in a reasonable and proper way. After a short time a beam which supported one of the floors broke, and ultimately the external walls sank and bulged outwards, and the lessor spent a large sum in repairing the premises. In an action by the lessor to recover from the lessee what he had thus expended:—Held, that the lessee had not been guilty of waste. *Id.*

And see LANDLORD AND TENANT.

**Gift of things *quæ consumuntur in usu*.**—Under a gift of farming stock to one for life, with remainder over, the first taker does not become absolutely entitled to such of the articles comprised in the gift as are of a consumable nature, but if he enjoys it in specie he must keep up the amount of it, and if it has to be sold he will only be entitled to the income produced by the proceeds. *Cockayne v. Harrison*, 13 L. R., Eq. 432; 41 L. J., Ch. 509; 26 L. T. 385; 20 W. R. 504.

**Cutting down Ornamental Timber.**—Although the Court of Chancery will grant an injunction to restrain a tenant for life from cutting down ornamental timber, irrespective of the question whether or not any damage would be occasioned to the inheritance by such cutting; yet when the ornamental timber has been actually felled, and the reversioner claims damages from the tenant for life in respect of such equitable waste, the amount of damages can only be measured by the damage done to the inheritance. *Bubb v. Yelverton, Hastings, Ex parte*, 10 L. R., Eq. 465; 40 L. J., Ch. 38; 18 W. R. 1127, 1146.

A tenant in fee simple having contracted to sell the reversion after his own life, cut down ornamental timber. After his death, in a suit for the administration of his estate, the purchaser of the reversion brought in a claim for damages. In the opinion of the court the evi-

dence did not shew that any injury had been done to the reversion:—Held, that as the purchaser had not applied for an injunction to restrain the cutting, he could not claim damages. But, semble, that if he had applied for an injunction, any timber, the loss of which would, in his opinion, have been injurious to the ornamental effect, would have been protected. *Id.*

The doctrine of equitable waste considered. *Baker v. Sebright*, 13 Ch. D. 179; 49 L. J., Ch. 65; 41 L. T. 614; 28 W. R. 177.

An equitable tenant for life, unimpeachable for waste, is entitled to the proceeds of ornamental timber cut by him, where the timber so cut is such as the court would itself direct to be cut for the preservation and improvement of the remaining ornamental timber; but it does not follow that the court will not, at the instance of the remainderman, grant an injunction restraining the tenant for life from cutting any ornamental timber which it has become necessary and proper to cut, and direct that the cutting be done under its supervision. *Id.*

**Timber—Tenant for Life.**—Although a tenant for life subject to impeachment for waste cannot cut timber at all (except periodically on a timber estate), or, as a general rule, trees which would become timber if they were of the age of twenty years or upwards, yet he may cut down timber-like trees under twenty years of age for the necessary purpose of preserving or allowing the growth of other trees, and is entitled to the proceeds of such cuttings. *Honywood v. Honywood*, 18 L. R., Eq. 306; 43 L. J., Ch. 652; 30 L. T. 761; 22 W. R. 749.

Where timber is cut down or blown down the property in it belongs to the owner of the first estate of inheritance. *Id.*

A tenant for life is entitled at law to the proceeds of trees (not timber) cut by him, whether rightfully or wrongfully, though liable in the latter case to an action of waste. *Id.*

**Court ordering Timber to be Cut—Proceeds of Sale.**—When the court orders timber to be cut for any reason, the proper course is for the proceeds to be invested, and the income given to the successive owners of the estate until there is an absolute estate of inheritance, the owner of which is entitled to the principal; and the same rule applies to cases of equitable waste. *Id.*

**Proceeds of Cutting.**—An equitable tenant for life, impeachable for waste, cut timber not otherwise than in due course of management. The proceeds had been brought into court and the income ordered to be paid to her. On her death her son, being the next tenant for life dispendable for waste, petitioned for payment to him of the timber money in court:—Held, that he was entitled to the money, as he would have been entitled to the trees which produced it. *Lowndes v. Norton*, 6 Ch. D. 139; 46 L. J., Ch. 613; 25 W. R. 826.

**What Wood.**—Cutting young trees under twenty years' growth, though of the kinds which may be timber by common law or by local custom, is not necessarily waste, but will be so if they are cut unseasonably or in such a manner as to injure the reproductive power of the stools. In all cases it is a very important consideration that they have or have not been

previously or usually cut. *Dunn v. Bryan*, 7 Ir. R., Eq. 143.

It is not waste in a lessee to cut down trees and timber, unless they are planted for the ornament or shelter of the house, or perform some important function, such as supporting a bank or the like, and provided also that he cuts them so as not to destroy the germinative or reproductive power of the stools. Trees, even of the kinds that may become timber by attaining a growth of twenty years, may, if under that age, be cut by a lessee, provided they are cut reasonably, that is, according to what has been done either with the same trees, if springing from old stools, or other trees in the same place or the same neighbourhood, on former occasions. *Ib.*

The principle that the cutting of saplings or young timber unfit to be felled is, under certain circumstances, equitable waste, does not apply to cases between landlord and tenant when the cutting of them is seasonable. *Ib.*

The mere cutting of a hedge in such a manner as that it will grow again is not waste; but grubbing up the thorns of which it is composed, or allowing the germins to be destroyed by the cattle, or cutting them so unseasonably or improperly as that they will not grow again and replace what has been cut, is waste. *Ib.*

— **Willows.**—A tenant for years is not guilty of waste in cutting down willow trees for sale, which sprung up again from the stools, unless they serve to protect the house, or to support the bank of a stream. *Phillips v. Smith*, 14 M. & W. 589; 15 L. J., Ex. 201.

— **Oak Coppice.**—All cutting of timber is not waste. In many places oak coppice is felled regularly every sixteen or eighteen years, leaving poles which are as regularly cut every second fall, every thirty-two or thirty-six years. *Bagot v. Bagot*, 32 Beav. 509; 33 L. J., Ch. 116; 9 L. T. 217.

— **Mode of Cutting.**—The court will not interfere by injunction to prevent the cutting of hedges with a saw instead of with a hatchet or a hedge knife, and will not go into the consideration of these different modes of operating; all that it will look to being that no permanent injury to the inheritance is done. *Dunn v. Bryan*, *supra*.

— **Right to Account.**—The right to an account inequity of the proceeds of timber wrongfully felled in commission of waste is only incident to the right to an injunction. *Higginbotham v. Hawkins*, 7 L. R., Ch. 676; 41 L. J., Ch. 828; 27 L. T. 328; 20 W. R. 955.

When after legal waste has been committed time has run so as to bar the legal remedy in respect thereof, the remedy in equity is also barred. *Ib.*

A tenant for life permitted her tenants to dig turf from fen lands. The turf, when sold, realized a considerable sum. It being proved that such digging, though technically an act of waste, had considerably improved the lands for agricultural purposes:—Held, that the tenant for life was not bound to account to the persons entitled for the value of the turf so removed. *Harris v. Ekins*, 26 L. T. 827; 20 W. R. 999.

A tenant for life, without impeachment of waste, of estates, felled and converted to his own use timber growing thereon. The tenant in

tail in remainder filed a bill to restrain the cutting of the timber, and for an account of the timber already felled. The tenant for life refused to account on the ground that he was entitled to the timber in right of his interest in the estate:—Held, that the tenant for life must set forth the accounts. *Newry (Viscount) v. Kilmorey (Earl)*, 24 L. T. 15; 19 W. R. 271.

Form of inquiry as to ornamental timber. *Baker v. Sebright*, *ante*, col. 508.

— **Statute of Limitations—Equitable Estate.**—A., being equitable tenant for life of lands impeachable for waste, and B. equitable tenant in tail in remainder after certain intervening contingent equitable estates of inheritance which did not take effect, acts of waste were committed by A. in cutting down ornamental and other timber. In an action by B. for an account of the waste: plea, that the alleged acts of waste were committed more than six years before action brought:—Held, on demurrer, a good defence. *Simpson v. Simpson*, 3 L. R., Ir. 308.

— **When Statute begins to Run against Remainderman.**—In a case of legal waste in cutting timber committed by a tenant for life, the Statute of Limitations begins to run as against the remainderman from the time of the waste being committed, or, at all events, from the time when the proceeds of the timber became money in the hands of the wrongdoer, and not from the time when the estate in remainder falls into possession. *Higginbotham v. Hawkins*, *supra*.

No action lies by a reversioner and owner of the inheritance to recover the value of timber cut by a deceased tenant for life, after a fine levied by her, whereby she acquired a base fee, and before the avoidance of such fine and base fee by the entry of the reversioner for that purpose, such entry not revesting the reversioner's old estate by relation during the continuance of the base fee thus created, so as to entitle him to the timber and other mesne profits taken during that interval: but held, that even after the Statute of Limitations had run against the appropriate action by the reversioner against the tenant for life for mesne profits, or for waste, upon the original wrongful act of cutting down and converting the trees, an action for money had and received for the purchase-money of the trees sold, which was in fact paid to the former tenant for life within the six years, was maintainable against her representatives after her death. *Hughes v. Thomas*, 13 East, 474.

If a tenant for life cuts timber which is ripe for cutting, but not decaying or overcrowding, the act is tortious, and the right of the remainderman accrues, and the Statute of Limitations begins to run immediately. *Nagarm v. Knight*, 36 L. J., Ch. 918; 17 L. T. 47; 15 W. R. 1152.

— **Trover for.**—Trover cannot be maintained by a tenant in tail expectant on the determination of an estate for life, without impeachment of waste, for timber which grew upon and was severed from the estate. *Pyne v. Dor*, 1 T. R. 55.

Lands, together with the woods, were conveyed under a marriage settlement to A. and B., their heirs and assigns, during the life of W., in trust to pay the rents and profits as W. should appoint during her life; and, after her decease,

to the use of such child or children of the marriage, and in such shares as W. should appoint; and, for want of appointment, to the use of the children equally, and the heirs of their bodies, with cross-remainders; and, in default of such issue, to the use of the right heirs of W. for ever.—Held, that A. and B. could not maintain trover against a stranger, for certain trees which had been cut down by order of the husband of W., and carried away by the stranger. *Blaker v. Ancombe*, 1 N. R. 25.

**Tenants in Common.**—One tenant in common cannot maintain an action in the nature of waste against another tenant in common (in possession of the whole, having a demise of the moiety from the first), for cutting down trees of a proper age and growth for being cut. *Martin v. Knowlly*, 8 T. R. 145.

**Permissive Waste.**—A devise of premises for life provided that the tenant for life should keep the premises in repair. The tenant for life entered upon and enjoyed the premises during her lifetime, but left them at her death out of repair. The remainderman in fee brought an action against the executor of the tenant for life in respect of the non-repair of the premises within the period of limitation prescribed by 3 & 4 Will. 4, c. 42, s. 2, which gives a right of action against the executor of a person deceased in respect of wrongs committed by the testator to another in respect of his property.—Held, that an action of tort in respect of the permissive waste by non-repair of the premises would have lain at common law against the tenant for life in her lifetime, and consequently lay under the above-mentioned statute against her executor after her death. *Woodhouse v. Walker*, 5 Q. B. D. 404; 49 L. J., Q. B. 609; 42 L. T. 770; 28 W. R. 765; 44 J. P. 666.

An action does not lie for permissive waste. *Gibson v. Wells*, 1 N. R. 290; 2 Smith, 677.

An action for permissive waste will not lie against a tenant for life. *Barnes v. Dowling*, 44 L. T. 809; 45 J. P. 635, 767.

Nor against a tenant by lease, who has not covenanted to repair. *Herne v. Benbow*, 4 Taunt. 764.

And an action for permissive waste will not lie against a tenant from year to year. *Martin v. Gilham*, 7 A. & E. 540; 2 N. & P. 568.

A tenant at will is not liable to an action for permissive waste. *Harnett v. Maitland*, 16 M. & W. 257; 4 D. & L. 545; 16 L. J., Ex. 134.

**Rights of Ecclesiastical Corporations.—To Timber.**—Timber on the estates of ecclesiastical corporations forms a fund for the benefit of the church. *Herring v. St. Paul's (Dean)*, 3 Swans. 509; 2 Wils. C. C. 1.

A dean and chapter have not the power of cutting timber on their lands, except for repairs of their property, and consequently cannot give any such right to their lessee. *Ib.*

A rector, during four years, cut down a number of timber trees, more than sufficient to be applied for the purposes of the repairs of the rectory buildings; and again when no timber was necessary for the repairs, he cut down other timber trees. Of these trees, part was applied for the repairs; others were sold to a carpenter, who employed other timber more suitable for repairs; other parts were sold at auction, in

lots; and some few trees were not accounted for; but the rector had expended on the rectory buildings and on farm improvements, beyond the produce of the sales of timber, 150*l.*, besides a considerable outlay in under-draining. On a bill filed in equity, by the patron against the rector, the court granted an injunction, restraining the rector from felling timber on the rectory lands save only for necessary repairs. *Marlborough (Duke) v. St. John*, 5 De G. & S. 174; 21 L. J., Ch. 381; 16 Jur. 310.

Timber cut by a vicar must either be specifically applied in repair of timber work, or be sold and the proceeds invested in the purchase of other timber to be so applied. *Sowerby v. Fryer*, 8 L. R., Eq. 417; 38 L. J., Ch. 617; 17 W. R. 879.

**—To Gravel Pits.**—Where gravel pits had been opened on rectory land, and gravel taken therefrom by the surveyors of the highways, for the purpose of their repair, without sloping down the ground as required by 13 Geo. 3, c. 78, s. 31.—Held, that neither the taking such gravel by the surveyors and omitting to slope down, nor the neglecting to compel the surveyors to slope down, could be considered waste on the part of the rector. *Huntley v. Russell*, 13 Q. B. 572; 18 L. J., Q. B. 239; 13 Jur. 837.

**—To Buildings.**—The executors of a rector are not liable to an action for pulling down a building on the rectory, and substituting another in a different part, unless the value of the estate is thereby diminished, the burdens upon it increased, or the evidence of title impaired. *Ib.*

A cottage or farm building placed upon the soil of a rectory or a vicarage, but not fixed into the ground, and intended at the time of the erection to be removable at will, may be removed without incurring any liability for waste, although posts on which it stands have, by the weight of the building, become imbedded in the ground to the depth of a foot. *Ib.*

The right of a rector to recover from the representatives of his predecessor damages for waste, is confined to the case of dilapidations to houses and buildings, and does not extend to waste committed in the glebe. *Ross v. Adcock*, 3 L. R., C. P. 655; 37 L. J., C. P. 290; 19 L. T. 202; 16 W. R. 1193.

**—Against Bishop.**—The court has no power to issue an original writ of prohibition to restrain a bishop from committing waste in the possessions of his see, at least at the suit of a stranger. *Jefferson v. Durham (Bishop)*, 1 B. & P. 105.

**Jurisdiction of Chancery Division to Restrain Commission.**—By its inherent jurisdiction to restrain fraud, the Court of Chancery will, although the party may have a legal remedy, interfere to prevent waste being committed by a tenant for life in collusion with the owner of a first estate of inheritance, or by a person who unites both these characters in himself; and as such a suit may be instituted by trustees to preserve contingent remainders during the life of a tenant for life in remainder, so may it be instituted by the tenant for life in remainder himself.

*Birch-Wolfe v. Birch*, 9 L. R., Eq. 683; 39 L. J., Ch. 345; 23 L. T. 216; 18 W. R. 594.

On the same principle, where waste has been committed by a tenant for life at a time when he was also owner of the first estate of inheritance, and when there was no one capable of bringing an action, a bill to make his estate accountable may, after his death, be brought by a tenant for life in possession. *Ib.*

But, before giving relief in a suit so instituted, the court must be satisfied that the acts of the deceased tenant for life were such as amounted to collusion between the two characters which he united in himself. *Ib.*

A court of equity will not grant an injunction to prevent waste unless there is some real and substantial injury to the inheritance. *Doherty v. Allman*, 3 App. Cas. 709; 39 L. T. 129; 26 W. R. 513.

Two leases were granted of pieces of land with some buildings on them, one granted in 1798 for 999 years, the other granted in 1824 for 988 years. There was no reservation of a power of re-entry for breach of covenant, nor was there any negative covenant obliging the lessee not to change the use of the premises. There was a power of re-entry for rent in arrear, and no sufficient distress on the premises. In each lease there was a covenant by the lessee that he, his executors, &c., "will during the term granted preserve, uphold, support, maintain, and keep the demised premises, and all improvements made and to be made thereon, in good and sufficient order, repair, and condition; and at the end or sooner determination of this demise, shall and will so leave and deliver up the same unto" the lessor, his heirs, &c. The premises had been used as corn stores for some years; and afterwards as artillery barracks, and dwellings for married soldiers. They had fallen into disrepair: it became necessary to repair them; the lessee thought it would be beneficial to convert the store buildings into dwelling-houses, which would much increase their value, and was proceeding to convert them accordingly, when the lessor filed a bill to restrain him, alleging waste:—Held, that this was not the case of enforcing a negative covenant where the words of contract were clear and indisputable; that the waste alleged was meliorating waste, and that, under the circumstances, the court had, in the due exercise of its discretion in such matters, properly refused to interfere by injunction. *Ib.* Affirming 10 Ir. R., Eq. 460.

Where the title to land is in dispute, the Court of Exchequer will not grant an injunction to restrain an act of trespass, but only to prevent an irreparable injury. The court therefore refused an injunction to restrain the owner in fee of a piece of land claimed by the crown, but denied by the owner to be part of a royal forest, from cutting down holly trees and underwood therein in the manner in which they had been ordinarily cut down for twenty years previously. *Att.-Gen. v. Hallett*, 16 M. & W. 569; 16 L. J., Ex. 131.

— **As to Inquiries and Accounts.**—See *Higginbotham v. Hawkins*, ante, col. 509.

**Action against Tenant.**—In an action on a covenant for non-repair, the breach assigned was, that the defendant did not keep nor yield up the premises in tenantable repair; "but, on the contrary, suffered and permitted them to be

ruinous, and left them so out of repair:"—Held, that the latter part of the breach precluded the plaintiff from recovering in respect of voluntary waste. *Edge v. Pemberton*, 1 D. & L. 467; 12 M. & W. 187; 13 L. J., Ex. 48.

An action in the nature of voluntary waste will lie against a tenant for years after the expiration of his term as well as an action for the breach of covenants contained in his lease. *Kinlyside v. Thornton*, 2 W. Bl. 1111.

An action for waste lies at the suit of a landlord against his tenant for acts done by the latter, while holding over after the expiration of a notice to quit. *Burchell v. Hornsby*, 1 Camp. 360.

A copyholder licensing his lessee to commit waste, on condition of his doing a subsequent act to diminish the damage thereby occasioned, cannot eject him for a forfeiture incurred by his committing the waste without performing the subsequent act. *Doe d. Wood v. Morris*, 2 Taunt. 52.

A breach, in an action by landlord against tenant, that the tenant threatened to commit waste unless paid a certain sum by the incoming tenant, and that the latter was thereby compelled to and did pay him that sum, in order to prevent his committing such waste, is bad. *Leach v. Thomas*, 2 M. & W. 427; 5 D. P. C. 612. And see LANDLORD AND TENANT.

— **Assignee of Lease.**—An action cannot be supported against the assignee of a lease, in which the lessee covenanted, from time to time, and at all times during the term, when need should require, sufficiently to repair the premises, with all necessary reparations, and to yield up the same so well repaired at the end of the term, in as good condition as the same should be in when finished under the direction of M., upon a breach that he suffered the premises to become and be in decay and ruinous during a large part of the term, and after the term wrongfully yielded them up in much worse order and condition than when the same were finished under the direction of M. *Jones v. Hill*, 7 Taunt. 392; 1 Moore, 100.

— **Assignee of Husband and Wife.**—Devise to A. and his wife to hold for their joint lives, and to the survivor for his or her life. The husband during the joint lives assigned, and the assignee committed waste:—Held, that the wife (who survived) could not maintain an action for waste, she having only a contingent remainder at the time of the waste done. *Bacon v. Smith*, 4 P. & D. 651; 1 Q. B. 345; 5 Jur. 549.

**Copyholder.**—No action of waste lies by the lord against a copyholder. *Dench v. Bampton*, 4 Ves. 706.

**Action by Executor.**—An executor is entitled to sue a lessee of his testator on a covenant not to fell, stub up, lop, or top timber trees, excepted out of the demise, such breach having been committed in the lifetime of the testator. *Raymond v. Fitch*, 2 C., M. & R. 588; 5 Tyr. 985.

— **Reversioner.**—To enable a reversioner to bring an action in the nature of waste, there must be an injury of a permanent nature. *Baxter v. Taylor*, 1 N. & M. 13; 4 B. & Ad. 72.

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## WATER.

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#### I. NAVIGABLE RIVERS.

##### 1. RIGHTS AND INCIDENTS.

###### a. Generally.

**Navigable River, what is.]**—A river or a creek into which the tide flows is not therefore necessarily a public navigation. *Rea v. Montague*, 6 D. & R. 616; 4 B. & C. 589.

The flux and reflux of the tides is *prima facie* evidence of a navigable river. *Miles v. Rose*, 1 Marsh. 313; 5 Taunt. 706; *S. P., Murphy v. Ryan*, 2 Ir. L. R., C. P. 143.

But not absolutely inconsistent with an exclusive right. *Id.*

On a question whether a creek is a public navigable river or not, instances of persons going up it for the purpose of cutting reeds, and on parties of pleasure, without the consent of the person claiming exclusive property in the creek, are evidence sufficient for the jury to presume it to be a public river. *Id.*

— **When Affected by High Tides.]**—An information was laid against the appellant for unlawfully fishing in a river wherein the respondents had a private right of fishery. It was proved that the river was navigable, and that at the place where the appellant fished the water was not salt, and that in ordinary tides it was unaffected by any tidal influence, but that upon the occasion of very high tides the rising of the salt water in the lower part of the river dammed back the fresh water, and caused it upon those occasions to rise and fall with the flow and ebb of the tide. The appellant contended that, the river being navigable and tidal at the place in question, there was a presumption that the public had a right to fish there, and that the jurisdiction of the justices was therefore ousted by a reasonable claim of right:—Held, that the river at the place in question could not be considered as tidal within the meaning of the rule of law which gives the public a right to fish in navigable tidal rivers, and therefore there was no claim of title set up sufficient to oust the justices' jurisdiction. *Reece v. Miller*, 8 Q. B. D. 626; 51 L. J., M. C. 64.

**Nature of.]**—A navigable river is a public highway navigable by all her Majesty's subjects in a reasonable manner and for a reasonable purpose. *Original Hartlepool Collieries v. Gibb*, 5 Ch. D. 713; 46 L. J., Ch. 311; 36 L. T. 433.

A navigable river is a public highway, and all persons have a right to come there in ships, and to unload, moor, and stay there as long as they please; but if they abuse that right, so as to work a private injury (as to interrupt the enjoyment of a private fishery), they are liable to an action. *Anon.*, 1 Camp. 517, n.

**Extinction of.]**—A public right of navigation

on a river or creek may be extinguished either by legal means, as an act of Parliament, a writ of *ad quod damnum*, or an order of commissioners of rivers, or by natural causes, as the retreat of the sea, or a deposit of silt and mud. *Rea v. Montague, supra.*

Where a public road obstructing a creek which is unnavigable, has existed beyond living memory, the law will presume that the public right of navigation has been destroyed by some one of the means above mentioned. *Id.*

**Riparian Proprietors.]**—The owner of land abutting on a tidal navigable river has, *jure nature*, a right of access to and from the stream wholly distinct from the right of navigation which he enjoys in common with the rest of the public. *Lyon v. Fishmongers' Company*, 1 App. Cas. 662; 46 L. J., Ch. 68; 35 L. T. 569; 25 W. R. 165—H. L.

There is no distinction between the position of a riparian owner of land abutting on a tidal and that of an owner of land abutting on a non-tidal stream, as far as regards right of access from the stream to his own land, and vice versa. *Id.*

Such right of access is a private right distinct from the right of navigating the stream, which is common to the riparian owner and the rest of the public, and it is not to be interfered with by a licence to embark, under s. 53 of the Thames Conservancy Act, 1857 (20 & 21 Vict. c. cxlvii.), but is protected by s. 179 of that act. *Id.*

In a public navigable river, twenty years' possession of the water at a given level is not conclusive as to the right. *Vooght v. Winch*, 2 B. & A. 662.

The rights of a riparian proprietor against adjoining or opposite riparian proprietors are not greater in respect of a tidal than in respect of a non-tidal river. *Att.-Gen. v. Lonsdale (Earl)*, 7 L. R., Eq. 377; 38 L. J., Ch. 335.

The right to the soil of a navigable river is not by presumption of law in the owners of the adjoining lands. *Rea v. Smith*, 2 Dougl. 411.

A party claimed a right to use a navigation, in respect of his occupation of a close abutting on the stream. This close formed a part of the King's Head Inn, until five years before the action was brought, when it was detached, and all the acts of the user of the navigation, which were proved, were exercised by the occupiers of the King's Head Inn, before the property was divided:—Held, that there was no evidence to support the right to a verdict, as on such evidence a grant could only be presumed to the occupiers of the inn. *Bower v. Hill*, 2 Scott, 535; 1 Bing. N. C. 549; 1 Hodges, 334.

An owner of land at the side of a public navigable river has no right to erect on the bed of the river, for the benefit of his own trade, any structure, whether any actual obstruction to the navigation of the river will or will not be thereby occasioned; and any benefit to his own trade is too remote to be held for the advantage of the public generally, and so to justify the erection. *Att.-Gen. v. Terry*, 9 L. R., Ch. 423; 30 L. T. 215; 22 W. R. 395.

—**Incidental Rights—Dredging Foreshore.]**

—The Clyde Navigation Trustees, being empowered by ss. 76 and 84 of 21 & 22 Vict. c. 149, to dredge the bed of the River Clyde to a depth of seventeen feet, cannot be interdicted

from dredging ground which has been declared the property of the riparian owner, subject to any right which the public may have over it, and subject also to any rights conferred on the trustees by their Acts of Parliament:—So held, affirming the decision of the court below, but without prejudice to the question of their liability to subsequent compensation for damage. *Blantyre (Lord) v. Clyde Navigation Trustees*, 6 App. Cas. 273—H. L. (Sc.).

**Rights of Crown.]**—There is no authority to shew that the crown is of common right entitled to land covered by water, where the water is not running water forming a river, but still water forming a lake. *Bristow v. Cormican*, 3 App. Cas. 641.

A navigable river is a public highway for vessels, at all times and states of the tide, and the right to pass and repass is not destroyed or abridged by the circumstance that, at particular states of the tide, a vessel cannot pass along without grounding, and thereby injuring oyster-beds therein. *Colchester (Mayor) v. Brooke*, 7 Q. B. 339; 15 L. J., Q. B. 59; 9 Jur. 1090.

The rights of the crown are subject to this public right of passage, and the crown, therefore, cannot, irrespectively of any ownership in the adjoining lands, make a grant inconsistent with it. *Id.*

The right of the public to navigate a public river is paramount to any right of property in the crown, which never had the power to grant a weir, so as to obstruct the public navigation; and if a weir, which was legally granted in such a river, caused obstruction at any subsequent time, it became a nuisance. *Williams v. Wilcox*, 3 N. & P. 606; 8 A. & E. 314; 1 W., W. & H. 477.

**Rights of Conservators.]**—An act, authorizing persons to repair and cleanse a navigable river, does not authorize them to make a passage to a new wharf on such river. *Partheriche v. Mason*, 2 Chit. 658.

**Ownership—Stealing Oysters.]**—In support of an indictment for stealing oysters in a tidal river, it is sufficient to prove ownership by oral evidence, as, that the prosecutor and his father, for forty-five years, since 1815, had exercised the exclusive right of oyster fishing in the locus in quo; and that in 1846 an action had been brought to try the right, and a verdict been given in favour of the prosecutor. *Reg. v. Downing*, 23 L. T. 398; 11 Cox, C. C. 580.

“**Vessels usually Navigating thereon.]**—Under the Trent Navigation Act of 1858, it is provided that the commissioners thereunder shall maintain the navigation of the river so as to enable vessels usually navigating thereon to carry a burthen of forty tons at the least, and shall maintain the hauling-paths and ways by the side of the river for hauling, towing or drawing by men or with horses, vessels using the navigation:—Held, that, although previous to the passing of the act steam tugs were not in use upon the river, yet that the term “vessels” includes steamers, and the use of them upon the Trent is lawful. *Martin v. Leavers*, 46 J. P. 807.

#### b. The Thames.

**Wharfs.]**—There is a custom on the Thames

which authorizes barges to be moored at low water for one tide at the piles in front of the wharfs; but in places where there are no piles, the custom does not extend to mooring at the wharf, unless through distress. *Wyatt v. Thompson*, 1 Esp. 252.

The corporation of London, being conservators of the river Thames, and owners of the soil between high and low water mark, cannot authorize, a lessee to erect a wharf thereon, which produces inconvenience to the public in the use of the river for the purposes of navigation. *Rea v. Greenoer (Lord)*, 2 Stark. 511. And see *Rea v. Hollis*, 2 Stark. 536.

**Erection of Works or Piers.**—The Metropolitan Board of Works has no power of erecting works of any kind in the bed or soil of the Thames, except with the consent, in writing, of the Board of Admiralty, signed by their secretary, previously obtained. *Brownlow v. Metropolitan Board of Works*, 31 L. J., C. P. 140; 8 Jur., N. S. 891; 6 L. T. 117; 10 W. R. 884. Affirmed, 16 C. B., N. S. 546; 38 L. J., C. P. 233; 12 W. R. 871.

The Thames Conservancy Act, 1857 (20 & 21 Vict. c. cxlvii.), authorizes the conservators of the Thames to grant to the owner of any land fronting the river a licence to make any pier or other work immediately in front of his land, and into the body of the river; upon payment of such reasonable consideration as directed by the act, and subject to such conditions as the conservators shall think fit to impose, and by a saving clause none of the powers of the act are to abridge any right, claim or privilege to which any owner of lands on the banks of the river is entitled.—Held, that the conservators had power under the act to license the erection of a platform interfering with the navigation of the river. *Kearns v. Cordwainers' Company*, 6 C. B., N. S. 389; 28 L. J., C. P. 285; 5 Jur., N. S. 1216.

Under the same act, the conservators of the Thames were empowered to erect piers at any convenient place, of such form and construction as they should deem advantageous to the public, and causing the least obstruction to the navigation. The plans were to be first approved by the Admiralty:—Held, that a court of equity had no jurisdiction to interfere by injunction at the suit of the attorney-general, on the ground of the alleged inconvenience of proposed piers; or, at most, that it could only interfere where it was shewn that the piers would be entirely useless. *Att.-Gen. v. Conservators of River Thames*, 1 Hem. & M. 1; 8 Jur., N. S. 1208; 11 W. R. 163.

The statute directed that, whenever the conservators should remove or obstruct the free use and enjoyment of any public stairs or landing-places marked by the Watermen's Company, they should erect equally convenient stairs or landing-places in substitution for them:—Held, that the substitution of new stairs or landing-places was not a condition precedent to the removal or disturbance, and that where the conservators had prepared plans for piers which would interfere with such old stairs without shewing any adequate provision in substitution for them, a court of equity would not assume that the duty would be neglected, and would not interfere at the suit of the attorney-general to restrain the works until proper substitutes should be provided for the old stairs. *Id.*

**Rights of Riparian Proprietors.**—By the Thames Conservancy Act (20 & 21 Vict. c. cxlvii.), s. 53, the conservators appointed under that act have a power to grant a licence to a riparian proprietor to make an embankment in front of his own land abutting on the river; but though such licence might be the owner's justification so far as the public right of navigation was concerned, it would not authorize a licensee, being a riparian owner, to embank in front of his own land so as injuriously to affect the land of another riparian owner. *Lyon v. Fishmongers' Company*, 1 App. Cas. 662; 46 L. J., Ch. 68; 35 L. T. 569; 25 W. R. 165. Reversing 10 L. R. Ch. 679; 44 L. J., Ch. 747; 33 L. T. 146; 24 W. R. 1.

The power granted to the conservators under 20 & 21 Vict. c. cxlvii. s. 53, is qualified and restricted by the provisions of s. 179. *Id.*

The owners of lands adjoining the banks of the river have no right to complain of works erected under the powers of the Thames Conservancy Act, 1857, if such erection does not deprive them of access to their land by the river side, but only interferes with the right which they have in common with the rest of the public to the unrestricted navigation of the river. *Kearns v. Cordwainers' Company*, *supra*.

**Water Bailiffs.**—As to the right of the conservators of the Thames to appoint, see *Turnidge v. Shaw*, 3 El. & Bl. 588; 30 L. J., M. C. 113; 7 Jur., N. S. 755; 3 L. T. 147; 9 W. R. 381.

**Watermen and Lightermen—Employment of.]**—Under 22 & 23 Vict. c. cxxxiii. s. 54, a penalty is imposed upon any person not being a freeman, licensed in pursuance of the act, or an apprentice to a freeman or to the widow of a freeman, who shall at any time act as a waterman or lighterman, or ply or navigate any wherry, passenger boat, lighter vessel or other craft upon the river Thames, from or to any place or places within the limits of the act, for hire or gain. The limits of the act are defined to be from Teddington Lock to Lower Hope Point:—Held, that a person not being a licensed freeman, or an apprentice to a freeman or the widow of a freeman, who navigates a barge for hire, within the limits of the act, is liable to the penalty, although such barge has started upon its voyage from a place outside the limits, and might, under 7 & 8 Geo. 4, c. lxxv., have been navigated as a western barge by such a person without incurring any penalty. *Dotok v. Phelps*, 30 L. J., M. C. 2; 6 Jur., N. S. 1871; 3 L. T. 296; 9 W. R. 70.

A bye-law imposed a penalty upon any freemen who should "set at work to row or in any manner navigate any lighter, barge, boat or other craft upon the river Thames, within the limit of the act, any other person not being a freeman of the company." A freeman who had employed a non-freeman for hire to assist in working a barge within the limits was convicted of an offence against the bye-law:—Held, that the bye-law was good, as it applied only to the employment of persons for the ordinary rowing and navigation of barges or other craft, and was consistent with the provisions and directions of the act, and therefore the conviction was valid. *Edmonds v. Watermen's Company*, 3 C. L. R. 902; 24 L. J., M. C. 124; 1 Jur., N. S. 727.

The 22 & 23 Vict. c. cxxxiii. s. 54, does not apply to a person (not being a freeman) con-

veying for his own purposes his servants or work-people, and not making any charge for such conveyance. *Tadhunter v. Buckley*, 7 L. T. 273.

— **Compliance with Rules—Liability for Injuries.**—Where a barge owner employed a freeman and an apprentice of a freeman to navigate a barge from the Pool to Lambeth and back, and owing to their misconduct the barge injured another barge:—Held, that the owner was liable, and that he was not protected by the Watermen's Act restraining him in the selection of his servants. *Martin v. Tempory*, 4 Q. B. 298; 3 G. & D. 497; 12 L. J., Q. B. 129; 7 Jur. 150.

— **Regulation of Traffic.**—The 22 & 23 Vict. c. cxxxiii., "An Act for the better regulation of the Barge Owners and others connected with the Navigation of the River Thames between Teddington Lock and Lower Hope's Point," by s. lxvi. enacts that no barge or other like craft for the carrying of goods shall be "worked or navigated" within the limits of the act, unless there be "in charge of such craft" a lighterman licensed or apprentice qualified as therein mentioned. Six barges fastened together in pairs were towed by a steam-tug on the river within the limits of the act. Four men were in charge, but no one was on board either of the last two barges:—Held, that the two barges were "worked or navigated" in contravention of the act, which required a qualified person to be on board each barge to manage it in case of separation or accident. *Elmore v. Hunter*, 3 C. P. D. 116; 47 L. J., M. C. 8; 38 L. T. 179.

The Isle of Dogs Ferry Society was the owner of an ancient ferry, called Potter's Ferry, which was described in their title-deeds as between the Isle of Dogs and Greenwich. Down to 1850, the use of the ferry appeared to have been exercised between an ancient landing-place in the Isle of Dogs and Garden Stairs opposite, and occasionally one or two other landing-places at Greenwich. Since 1850, a dock and wharf and public road were constructed by C., in the Isle of Dogs, about 800 yards lower down the river than the ancient landing-place. The society leased their right of ferry to D., who employed M., a freeman, to carry passengers for hire from C.'s dock and wharf to a point opposite at Greenwich, and not having a licence, as required by 7 & 8 Geo. 4. c. lxxv. s. 38, he was convicted in a penalty under its provisions:—Held, first, that s. 99 was not limited by s. 101, and extended to except boats plying in the exercise of a right of ferry from the operation of the act; but, secondly, that the right did not extend to the landing-place at C.'s dock and wharf, and therefore that s. 99 did not apply, and M. was properly convicted. *Reg. v. Matthews*, 5 El. & Bl. 646; 25 L. J., M. C. 7; 1 Jur., N. S. 1204.

The Watermen's Act, 7 & 8 Geo. 4. c. lxxv. s. 57, gave authority to the mayor and aldermen of the city of London, to make bye-laws "for the government and regulation of the freemen of the Watermen's Company, and their widows and apprentices, and boats, the vessels and other craft to be worked within the limits of the act":—Held, that, under these words of the act, the lord mayor and aldermen were authorised to make general regulations affecting the speed of steam-vessels navigating within certain limits. *Fiswell v. Combe*, 3 N. & P. 29; 7 A. & E. 788; 1 W., W. & H. 5; 2 Jur. 32.

A steam-tug of eighty-seven tons burden employed in moving another vessel was not a "wherry, lighter, or other craft," under 7 & 8 Geo. 4. c. lxxv. s. 87, and a person navigating her for this purpose, not being a freeman, did not thereby incur a penalty. *Reed v. Ingham*, 3 El. & Bl. 889; 2 C. L. R. 1495; 23 L. J., M. C. 156; 1 Jur., N. S. 61.

A. was employed by the Great Western Railway Company, at a weekly salary, in navigating the company's barges upon the Thames, and at the time of the alleged offence he had the command of the company's barge, laden with the goods in the possession and care of the company as common carriers, and which were in the course of being forwarded for delivery to the owners and consignees. The goods had been laden on board the barge at a private basin of the Grand Junction Canal, adjoining one of the company's stations, and without the limits of the 7 & 8 Geo. 4. c. lxxv. The barge was towed along the canal to the river, and steered by A. upon the river and within the limits of the act, to a private wharf of the company west of London bridge. The barge was flat-bottomed, and of the same build as barges known as western barges, and before it was purchased by the company it was known as a western barge, and was worked and navigated upon the river from Reading and places west of Reading to the same wharf:—Held, that the barge was not, at the time of the offence, a western barge within s. 101. *Tibble v. Beadon*, 24 L. J., M. C. 104; S. C., nom. *Reg. v. Tibble*, 4 El. & Bl. 888.

**Using Vessels on, not Constructed to Consume their own Smoke.**—See NUISANCE.

**Matters relating to Navigation on.]—See SHIPPING.**

## 2. TOWING-PATHS.

**Public Rights in.]—**The public are not entitled at common law to tow on the banks of ancient navigable rivers. *Ball v. Herbert*, 3 T. R. 253.

But a right to a track path on either side of the river Tees (alternately) for towing, without paying any acknowledgment, was found upon a trial at bar. *Pierce v. Fauconberge (Lord)*, 1 Burr. 292.

A right of way along the bank, of the nature of a towing-path, is not a necessary incident to an inland navigation. *See Navigation Conservators v. Button*, 6 App. Cas. 685; 51 L. J., Ch. 17; 45 L. T. 385; 30 W. R. 233; 46 J. P. 164.—H. L. per Blackburn (Lord).

A towing path is not necessarily confined to the mere beaten track, but may include so much of the bank as may ordinarily be used by horses when towing barges. *Winch v. Conservators of the River Thames, infra*.

**Exemption from an Inclosure Act.]—**If an act for inclosing and allotting the common and waste lands of a parish through which a navigable river flows, empowers commissioners to set out such public and private roads and ways as they shall think necessary, and directs that all roads and ways not so set out shall be deemed part of the lands to be allotted; an ancient towing-path upon the banks of the river, though not set out by the commissioners, still subsists, for it is not within their jurisdiction. *Simpson v. Soales*, 2 B. & P. 496.

**Ownership—Compensation for Obstruction.]**—By acts relating to a river navigation, commissioners were authorized to make such cuts as they should deem necessary for the navigation, provided that no cut should divert or stop up the present channel of the river, or alter the course of the stream. If any person should think himself injured by any work made by the commissioners, and should make complaint to the commissioners, they were to hear, and report to a subsequent general meeting, at which the commissioners were to make such order, determination and judgment thereon, as to them should seem just, and give such satisfaction as they should think reasonable. And if the party complaining should be dissatisfied with such order, he might appeal to the quarter sessions, who should make adjudication thereon, and award such costs to either party as they should think reasonable, which order and determination should be final and conclusive, to all intents and purposes whatever. A mandamus recited that B. was seised in fee of an ancient towing-path, on a part of the river, and to the exclusive right of towing barges at that part, taking reasonable tolls for such towing by his horses; that the commissioners made a cut, by which the barges were enabled to avoid that part of the river, dispense with the use of the horses, and withhold the tolls; that the commissioners had, by the cut, injured the old channel of the river, and made the navigation of the part aforesaid less easy and convenient, and diverted the navigation of the river from B.'s towing-path, and rendered the towing-path and his exclusive right wholly unprofitable; that B. had complained to the commissioners, and demanded compensation adequate to the injury he had sustained; that the commissioners, at a subsequent general meeting, made an order, determination and judgment, that they could not accede to B.'s application; that B. being dissatisfied with such order, appealed to the quarter sessions, who ordered the commissioners to pay B. 1,000*l.* in full compensation for the injury sustained by him, and 200*l.* costs, which they refused to pay, and the writ commanded them to pay. Return: That the commissioners, believing B. had no claim to compensation, did not hear evidence on the complaint, or the amount of the alleged loss, and notified to B. that they refused to accede to his application; that B., treating this refusal as an order, appealed; that on the appeal the commissioners objected that the refusal was not an order, but the quarter sessions overruled the objection; that the cut enabled navigators to avoid a dangerous bend of the river; that B. was no further entitled to the path than as owner of the land; that they had not obstructed his towing-path, nor placed any obstacle to the navigation against the towing-path; that parties might, as they sometimes did, still navigate by the old channel:—Held, first, that the refusal of the commissioners was an order, determination and judgment, from which an appeal lay to the sessions; secondly, that the sessions had jurisdiction to award compensation to B., both for the damage suffered by his towing-path being obstructed, and for the obstruction of the old navigation; thirdly, that the order of sessions was final and conclusive, and must be held to have been made on both complaints, inasmuch as the return (assuming it to negative the obstruction of the navigation) did not deny that the sessions had

found such obstruction. *Reg. v. Thames and Isis Navigation*, 5 A. & E. 804.

**—Evidence of—Onus probandi.]**—Provisions in different acts of parliament appointed conservators of a river navigation and gave them full powers to do what was necessary for carrying the object of the acts into effect, including powers to purchase land and levy tolls. The conservators executed the powers of the acts so far as related to the improvement of the river navigation and the making of towing-paths, and they levied tolls. There was no evidence that they had actually purchased any of the land that lay along the course of the navigation, and had been used to form the towing-paths:—Held, that, as the acts might be carried into effect without purchasing, the burden of proof lay on the conservators to shew that they had purchased; and since they had failed to shew it, though they were entitled to an injunction to prevent any owner of adjoining land from so using the towing-paths as to obstruct in any way their free use for the purposes of the navigation, they were not entitled to be treated as owners of the soil of the towing-paths. *Lee Navigation Conservators v. Button*, 6 App. Cas. 685; 51 L. J., Ch. 17; 45 L. T. 385; 30 W. R. 233; 46 J. P. 164—H. L.

**Liability for Damage caused by Non-Repair.]**—A corporation constituted for the purpose of the upper navigation of the river Thames by the Thames Navigation Act, 1866 (29 & 30 Vict. c. 89), and under the powers of that act, and of the previous statutes relating to the navigation which had become vested in them, had constructed bridges and other works, and had acquired the right to use the whole of the towing-paths along the river, and to take toll for the same. In the exercise of such right the corporation took an aggregate toll in one sum for the use of the entire navigation and towing-paths, which included the works it had constructed, as well as the natural soil which had been worn into the track of a towing-path. Part of such natural towing-path got into a dangerous state by the action of the water, and in consequence thereof the horses of the plaintiff, whilst using it in towing a barge, for which the proper toll had been paid to the corporation, fell into the river and were drowned:—Held, that as the corporation took one toll for the use of the entire towing-path, parts of which were artificial, it mattered not that the place where the accident happened was not artificial, but that it was its duty to take reasonable care that the whole of the towing-path was in such a state as not to expose those using it to undue danger, and that for a neglect of such duty the corporation was responsible to the owner of the horses, although they were a public body receiving their powers for public purposes. *Winch v. Conservators of the River Thames*, 9 L. R., C. P. 378; 43 L. J., C. P. 167; 31 L. T. 128; 22 W. R. 879—Ex. Ch.

Where it appeared that for making the towing path of a canal the ownership of the soil was not necessary for the purpose:—Held, that a mere easement and not the soil had been acquired by the company. *Badger v. South Yorkshire Railway and River Don Company*, 1 El. & El. 347; 28 L. J., Q. B. 118; 5 Jur., N. S. 459; 3 L. T. 449; 9 W. R. 158—Ex. Ch.

## 3. OBSTRUCTION OR INJURY.

## a. What Amounts to, &amp;c.

**Weirs.**—A weir appurtenant to a fishery, obstructing the whole or part of a navigable river, is legal if granted by the crown before the reign of Edw. 1. *William v. Wilcoor*, 8 A. & E. 314; 3 N. & P. 606; 1 W., W. & H. 477.

If the weir when so first granted obstructs the navigation on only a part of the river, it does not become illegal by the stream changing its bed, so that the weir obstructs the only navigable passage remaining. *Id.*

Where the crown had no right to obstruct the whole passage of a navigable river, it had no right to erect a weir obstructing a part, except subject to the right of the public; and therefore, in such a case the weir would become illegal upon the rest of the river being so choked that there could be no passage elsewhere. *Id.*

The 12 Edw. 4, c. 7, relates to navigable rivers only, and though weirs in navigable rivers are illegal unless they existed before the time of Edw. 1, such an easement may be acquired in private waters by grant from other riparian owners, or by enjoyment, or by any means by which such rights may be constituted. *Rolle v. Whyte*, 3 L. R., Q. B. 286; 37 L. J., Q. B. 105; 17 L. T. 560; 16 W. R. 593; 8 B. & S. 116.

**Loading Staiths.**—When on the trial of an indictment for a nuisance in a river, by erecting staiths for loading ships with coal, the judge left the following points to the jury:—whether they were erected in a reasonable part of the river; whether reasonable space was left for navigation; whether loading the vessels by means of them was a public benefit; whether they extended farther than was required, and whether the public benefit produced was greater than the public injury sustained: and he pointed out to the jury, among other benefits, that by means of the staiths the coals were supplied at a cheaper rate, and in better condition than they otherwise could be:—Held, to be a proper direction. *Rex v. Russell*, 6 B. & C. 566; 9 D. & R. 566. See also cases ante, col. 519.

**Wharfs and Jetties.**—A wharf-owner drove piles into the bed of a river, extending the wharf so as to occupy three feet out of a breadth of about sixty feet available for navigation:—Held, that this was such an obstruction as would be restrained at the suit of a corporation empowered by act of parliament to remove obstructions. *Att.-Gen. v. Terry*, 9 L. R., Ch. 423; 30 L. T. 215; 22 W. R. 395.

The plaintiff and defendant were opposite riparian proprietors on the banks of a navigable tidal river:—Held, that the defendant could not, for the protection of his own soil or otherwise, construct a jetty projecting into the bed of the river, whereby the tidal water was thrown with greater violence upon the plaintiff's shore, and the public navigation of the river was or might be impeded; and that a suit by information and bill in equity to restrain the erection of such a jetty was properly instituted. *Att.-Gen. v. Lonsdale (Earl)*, 7 L. R., Eq. 377; 38 L. J., Ch. 335; 20 L. T. 64; 17 W. R. 219.

Held, also, that the fact of the river traffic having been almost entirely superseded by local causes did not affect the right of the public to have the navigation conserved. *Id.*

Action for navigating a vessel in the Thames in so negligent and unskilful a manner that she struck against and damaged a wharf and jetty. A plea that the wharf and jetty were constructed within the flow of the tide, and below low-water mark, and obstructed part of the bed and course of the river, which was a public navigable river and highway for all the Queen's subjects, with vessels, to navigate over and along at all times, at their free will; and that the wharf and jetty had been constructed, and wrongfully obstructed the liege subjects from navigating in, over or along the part of the bed and course of the river with vessels, to the common nuisance of the liege subjects; and that they could not navigate in, over or along the part of the bed and course of the river, unless the wharf and jetty were damaged: that the plaintiff had notice of the premises, and wilfully continued the nuisance: that the defendant "had occasion to pass with the vessel over that part of the bed and course of the river, and in so passing did the damage mentioned, and that he navigated the vessel with all the skill and care which would have been due and proper had not that part of the bed and course of the river been obstructed, and that he did no unnecessary damage:"—Held, after verdict for the defendant, that the plea was proved, though the nuisance did not reach low-water mark, and there was no evidence that the plaintiff constructed the nuisance, and the defendant did not disprove negligence; but that the plea was bad for not alleging either a necessity to navigate the vessel over that part of the river where the nuisance was, or that the defendant's right course was over that part of the river, and that it would have been inconvenient and difficult to have taken any other course by which the nuisance might have been avoided. *Dimes v. Petley*, 15 Q. B. 276; 19 L. J., Q. B. 449; 14 Jur. 1132.

One who erects or keeps erected on the shore of a navigable river between high and low water-mark a work for the more convenient use of his wharf adjoining, which work, either from its original defective construction, or from want of repair, presents a dangerous (hidden) obstruction to the navigation, is responsible for an injury thereby occasioned to a barge coming to the wharf, without any default on the part of the persons in charge of it. *White v. Phillips*, 15 C. B., N. S. 245; 33 L. J., C. P. 33; 10 Jur., N. S. 425; 9 L. T. 388; 12 W. R. 85.

— **Vessels Moored to.**—In a public navigable river a decked barge or a dummy is firmly moored alongside a quay, so as to be a private nuisance to persons having a right to land from the river on the quay; if it is so fixed as not to be readily abateable, any such person may pass over such dummy in order to get to the quay, there being no other route available, where his so passing over it is not more injurious to the owners of it than the removal would be; and especially if to have removed it would have caused such person injurious delay in his affairs and business. *Eastern Counties Railway Company v. Dorling*, 5 C. B., N. S. 821; 28 L. J., C. P. 202; 5 Jur., N. S. 869.

But he is not entitled so to use the barge as a means of passage, except in such states of the tide as, but for the barge, would have enabled him to land directly on the quay, and when the barge is

therefore an obstruction and a nuisance to his right of way. *Ib.*

A. was possessed of a wharf, and had a mast projecting therefrom over the river. B. moored his vessel at the adjoining wharf, with her bowsprit overhanging the front of A.'s wharf, and, on the falling of the tide, the bowsprit of B.'s vessel coming in contact with A.'s mast, broke it:—Held, that B. was not responsible. *Dalton v. Denton*, 1 C. B., N. S. 672.

A riparian owner has a right to moor a vessel of ordinary size alongside his wharf for the purpose of loading or unloading, at reasonable times and for a reasonable time. *Original Hartlepool Collieries Company v. Gibb*, 5 Ch. D. 713; 46 L. J., Ch. 311; 36 L. T. 433.

The court will restrain by injunction the owner of adjoining premises from interfering with the access of such vessel, even though the vessel may overlap his own premises; though such vessel would not be allowed to interfere with the proper right of access to the neighbouring premises if used as a wharf, nor to the free entrance to or exit from such premises, if used as a dock, by other vessels. *Ib.*

The plaintiffs were owners of a wharf 125 feet long on a navigable river, and of a collier boat 176 feet long, which stopped there at intervals of time for the purpose of unloading, and while there necessarily projected over part of the defendant's wharf, close to the entrance of a dock where he carried on the business of repairing ships, the wharf itself not being used. The defendant moored a raft of timber used in his business in front of his own wharf, so as to interfere with the access of the collier to her berth:—Held, that the raft was an obstruction to the navigation; and that the collier had a right to come at reasonable times to, and remain a reasonable time alongside of, the wharf of the plaintiffs, although she projected over the defendant's wharf while doing so. *Ib.*

**Landing-Stage—Anchor.**—By a local act a local board of health was authorized to construct in conformity with certain deposited plans, "and upon the lands delineated upon the plans," a pier or landing-stage, "together with such other works and conveniences in connexion therewith" as it should from time to time think fit. Before the landing-stage was commenced plans of the proposed works were to be deposited at the Admiralty for approval. The local act was to be executed subject to the powers and provisions of the Public Health Act, 1848, s. 139 of which requires notice of action "for anything done or intended to be done" under the provisions. The local board deposited plans (differing in extension from the plans under the act) which received the approval of the conservators of the river, representing the Admiralty, and constructed the landing-stage in conformity therewith. The landing-stage was a floating one, and was moored by anchors lying in the bed of the river. The position of the anchors was indicated by a buoy, which, being carried down by the tide, became concealed from view. One of the anchors becoming displaced, stove in and swamped a vessel which was lawfully navigating the river:—Held, first, that the anchor, although placed where it was for the benefit of the public, was an obstruction which the local board could not have created without statutory authority, and was a nuisance to the river. *Jolliffe v. Wallasey*

*Local Board*, 9 L. R., C. P. 62; 43 L. J., C. P. 41; 29 L. T. 582.

Held, secondly, that the local board was guilty of negligence in its management of the buoy, but that inasmuch as the plans had received the approval of the Admiralty, such approval was tantamount to the sanction of the act, so as to entitle the board to the statutory notice of action. *Ib.*

**Railway Embankments.**—A declaration stated that there was a public navigable river, called the Ouse, the waters of which of right flowed along the east and west sides of a certain island, without any obstruction to the navigation thereof; that the plaintiff was possessed of barges navigating it, and along the river to the east of the island; yet the defendants wrongfully and injuriously put earth into the bed of the river to the east of the island, and filled up the ancient channel, and penned up the water, and prevented it from flowing in its usual channel, whereby the plaintiff was prevented from navigating his barges in the ancient course. Plea, that the defendants were a railway company incorporated by an act embodying the Land and Railway Clauses Act, 1845. That by the special act it was enacted, that, subject to the provisions of that act and of the incorporated acts, it should be lawful for the defendants to make and maintain the railway in the line and on the land delineated and described in the plans and books of reference. That the part of the bed of the river was in the line and among lands so delineated and described, whereupon the defendants, for the purpose of constructing the railway under the powers in the acts, entered on the part of the bed of the river, and made part of the railway thereon, and committed the grievances, the same being necessary for the making the railway. On the trial, the allegations in the plea were proved as laid; but the defendants gave no evidence of the preliminary steps having been taken, which would have been necessary under the acts if they had sought to have the ownership of the locus in quo vested in them as purchasers under the acts:—Held, first, that as the declaration did not claim for the plaintiff any interest in the soil, but merely a public right of way, the question of ownership was irrelevant, and it was not necessary for the defendants either to allege or prove that such preliminary steps had been taken. *Abraham v. Great Northern Railway Company*, 16 Q. B. 586; 20 L. J., Q. B. 322; 15 Jur. 855.

Held, secondly, that the first clause of s. 16 of the Railway Clauses Act (as to works to be executed by the company) empowers companies to execute such works in navigable rivers, and is not, by the second clause of that section, restricted to works in rivers not navigable. *Ib.*

Held, thirdly, that although the proviso at the end of s. 16 requires that, in the exercise of the powers, the company "shall do as little damage as can be," the plea, which did not allege that the company had done as little damage as could be, was not bad for that omission. *Ib.*

**Effect of Non-User.**—The defendants having erected on their own premises a permanent obstruction to a navigable drain leading from a river through their premises to the plaintiffs' close:—Held, that an action lay by the plaintiffs notwithstanding the portion of the drain, which passed through their close, had for sixteen years been completely choked up with mud. *Boucaux v.*

*Hill*, 1 Bing. N. C. 549; 2 Scott, 535; 1 Hodges, 334.

**User—In Derogation of Grant.**—A. being the owner of land adjoining a navigable lake, the bed of which was the soil and freehold of the plaintiff, granted to the defendants a right of way, and made a pier, part of which was upon his own land, and part upon the bed of the lake. He then leased the pier and the land belonging to him to a steam-boat company, who used the pier for the purpose of landing and embarking passengers. If the pier had not been built on the bed of the lake, they might have brought their steam-boats sufficiently near to be able to land their passengers by means of a temporary stage reaching from their boats to the land so leased to them, and upon which part of the pier was built. The public had a right to navigate the lake, and the plaintiff had not removed the pier, although it had been erected without his consent and against his will.—Held, that he could not maintain an action against the defendants for using the pier as above stated, inasmuch as while he allowed it to remain, it was an obstruction to their right to navigate the lake, and to land and embark their passengers at that place. *Marshall v. Ulsterwater Steam Navigation Company*, 7 L. R., Q. B. 166; 41 L. J., Q. B. 41; 25 L. T. 793; 20 W. R. 144.

**Liability of Conservators—For not removing Obstruction.**—The defendants were an unpaid body of trustees created by statute conservators of the Lee, an ancient and navigable river, and were "authorized and empowered from time to time at their discretion to cleanse, scour, deepen, enlarge, or straighten the channel or course of the said river, and also to set out, open, make and maintain" certain new cuts, or canals thereinafter specified, to communicate with the river and to be used for the navigation, "and also to remove all obstructions and impediments whatsoever to the said navigation." The defendants were also by statute empowered to levy rates or tolls for the use of certain locks and artificial cuts, but were expressly forbidden to receive any tolls in respect of such part of the navigation as was between Bow Creek and Old Ford Lock, which part of the navigation was an ancient highway, and was by statute declared to be for ever free from toll. The plaintiff's barge, while navigating a part of the river between Bow Creek and Old Ford Lock, struck upon one of several submerged piles and was injured. The plaintiffs having brought an action for damages, the jury found that the piles were dangerous; that the defendants ought to have been aware of the danger, and had neglected their duty.—Held, that the action could not be maintained, since the defendants were unpaid trustees appointed for public purposes in aid of the common law right of navigating an ancient highway, and the duty of removing obstructions imposed by the statute was discretionary and not compulsory. *Forbes v. Lee Conservancy Board*, 4 Ex. D. 116; 48 L. J., Ex. 402; 27 W. R., 688.

Where damage was caused to a ship by striking on a mud bank which the defendants, who were empowered to take toll for the navigation, had neglected to remove.—Held, that they were liable, though the tolls were not applied to the use of the company. *Mercsey Docks v. Gibbs*,

1 L. R., H. L. 93; 35 L. J., Ex. 225; 12 Jur., N. S. 571; 14 L. T. 677; 14 W. R. 872.

By a local act, persons were incorporated for the purpose of improving the navigation of a river; and they were empowered to take tolls in respect of the transit or conveyance of goods thereon.—Held, that in the absence of any express enactment on the subject in the act, the duties of the company were confined to matters relating to the navigation, and that they were not liable for the sewerage of the river, as to clear away weeds, which, though injurious to the adjoining lands, were no detriment to the navigation. *Parrett Navigation Company v. Robins*, 3 Rail. Cas. 383; 10 M. & W. 593; 12 L. J., Ex. 81.

**—Abstraction of Water.**—A local act empowered certain persons to make the river Kennet navigable, and to dig and cut through the banks of the river, and to erect in the river, and upon the lands adjoining, weirs, pons, dams, &c., and to do all matters and things necessary for making and maintaining or improving the navigation, the undertakers first giving satisfaction to the owners of such lands, weirs, &c., as should be digged, cut or removed, or otherwise made use of, as the commissioners named for the purpose should direct, in case the undertakers should not beforehand have agreed with the proprietors of such lands and hereditaments concerning the same. Commissioners were appointed to mediate between the undertakers and the owners of lands and hereditaments intended to be made use of, and to settle satisfaction for such portion of the lands as should be cut, digged, or made use of; and a provision was made for filling up vacancies in the body of the commissioners. If any person should sustain damage in his mills, by the owners of the navigation taking away or diverting the water, or any similar injury, the commissioners should, by a jury empanelled as therein directed, assess such damage and award compensation to the party injured. The proprietors of the navigation obstructed the water flowing to a mill by the erection of a dam under the powers of the act. All the commissioners under the act had died, and there were no commissioners in existence by whom compensation could be assessed.—Held, by Wightman, J., Erle, J., and Crompton, J., that the powers of the proprietors to raise weirs for the necessary purposes of the navigation did not cease by reason of the right of the mill-owner to recover compensation for consequential damages through the commissioners being lost; and, by Lord Campbell, C. J., that the power to raise the weir and cut off the water flowing to the mill, could only be exercised during the continuance of the body of commissioners, and that upon their extinction the extraordinary powers of the proprietors ceased. *Kennet and Avon Canal Navigation v. Witherington*, 18 Q. B. 531; 21 L. J., Q. B. 419.

An act for making a navigable communication for ships between the city of Norwich and the sea empowered a company to erect a lock or a sluice, with proper stop-gates, to prevent the waters of a "broad" and certain navigable rivers from flowing into a lake, and to make an entrance cut from that lake to the sea. S. 3 provided, that nothing in the act contained should authorize or enable the company to divert or abstract any of the waters of the broad or rivers for any purpose whatsoever, except for the pur-

pose of supplying certain intended cuts with water, and for the purposes of locking ships or vessels from or into the lake. This entrance cut from the lake into the sea was constructed under the act, and the level of the water in the lake was kept lower than the level of the broad and rivers. The lock was made with proper gates in pursuance of the act. By several acts the lock and works became vested in the Norfolk Railway Company; it was provided that "the Eastern Counties Railway Company should have, as between themselves and the other company (but subject to such division and apportionment of gross receipts as is therein mentioned), the exclusive possession, use, enjoyment and receipt of all the property, rights, &c., of the works in the same manner as the Norfolk Railway Company have become entitled to the same, under or by virtue of the respective acts or otherwise; that the Eastern Counties Company should at all times repair and keep up the works with the appurtenances;" and that the powers of the Norfolk Railway Company should be exercised by the Eastern Counties Company. By 17 & 18 Vict. c. cxxx. s. 2, the agreement was confirmed, and by s. 11, the Eastern Counties Company was to use, work, regulate and manage the five undertakings (in the act mentioned) as if they were one undertaking. By s. 12, the powers granted to the companies, by virtue of the recited acts, or any of them, with respect to the user, working, regulation and management of their respective railways, works and undertakings, were to be exercised and enjoyed by the Eastern Counties Railway Company, under the same regulations and restrictions as were, by the recited acts relating to that company, imposed on that company. After the making of the agreement, the Eastern Counties Railway Company entered into possession of the lock and works, and the Norfolk Railway Company was not in possession. At the time of making the agreement, the lock had been allowed to become out of repair, and such want of repair continued after the lock and works came into the possession of the Eastern Counties Railway Company, and during all that time large quantities of water escaped from the broad and rivers into the lake:—Held, first, that such water was diverted or abstracted contrary to the prohibition in the first-mentioned act. *Preston v. Norfolk Railway Company*, 2 H. & N. 735.

Held, secondly, that the Norfolk Railway Company was not responsible for the diversion or abstraction of the waters subsequent to the making of the agreement, and the passing of 17 & 18 Vict. c. cxxx., while the lock and works were in the possession of the Eastern Counties Railway Company. *Id.*

—**Escape of Water.**—By a local act of 1859, s. 7, the corporation of York was authorized to abandon the navigation of the river Foss, which they had previously purchased, to alter the channel, and to remove locks or works connected with the navigation; but before removing any locks the corporation was to make due provisions for the escape or disposal of the water held up by such locks or theretofore accustomed to flow along or into the channel of the navigation, so as to prevent the same from overflowing or otherwise damaging the adjacent lands. By s. 19, the corporation at their own expense was to make, and for the period of five years

maintain, such arches, drains and passages as should in consequence of any alteration of the navigation be necessary and sufficient to convey the water from the lands adjoining the navigation into the river. The corporation abandoned the navigation and made alterations, the effect of which was that, if the channel remained in the state it then was, due provision was made for the escape of the water. They, however, took no measures to prevent the navigation from becoming silted up and choked with weeds, and in consequence the land adjoining the river about a mile above the alterations was flooded during an extraordinary rainfall, and the grass was damaged:—Held, that the corporation was not responsible for this damage. *Hodgson v. York (Mayor)*, 28 L. T. 836.

#### **Abstraction by Persons not Riparian Owners.]**

—By a statute a company was incorporated and empowered to do all things necessary to make the river Medway navigable; and the river or streams so to be made navigable, and all lands, tenements, and hereditaments to be by them made use of for the benefit of the navigation, were thereby vested in the company:—Held, that the statute conferred on the company such an interest in the whole of the water of the river and streams, for the purposes of the navigation, as to entitle them to sue persons abstracting part thereof, such persons not being riparian proprietors, and applying it to purposes more extensively than the rights of riparian proprietors cover; and that the company might sue independently of any question of actual damage to the navigation by reason of such abstraction. *Medway Navigation Company v. Romney (Earl)*, 9 C. B., N. S. 575; 30 L. J., C. P. 236; 7 Jur., N. S. 846; 9 W. R. 482.

**Right to Soil of River—Trespass.**—By 16 & 17 Car. 2, c. 12, certain persons were authorized to make navigable the river Itchen and certain other rivers, and to cut, dig and make new channels, and to deepen or widen the river, channels, &c., and to do all that might be fit for navigation, and to build locks, &c., upon any of the lands adjoining the rivers, and to make towing-paths; and it was expressly provided that the undertakers should not make any trench, river or watercourse, or use the locks, upon the land of any person, until a full agreement with and satisfaction to the owners of the land had been made by the commissioners appointed by the act, or by the persons authorized to make the navigation, nor until satisfaction should be paid to the owners of the lands, according to the determination of the commissioners, or by agreement, by the undertakers of the navigation. By a subsequent clause, the commissioners were to determine what satisfaction any person should have in respect of any prejudice, loss or damage sustained for such proportion of his lands next adjoining to the navigation as should be made use of for the purposes of the act, in case the undertakers of the navigation should not have agreed beforehand, and satisfied the party so damaged. But the act contained no clause giving the undertakers any power to purchase lands, nor did it recognize in them any right of soil in the beds or banks of the rivers intended to be made navigable. Where a river, mentioned in the act, was made navigable by certain undertakers

in 1702, and their successors exercised for a long series of years various acts of ownership and enjoyment of the banks, by cutting bushes, &c., and had granted a lease of hatches and sluices, made in one of the banks, to an occupier of land adjoining thereto, for the purpose of irrigation, and there was no proof of any agreement between the undertakers and the original proprietors of the land for the purchase of the soil of the bank:—Held, that by virtue of the provisions of this act, the proprietors of the navigation did not necessarily acquire such an interest in the soil in a bank adjoining to, and formed out of the earth excavated from a new channel made for the first time under the act, as would enable them to maintain trespass; and that such an agreement could not be presumed from these acts of ownership and enjoyment, when opposed to similar acts exercised by the occupier of the adjoining land, and that the act afforded strong evidence against such presumption. *Hollis v. Goldfinch*, 2 D. & R. 316; 1 B. & C. 205.

**Preventing Obstruction.**—By a public act passed in the reign of Henry 8, the corporation of the city of Exeter was empowered to remove obstructions to the navigation of the river Exe, paying compensation to the owners of the soil, where the obstructions were situated:—Held, first, that this act did not confer the conservancy of the river on the corporation. *Exeter (Corporation) v. Devon (Earl)*, 10 L. R., Eq. 232; 18 W. R. 879.

Held, secondly, that it did not entitle the corporation to file a bill in equity to restrain the erection of a pier in the river. *Ib.*

Held, thirdly, that it did not confer any right or privilege on the corporation within the General Pier and Harbour Act, 1861, s. 14, so as to prevent the erection of a pier in the river without their consent being obtained. *Ib.*

**Sunk Vessels — Liability of Owner.**—The owner of a vessel sunk in a navigable river is bound to place a buoy over the wreck, and it is not enough to station a watchman near the spot to point out the danger. *Harmond v. Pearson*, 1 Camp. 515.

Where a vessel is sunk by accident, and without any default in the owner or his servant, in a navigable river, and remains there under water, no duty is ordinarily cast upon the owner to use any precaution by placing a buoy or otherwise to prevent other vessels from striking against it. *Brown v. Mallett*, 5 C. B. 599; 17 L. J., C. P. 227; 12 Jur. 204.

Where a vessel is sunk by unavoidable accident in a public navigable river, whether in the usual track of navigation or not, it is the duty of the owner, so long as he continues to have the possession and control of the vessel, to take due precaution to prevent injury to other vessels by their striking against it, and this obligation may be transferred with the transfer of the possession and control to another person, and on the abandonment of the possession and control the obligation ceases. *White v. Crisp*, 10 Ex. 312; 2 C. L. R. 1215; 23 L. J., Ex. 317.

An indictment does not lie against the owner of a vessel, sunk by accident or misfortune in a navigable river, for not removing it. *Re v. Watts*, 2 Esp. 675.

**Oysters—Persons Damaging in Navigation.]**

—If property (as oysters) is placed in the channel of a public navigable river, so as to create a public nuisance, a person navigating is not justified in damaging such property, by running his vessel against it, if he has room to pass without so doing; for an individual cannot abate a nuisance if he is not otherwise injured by it than as one of the public. *Colchester (Mayor) v. Brooke*, 7 Q. B. 339; 15 L. J., Q. B. 69; 9 Jur. 1090.

#### b. Actions for.

**Flooding.**—Where a plaintiff declared that he was navigating his barges laden with goods along a public navigable creek, and that the defendant wrongfully moored a barge across, and kept the same so moored thence hitherto, and thereby obstructed the public navigable creek, and prevented the plaintiff from navigating his barges so laden; per quod he was obliged to convey his goods a great distance over land, and was put to trouble and expense in the carriage of his goods over land:—Held, that this was such a special damage for which an action upon the case would lie. *Rose v. Miles*, 4 M. & S. 101.

A count stating that the plaintiff was possessed of a messuage abutting on a public navigable river, and by reason thereof was accustomed, and of right entitled, to have free use and navigation of the river, for the purpose of passing in boats and conveying goods to the messuage, and convenient access to the messuage from the river, but that the defendant fixed barges, planks and logs of wood, in that part of the river near the messuage, and kept and continued the same, and thereby hindered the plaintiff from having the free use of the river, and passing in boats and conveying goods to and from the messuage, and he was thereby put to expense in endeavouring to remove the obstructions, and was obliged to convey the goods in a longer and more inconvenient route, is good, as sufficiently shewing a particular injury to the individual. *Dobson v. Blackmore*, 9 Q. B. 991; 16 L. J., Q. B. 233; 11 Jur. 556; *S. P.*, *Rose v. Groves*, 5 M. & G. 613; 6 Scott, N. R. 645; 1 D. & L. 61; 12 L. J., C. P. 251; 7 Jur. 951.

**— Allegation of Duty in Defendants.]**—A declaration stating that the defendants were possessed of a mooring anchor, which was kept by them fixed in a known part of a navigable river, covered by ordinary tides; that the anchor had become removed into and remained in another part of the river covered by ordinary tides not indicated; whereof the defendants had notice; and although they had the means and power of refixing and securing the anchor and indicating it, they neglected so to do; whereby the plaintiff's vessel, whilst sailing in a part of the river ordinarily used by ships, ran foul of and struck against the anchor, and was thereby damaged, is bad, for not shewing that the defendants were privy to the removal of the anchor, or that it was their duty to refix it and indicate it. *Hancock v. York, Newcastle and Berwick Railway Company*, 10 C. B. 348.

A declaration alleged that the defendant was possessed of a wharf for loading and unloading vessels on the banks of the river Thames, near to which wharf there was certain wood work, placed by the defendant at the bottom of the river, over which wood work, at certain states of the tide, a ship would float, but at others would

not; that the plaintiff was possessed of a ship, which was, by sufferance and permission of the defendant, at and alongside the wharf, for reward in that behalf to the defendant; and that the defendant had the management and control of the wharf, and the mooring and stationing of ships at and near the same, while such ships were at the wharf for the purpose of using the same. Breach, that the defendant so unskilfully and negligently moored and stationed the plaintiff's ship in that part of the river, over the wood work, that it was greatly injured:—Held, that the declaration sufficiently alleged a duty, on the part of the defendant, to moor and station the plaintiff's ship safely, and that the breach was well stated. *Curling v. Wood (in error)*, 16 M. & W. 628; 17 L. J., Ex. 301; 12 Jur. 1055—Ex. Ch.

#### c. Indictments for.

**Remedy by Statute.]**—The 19 Geo. 2, c. 22, s. 1, which imposed a penalty for the offence of throwing ballast into navigable rivers, is repealed impliedly by 54 Geo. 3, c. 159, s. 11, which provides a different punishment for the same offence, and prescribes a different mode of procedure. *Mitchell v. Brown*, 1 El. & El. 267; 28 L. J., M. C. 53; 5 Jur., N. S. 707.

**Persons Liable — Diversion of Water for private Protection.]**—On indictment for nuisance to a canal established by act of parliament, it appeared that the canal was carried across a river and the adjoining valley by means of an aqueduct and embankment, in which were several arches and culverts: that a brook fell into the river above its point of intersection with the canal; and that in times of flood the water which was then penned back into the brook overflowed its banks, and was carried by the natural level of the country to the arches, and through them to the river, doing however much mischief to the lands over which it passed: that except for the nuisance after mentioned, the aqueduct would be sufficiently wide for the passage of the river at all times, but those of high flood, notwithstanding the improved drainage of the country which had increased the body of water: that the occupiers of lands adjoining the river and brook had, for the protection of their lands, subsequently to the making of the canal, aqueduct, and embankment, erected or heightened artificial banks called fenders on their properties, so as to prevent the flood-water from escaping as above mentioned; and that the water had consequently in time of flood come down in so large a body against the aqueduct and canal banks as to endanger them and obstruct the navigation; that the fenders were not unnecessarily high, and that if they were reduced many hundred acres of land would again be exposed to inundation:—Held, that the occupiers were not justified in altering for their own benefit the course in which the flood-water had been accustomed to run, and consequently they were indictable. *Reg. v. Trafford*, 1 B. & Ad. 874. See *S. C. (in error)*, 1 M. & Scott, 401; 2 C. & J. 265; 8 Bing. 204.

**— Erection of Buildings or Works.]**—The erection of any building in a port or a navigable river, which of itself is such a hindrance to the

navigation as to amount to a nuisance, is an indictable misdemeanor, although such building is productive of collateral benefit, sufficient, in the opinion of the jury, to counterbalance the injury done to the navigation. *Reg. v. Ward*, 6 N. & M. 38; 4 A. & E. 384; 1 H. & W. 703.

The defendants, who were the owners of the soil adjoining a harbour, were indicted for a nuisance in erecting planks in it; a special verdict was found, but it did not distinctly appear by the verdict whether the erection was in the harbour or not. The verdict found, that by the defendants' works, the harbour was in some extreme cases rendered less secure. Assuming the erection to have been in the harbour:—Held, that consequences so slight, resulting from the acts of the defendants, did not amount to a nuisance. *Reg. v. Tindall*, 1 N. & P. 719; 6 A. & E. 143.

On an indictment for a nuisance, it was proved that the wharf (the nuisance complained of) was erected over a part of the river, between high and low water-mark, where boats were used before to pass. And, for the defendant, it was shewn that the wharf was a convenience to the public, inasmuch as boats of heavy burden could come to unlade at the wharf, which, before the building of the wharf, anchored in the middle of the river; and that the channel of the river was by this convenience kept clear:—Held, that the question for the jury was, whether the wharf occasioned any hindrance to the navigation of the river by vessels of any description, and not whether the erection of the wharf had caused a benefit to the navigation in general. *Reg. v. Randall*, Car. & M. 496.

By a statute reciting that the river Witham was formerly navigable for lighters, boats, &c., from Lincoln to the sea, and that, by sand and silt brought in by the tide, the outfall had been greatly obstructed, and was in a great measure stopped up, whereby trade and commerce had decayed, powers were given to commissioners for the purpose of restoring the navigation; and they were authorized, in order for the carrying on and effecting the navigation, to make a new cut through lands adjoining the river (not vested in the commissioners), and the navigation so made was to be open to all subjects of the realm paying tolls. The commissioners were also empowered, under certain regulations, to build bridges. The cut was made, and a more direct channel thereby created, through which the waters of the Witham passed to the sea. A company in whom the powers of the commissioners afterwards became vested by statute, built a bridge not according to the regulations, and occupying to some extent the bed of the new cut. On an indictment against them for a nuisance to the river as a public highway, the jury found specially that the company was guilty of building the bridge, but that it did not obstruct the navigation:—Held, first, that the cut was a public navigable river, the obstruction of which was an indictable offence. *Reg. v. Betts*, 16 Q. B. 1022; 4 Cox, C. C. 211; 19 L. J., Q. B. 501.

Held, secondly, that building a bridge partly in the bed of a navigable river is not necessarily a nuisance; that the question, whether in fact it is so or not in a particular instance, is for a jury; and that the verdict negating actual obstruction was in effect an acquittal. *Id.*

The judge, on a trial of an indictment for

obstructing the navigation of the Menai Straits by erecting a wall, asked the jury whether they thought the erection proved "a material nuisance," in which case they were to find a verdict of guilty; but told them that if they thought the nuisance was so slight, rare, and uncertain, that the defendant ought not to be made criminally liable for it, they were to acquit him; and on the jury saying that they considered the erection, "although a nuisance, was not sufficiently so as to render the defendant criminally liable," he directed an acquittal:—Held, per Coleridge and Crompton, J.J., and semble, per Lord Campbell, C. J., that the charge was to be understood as meaning, not that a party may legally commit a small nuisance, but that an obstruction might be so insignificant as not to constitute a nuisance: and that the jury must be understood as finding that the obstruction in question was so insignificant, and that therefore there was not a misdirection warranting a new trial. *Reg. v. Russel*, 3 El. & Bl. 942; 23 L. J., M. C. 173; 18 Jur. 1022.

— **Acts of Workman.**—The workmen of a colliery owner, in working the colliery, stacked the refuse in such a manner that it fell into a navigable river, and caused an obstruction therein. The owner was indicted for a nuisance in causing such obstruction:—Held, that not having personally superintended the works, and having given express orders to the workmen that the refuse should be deposited in a particular place where it would not do any harm, and should not be thrown into the river, did not relieve him from liability upon the indictment. *Reg. v. Stephens*, 1 L. R., Q. B. 702; 35 L. J., Q. B. 251; 12 Jur., N. S. 961; 14 L. T. 593; 14 W. R. 859; 7 B. & S. 710.

— **Accidental Sinking of Vessel.**—An indictment does not lie against the owner of a vessel, sunk by accident or misfortune in a navigable river, for not removing it. *Re v. Watts*, 2 Esp. 675.

## III. CANAL AND NAVIGATION COMPANIES.

### 1. REGULATION OF COMPANIES.

#### a. Shares.

**Nature of Property.**—Shares in canal companies are pure personalty. *Edwards v. Hall*, 6 De G., M. & G. 74; 25 L. J., Ch. 82; 1 Jur., N. S. 1189.

A canal was made under the authority of an act; the lands for that purpose were purchased and vested in a corporation, but the shares therein were to be deemed personal estate, and transmissible as such, and were to be conveyed by bargain and sale:—Held, that the shares did not bear the character of realty, so as to make a bequest of them specific. *Robinson v. Addison*, 2 Beav. 515.

**Liability of Company in respect of.**—A mandamus will lie against a company of proprietors of a canal navigation and their clerk, to compel them to make an entry of the probate of a deceased proprietor, and to register the name and place of abode of his executrix as the proprietor of one share in the profits of the navigation, belonging to the deceased at the time of his death. *Horne, Ex parte*, 7 B. & C. 632; 8 C.

nom. *Re v. Worcester Canal Company*, 1 M. & R. 529.

By a navigation act it was enacted, that on a certain day the first general meeting of the proprietors should be held, at which the company should execute a deed under their common seal for each distinct share, "which deed should respectively vest a certain share in each proprietor;" the plaintiff declared in an action against the defendant, for not completing a contract for the purchase of some shares, averring, that, on a day prior to the first general meeting, he was lawfully entitled to so many shares:—Held, that this was a material averment, and the ground of a nonsuit, as it could not be proved; though there was another clause in the act, by which certain persons by name (of whom the plaintiff was one) were made a corporation for the purposes of the act; and the money to be subscribed was to be divided into so many equal shares, "which were thereby vested in the person so subscribing," &c. *Latham v. Barber*, 6 T. R. 67.

#### b. Accounts.

#### **Authority to Execute necessary Works—**

**Passing of Accounts by Sessions.**—By an act for making and maintaining a canal, power was given to the canal company to make all such works as they should think necessary and proper for effecting, completing, maintaining, improving, and using the canal, and other works; and the company was required to lay before the sessions an account of the sums expended in making and completing the canal, up to the time of its completion; and after that, an annual account of the rates collected, and of the charges and expenses of supporting, maintaining, and using the navigation and its works; and the sessions were authorized, in case it appeared to them that the clear profits exceeded the per-centage limited by the act on the sums mentioned in the first account to have been expended by the company (i. e., in making and completing the canal and its works), to reduce the canal rates:—Held, that the sessions, even after the period fixed for the completion of the canal, and after the first account delivered of the capital expended in the undertaking, and on which the dividends were to be calculated, were not authorized to reject charges and expenses, stated in the annual account of disbursements, for new works, such as a reservoir and a steam-engine, which the company deemed necessary, and proved to have been erected for the support and improvement of the original line of canal, and for the better supplying it with water in dry seasons. *Re v. Glamorganshire Canal Company*, 12 East, 157.

By an act, a company of proprietors was authorized to make the canal, and to do all other acts which they might think necessary and convenient for the making, improving, and using the canal; and the profit of the company on the money expended in making and completing the navigation was not to exceed 8l. per cent. per annum: and in order to ascertain the clear amount of the profits of the navigation, the company was required to keep an account of the money laid out in making the canal, and of all charges incurred before the canal was completed, and also to make out an annual account, balanced to the 29th of September, of

the rates and of the charges attending the supporting, maintaining, and using the said navigation; and these accounts were to be laid before the justices at quarter sessions, and they were to reduce the rates whenever the clear profits of the navigation exceeded 8l. per cent. upon the money laid out:—Held, that the company was authorized to widen and deepen the canal, after it had been once completed (that being beneficial to the public), and that the charge of such widening and deepening was a charge attending the using of the canal. *Rea v. Glamorganshire (Justices)*, 7 B. & C. 722.

**Right to Adjourn Consideration.]**—By an act for making the river Tone navigable, conservators were appointed, and it was enacted that the accounts of the conservators should be made up to the 24th of June yearly, and the accounts so made up, and vouchers for the same, should be brought before the Bishop of Bath and Wells, or any five of the justices without the bishop, between the first day of August and the then next general sessions of the peace to be held for the county of Somerset, at a place appointed by the bishop, or by any five of the justices without the bishop, then and there to be examined, stated, and corrected; and the accounts, whether or not the same should have been examined and corrected by the bishop and justices, were to be brought before the bishop and justices, or any five of the justices in the absence of the bishop, at the opening of the court at the next quarter sessions to be held after the first day of August yearly; and the bishop and justices at the sessions, or any five of the justices in the absence of the bishop, were required to examine, state, and allow the accounts of the conservators, and that allowance was to be final and conclusive:—Held, that the bishop and justices were bound to examine, state, and allow the accounts, at the first sessions, and had no authority to adjourn the examination to a subsequent session. *Bridgewater Canal Company v. Bluet*, 10 B. & C. 393.

## 2. PURCHASE OF LANDS.

**Conveyance—Inrolment of.]**—Where a company was authorized by an act to purchase lands necessary for the navigation, and was required to inrol the conveyances of such purchased lands with the clerk of the peace, copies whereof were to be good evidence in all courts, the court, after a lapse of sixty-five years from the time of the purchase of certain lands, during which no application had been made to the company to inrol the conveyances, refused to grant a mandamus to that effect on the refusal of the company to do so. *Reg. v. Leeds and Liverpool Canal Company*, 3 P. & D. 174; 11 A. & E. 316.

**Necessity of Writing.]**—Under an act, proprietors of lands were authorized to contract for, sell, and convey their lands to a canal company; such "contracts, agreements, sales, exchanges, conveyances and assurances," were to be valid to all intents and purposes; were to be inrolled with the clerk of the peace, and copies thereof to be evidence; and, upon payment of the sum agreed on for the purchase of lands, such lands were to be vested in the canal company:—Held, that a conveyance of land under this act must be in writing. *Doc d. Robins v.*

*Warwick Canal Company*, 2 Bing. N. C. 483; 2 Scott, 717.

Where an act enacted, in one clause, that after any land should have been set and ascertained for making the canal, it should be lawful for all persons seised or possessed of or interested in such lands, to contract for, sell and convey them to the company, and that all such contracts, sales, and assurances should be valid and effectual in law, and all such contracts, &c., should be made at the expense of the company and inrolled with the clerk of the peace, and copies signed by the clerk of the peace should be evidence; and a subsequent clause enacted, that upon payment of such sums of money as should be contracted or agreed for between the parties, or determined and adjusted by the commissioners, or assessed by a jury, in manner thereinbefore mentioned, the lands should be vested in the company:—Held, that, by reference to the former clause, the contract, in order to vest the lands in the company, must be in writing, and that, therefore, proof of payment by the company, for particular lands identified in evidence, was not sufficient proof of title in the company. *Harborough (Earl) v. Shardlow*, 7 M. & W. 87; 2 Railw. Cas. 253.

**Presumption of Agreement—Acquiescence.]**—A canal company having power to purchase lands for gross sums or for annual rent-charges, to be determined by commissioners in cases of disability, took possession of the lands of an infant, on an agreement with his tenant, and after an award by the commissioners of the gross sum or annual rent-charge which ought to be paid, but which award was invalid, no one being party to it who had power to bind the infant's interest, the awarded gross sum was paid by the company to the steward, on an agreement for its return if the land was not conveyed to the company on the infant attaining his majority. No conveyance was executed and the purchase-money was returned, but the company continued in the use of the land for their canal, paying to the landowner for forty years after he attained his majority a rent of nearly the amount awarded by the commissioners. The company also, with his knowledge, purchased the interests of leaseholders in the land:—Held, first, that an agreement could not be presumed to have been entered into or ratified by the landowner for a sale of the fee in consideration of a rent-charge. *Somersetshire Coal Canal Company v. Harecourt*, 2 De G. & J. 596.

Held, secondly, that an ejectment brought by the landowner and the intended erection of a bridge by him, ought to be restrained by injunction on the ground of acquiescence, the company undertaking to put in force their parliamentary powers (which had not expired), to acquire the land. *Ib.*

**Rights Incidental to Conveyance—Exclusive Letting of Boats.]**—A company was empowered by an act to make a canal, and to purchase lands for the purpose of the navigation, and upon payment of the purchase-money the fee simple of the lands was to be vested in the company for the use of the navigation, but to or for no other use or purpose whatsoever. By a subsequent act the company was empowered to make a reservoir, for the purpose of supplying the canal with water, and to purchase land for

that purpose, and all the powers of the first act were extended to making the reservoir. The acts contained various clauses reserving rights of fishery to the owners of the lands through which the canal and reservoir were made, and enabling them to use pleasure boats thereon without paying toll, but prohibiting the passage of any boats carrying passengers or goods for hire, except upon payment of toll. The canal and reservoir, and all the rights of the canal company, were subsequently vested in a railway company by act of parliament, in the same manner and to the same extent as the canal company could have held or used the same, and all the powers of the canal acts were extended to the railway company. The canal company purchased from the plaintiff's ancestor land, upon which the company made the reservoir, and took a conveyance of it in fee to a trustee for the company. Two questions being raised, first, whether the railway company could lawfully let out boats for hire upon the reservoir; and secondly, whether they could lawfully use the reservoir for any other purposes than for supplying the canal with water:—Held, by Lord Campbell, C. J., that, under these statutes, there was not a universal prohibition against the railway company using the reservoir for any other purpose, except that of feeding the canal, but that all uses of it, whether by pleasure boats or otherwise, other than for the purposes of navigation, whereby the grantor of the land, or his heirs or assigns, were prejudiced, was unlawful, but that the plaintiff, not being a shareholder, could not rely upon the improper applications of the corporate funds to this purpose. Per Coleridge, J., and Wightman, J., that the railway company could not lawfully let out pleasure boats for hire upon the reservoir, or use it for any other purposes of profit, except those contemplated by the statutes under which they were incorporated, as the land was vested in them for the use of the navigation, and for no other use or purpose, and also because such use of the reservoir would derogate from the rights of adjacent landowners; and lastly, because it involved a disposal of the corporate funds to a purpose foreign to the object of their incorporation, and might be prejudicial to the shareholders. Per Erie, J., that the canal company and the railway company acquired, by the conveyance of the land to them, all the incidents to an estate in fee simple not expressly prohibited by their acts, with the specified duty superadded of using it for the purpose of the navigation, and of not using it for any purpose inconsistent with that object, and that therefore they might lawfully use the reservoir with pleasure boats, or in any other manner which did not impede the performance of the statutory duty. *Bostock v. North Staffordshire Railway Company*, 3 C. L. R. 1027; 4 El. & Bl. 798; 24 L. J., Q. B. 225; 1 Jur., N. S. 921. See *S. C.* in equity, 3 De G. & S. 584; 25 L. J., Ch. 325; 2 Jur., N. S. 248.

**Time for—When Limited.]**—An act of the 51 Geo. 3, for making the Bridgewater and Taunton canal, after reciting that the making of that canal would be very prejudicial to the tolls authorized to be levied and collected from the Tone navigation, authorized and required the canal company within three calendar months to contract and agree with the conservators of the river Tone navigation and other persons, proprietors of shares or parts of shares, or otherwise

interested therein, for the absolute purchase of their several and respective estates, rights and interests in and to the same; and also to contract and agree with the overseers of the poor for the time being of the town of Taunton, and the several parishes of Taunton St. Mary Magdalen and Taunton St. James, for the absolute purchase of certain respective estates, rights and interests of the town and parishes, under and by virtue of the therein-recited acts. This act was repealed by the 5 Geo. 4:—Held, by Bayley and Little-dale, JJ., that the words "within three calendar months" applied to both branches of the clause, and that the canal company, therefore, was bound to have contracted within that period with the overseers of the parishes of Taunton; and not having done so, they could not afterwards compel them to sell their interest; and by Parke, J., that, whether the right to purchase that interest was limited to three months or not, at all events it was gone when the 51 Geo. 3 was repealed. *Tone v. Ash (Conservators)*, 10 B. & C. 349.

**— When not Fixed.]**—If an act is obtained by a company, authorizing them to make a canal, and for that purpose to take certain lands specified in the act, on giving compensation to the owners in the manner pointed out, but the act contains no limitation of time within which those powers are to be exercised, the company is entitled to commence those works, and avail themselves of the provisions of the act after any lapse of time, however great; and the owner, if dissatisfied, cannot restrain, and has no remedy against them in a court of law. *Thicknesse v. Lancaster Canal Company*, 4 M. & W. 472; 3 Jur. 11.

**Vesting of Title.]**—In 1779, P. demised land, of which he was seised, to M. & Co., for a term of sixty-five years. In 1794, an act was obtained by the Swansea Canal Company, for the purpose of making a canal through part of the land in question; and it was enacted that upon payment or tender of certain sums of money, adjusted by commissioners or assessed by a jury, for the purchase of any such lands, it should be lawful for the company to enter upon such lands, or before such payment or tender, by leave of the owners or occupiers; and that, thereupon, such land should be vested in the company for the purposes of the act. In 1797, and during the continuance of the lease, B. entered into an arrangement with M. & Co., the lessees, by which a canal made by the latter was extended through part of the same land, and formed a continuation of the Swansea canal. No payment or satisfaction was made or agreed to be made to the owners of the lands, but everything was done by B. with the consent and in accordance with the wishes of such owners and proprietors. Upon the termination of the lease of 1779, the assignees of the reversion brought ejectment against the assignee of B., who continued in possession of the canal made upon the land demised:—Held, that the mere consent of the owner of the property to the construction of the canal did not bring the case within the act; and that the assignees were entitled to the possession of the land. *Doe d. Patrick v. Beaufort (Duke)*, 6 Ex. 498.

**— To Ownership in the Soil.]**—A. was empowered by acts to make a canal, and he was authorized to supply the canal from brooks

within five hundred yards thereof, to dig and trench the adjacent land, and remove earth, trees and other obstructions thereon, for making, using, and maintaining the canal, towing-paths, trenches and watercourses, with similar powers as to roads and other conveniences connected with the canal; to inclose and appropriate such parts of the land as should be proper for wharfs or quays; to set up posts, ditches and fences in places necessary for separating the towing-paths from the adjacent lands; to lay earth and other materials requisite for the works, and do all things necessary for the making, maintaining and convenient use of the canal. It was provided that nothing should authorize A. to use the lands for any other purpose than that of the navigation. Provisions were made for the purchase and sale of such lands as should be wanted for assessing the price and the damages to be paid by A. for the use of or injury to the lands; and if he should be in possession of any lands for a certain space of time without using them for the canal, he was to re-convey his right and interest therein; and it was provided that the works and things made in forming a certain part of the canal should become the property of A.:—Held, that no right to the soil of the lands adjoining to the canal, and applied to the purposes thereof under the powers of the act (not being those comprehended under the last-mentioned proviso), passed to A. where there had been no actual purchase. *Doe d. Reg. v. York (Archbishop)*, 14 Q. B. 81; 19 L. J., Q. B. 242.

Where it appeared that for the purpose of making and maintaining the towing-path of a canal, the ownership of the soil was not necessary:—Held, that a mere easement and not the soil had been acquired by the company. *Badger v. South Yorkshire Railway and River Don Company*, 1 El. & El. 347; 28 L. J., Q. B. 118; 5 Jur., N. S. 459; 3 L. T. 449; 9 W. R. 158.—**Ex. Ch.**

—**Proof of Ownership.**—Provisions in different acts of parliament appointed conservators of a river navigation with full powers to do what was necessary for carrying the object of the acts into effect, including powers to purchase lands and levy tolls. The conservators executed the powers of the acts so far as related to the improvement of the river navigation and the making of towing-paths, and they levied tolls. There was no evidence that they had actually purchased any of the land which lay along the course of navigation and had been used to form the towing-paths:—Held, that as the acts might be carried into effect without purchasing, the burden of proof lay on the conservators to shew that they had purchased, and since they had failed to shew it they were not entitled to be treated as owners of the soil of the towing-paths. *Lee Navigation Conservators v. Button*, 6 App. Cas. 685; 51 L. J., Ch. 17; 45 L. T. 385; 30 W. R. 233; 46 J. P. 164.—**H. L.**

**Compensation—Proceedings to Compel.**—The court will not grant a mandamus to compel a canal company, pursuant to the provisions of an act, to proceed to an assessment of the value of land, taken by them for the purposes of their canal; and also of the recompense to be made for the damages thereby sustained; if the parties interested in the land do not make their application to the court within a reasonable time after

the land was taken by the company; especially, if the parties have another remedy by ejectment. *Rees v. Stainforth and Keadby Canal Company*, 1 M. & S. 32.

In order to induce the court to issue a mandamus to a canal company, to make compensation to a claimant, a clear refusal on the part of the company must be shewn; mere delay in attending to the claim is not sufficient. *Reg. v. Wilts and Berks Canal Company*, 8 D. P. C. 623; 4 Jur. 848. See *Reg. v. Thames and Isis Navigation*, 8 A. & E. 201.

—**Persons Entitled.**—Under a clause in an act giving compensation for the value of lands, tenements, and hereditaments, or for damage done thereto, the titheowner is not entitled to compensation for the injury done to him by the conversion of titheable land taken for the purpose of the navigation, and covered with water. *Rees v. Nene Outfall (Commissioners)*, 4 M. & R. 647; 9 B. & C. 875.

—**Amount Recoverable.**—By 9 Geo. 4, c. 98, the undertakers of the Aire and Calder Navigation were empowered to make a navigable canal from certain points mentioned in the act, and also to construct a railroad from such canal to a certain highway, and for such purpose to enter upon any lands, making satisfaction as hereinafter mentioned; and it was provided, that, in case of any disputes between the undertakers and the parties interested in the lands, taken, used, damaged, or affected by execution of any of the powers of the act, a jury should assess the amount to be paid for the purchase of such lands, and also what amount should be paid by way of recompense, either for the damages which should before that time have been sustained, or for the future recurring damages which should have been occasioned, and the cause of which should have been only in part obviated or repaired by the undertakers, and which could be no further obviated, repaired, or remedied by them. Other clauses provided that the company should agree for, or cause to be valued and paid for, the lands, which they were empowered to purchase, within five years after the passing of the act; that they should not deviate above 100 yards from the parliamentary line, and that they should complete all their works within fifteen years. A dispute having arisen as to the value of a piece of land, in which the contemplated railroad crossed the line of an existing railroad, a jury was summoned, who assessed the value and damages as follows: Value of the land, 6l.; present damages, 0; future damages, 2,800l. At this time the undertakers had contracted or paid for all the lands required for their works, but had not executed the works between the termini laid down in the parliamentary map, and had deviated above 100 yards from the parliamentary line, and made a cut through land of their own:—Held, first, that that part of the verdict which assessed the future damages was void; for that, in order to enable the jury to make an assessment of future damages, the cause of injury must already exist in some work of the undertakers already done; and, secondly, that, unless the undertakers had finally abandoned the intention of making the cut in the parliamentary line, they had a right, at any time within fifteen years, to take possession of the land in question, on the payment or tender of

the 6l. assessed as its value, and that they had a right to go on simultaneously with the making both of the cut and the railroad. *Lee v. Milner*, 2 M. & W. 824; M. & H. 275.

### 3. CONSTRUCTION OF WORKS.

**Liability for Injuries—Time Limited for Construction.]**—By a canal act, a company was restricted from any alterations of their canal after the expiration of two years. By the same act, a proprietor of a mill near the lower part of the canal was entitled to all the surplus water of it:—Held, that the erection of a steam-engine after the two years, to pump water into the upper part of the canal, by which the carrying power of the canal was increased, and the surplus water diminished by the enlarged trade, was an injury to the mill-owner, for which he was entitled to damages. *Blakemore v. Glamorgan Canal Company*, 2 C., M. & R. 133; 1 Gale, 78; 5 Tyr. 603; *S. C. (in error)*, 1 C. & F. 263; 5 Bligh, N. S. 547.

A clause in a second act relating to the same canal, declared that the works thereby authorized should be completed within two years from the time of its passing, and that the money to be raised by it should not be applied to defray the expenses of any of the works not made within that time:—Held, that this clause not only limited the application of the money to the works completed within that time, but that no works should be carried on adversely to the interests of individuals, after the expiration of two years. *Id.*

**Remedy of Party Aggrieved.]**—Where a particular jurisdiction is appointed under a canal act to determine all questions that may arise respecting things to be done in pursuance and in execution of the act, if the projectors of the canal exceed their powers, or do any act not strictly within the terms of the statute, by which any individual finds himself aggrieved, he is not confined to the particular jurisdiction, but the wrong is to be remedied in the ordinary manner. *Shand v. Henderson*, 2 Dow. 519. And see *Re v. Croker*, Cowp. 26.

### 4. LEASE AND MORTGAGE OF CANALS.

**Transfer of Right.]**—The 8 & 9 Vict. c. 42, enabled canal companies to become carriers on canals, to lease their canals, and to take leases of others. Subsequently a railway company obtained an act enabling them to purchase the X. canal, and to exercise all its "rights, powers, and privileges":—Held, that after the purchase, the railway company had authority to take a lease of canal Y., under the first act, this being a "right, power, and privilege" possessed by canal X., and which passed, on its sale, to the railway company. *Rogers v. Oxford, Worcester, and Wolverhampton Railway Company*, 25 Beav. 322. Affirmed, 2 De G. & J. 662.

**Pledge of Undertaking—Effect of.]**—By a canal act, the company was empowered to borrow and take up money upon the credit of the undertaking and the rates or duties made payable by the act, and by writing under their common seal to mortgage or assign over the undertaking and the rates or duties to the person advancing the money, as a security for the money so bor-

rowed; and a form of mortgage was given, whereby the company engaged to pay the interest half-yearly:—Held, that the property of the company, and the rates or duties alone, were pledged for the payment of the moneys advanced; and that the company was not liable to be sued for arrears of interest. *Pontet v. Baringstoke Canal Company*, 4 Scott, 182; 3 Bing. N. C. 433.

### 5. LIABILITY TO REPAIR CANAL AND BANKS.

**Applicable to what Works.]**—An incorporated company was authorized by act of parliament to make a navigable canal, the construction of which would interfere with an ancient drain. By one section of the statute the company was required to make a drain on each side of the canal, and parallel therewith, in lieu of part of the ancient drain which would be destroyed. By another section the company was required to make such arches, tunnels, culverts, drains or other passages, over, under, by the side of, or into the canal, and the trenches, streams and watercourses communicating therewith, and the towing-paths on the sides thereof, of such depth, breadth and dimensions as should be sufficient to convey the water clear from the lands adjoining or lying near the canal, without obstructing or impeding the same; and to support, maintain, cleanse and keep in repair all such arches, tunnels, culverts, drains, and other passages:—Held, that the drains made in pursuance of the former section, in lieu of the ancient drain, were to be cleansed by the company, as well as those made in pursuance of the latter section; and that a summary remedy given by the latter section, in case of non-repair by the company, was applicable to a default in cleansing the drains made in lieu of the ancient drains. *Priestley v. Foulds*, 2 Scott, N. R. 265; 2 M. & G. 175; 2 Railw. Cas. 422.

**Lease of Canal—Neglect of Company to give Notice to Lessee.]**—Where an act authorized navigation commissioners to lease the works, and the act put the duty of repairing upon the lessees, and in case they did not repair, authorized and required the commissioners to give them notice to repair, and, in case they neglected to finish the repairs in such period as the commissioners pointed out, authorized them to take possession of the tolls, and cause the repairs to be done themselves, an action does not lie against the commissioners, for that the commissioners had neglected to give the notice, whereby a lock in the line of the navigation fell in, and the plaintiff's barge was delayed in the canal, so as to cause him to lose the use of it; the alleged injury not being the natural, necessary, and proximate result of the not giving notice. *Walker v. Goe*, 4 H. & N. 350; 28 L. J., Ex. 184; 5 Jur., N. S. 737—Ex. Ch.

**Action against Adjoining Owner for Excavations.]**—By an act a canal company was bound to repair the banks of the canal; in an action brought by the company against the owner of adjoining land, for digging clay-pits upon his own land, and causing the bank to give way, there was some evidence to shew that the bank was not in good repair; but the judge directed the jury to find for the company, if they thought that the falling

in of the bank was caused by the defendant having dug clay-pits:—Held, that the company was not entitled to recover, unless, at the time when the bank gave way, it was in good repair; and that question not having been submitted to the jury, a new trial was granted. *Staffordshire and Worcestershire Canal Company v. Hallen*, 6 B. & C. 317; 9 D. & R. 266.

#### 6. LIABILITY TO FENCE.

**Neglect of—Bridge over Canal.**—When a canal company is empowered to intersect high-ways and to construct bridges to connect the intercepted portions, and the canal and bridges are vested in it, and it is enabled to take tolls from boats passing the bridges, and the company erects swing-bridges, which the boatmen are entitled to open for the purpose of passing, and which when opened leave the edge of the canal unprotected, and there is not sufficient light or other means of preventing accidents, and the consequence is that while the bridge is lawfully opened at night-time, a person falls into the canal, without any fault on his part, the company will be liable to an action. *Manley v. St. Helen's Canal and Railway Company*, 2 H. & N. 840; 27 L. J., Ex. 159.

A swing-bridge over a canal crossing a public highway, when turned back for the passage of a barge along the canal, left a gap on the side of the road, without any fence towards the water. A., being upon the bridge whilst it was in this state, and the spot being dark, incautiously stepped back and fell into the water and was drowned. In an action by his widow and administratrix against the canal company, the jury was told that if they thought there had been negligence on the part of the company, and no want of proper care and caution on the part of the deceased, the plaintiff was entitled to a verdict; but that if they thought that the deceased had by his own negligence contributed to the accident, they must find for the company:—Held, a proper direction, and that upon the facts the jury was warranted in finding for the company, although of opinion that the bridge was not secured as it should have been. *Witherley v. Regent's Canal Company*, 12 C. B., N. S. 2; 3 F. & F. 61; 6 L. T. 255.

**Proximity of Public Path.**—A company was possessed of a canal and the land between it and a sluice; an ancient public footpath passed through the land close to the sluice; there was a towing-path, nine feet wide, by the side of the canal, and an intervening space of twelve feet of grass between the towing-path and the footpath. By the permission of the company, the intervening space had been recently used for carting, and ruts having been caused, the whole space between the sluice and the canal had been covered with cinders, and thus all distinction between the path and the rest of the land was obliterated. A person using the path at night missed his way, and fell into the canal and was drowned:—Held, that the canal was not so near the footpath as to be adjoining to it, so as to throw upon the company the duty of fencing off the canal, and that the other facts did not render the company liable for the accident. *Binks v. South Yorkshire Railway and River Dun Company*, 3 B. & S. 244; 32 L. J., Q. B. 26; 7 L. T. 350; 11 W. R. 56.

#### 7. LIABILITY FOR OVERFLOW OF WATER.

**Unusual Rainfall—Bursting of Banks.**—A company undertaking for their own profit to maintain a channel for carrying off water, and neglecting to do so effectually, is responsible for damage done to the adjoining land by reason of the banks giving way after an unusual rainfall, although other persons who were bound to keep the outlet of the channel of certain dimensions had failed to perform that duty, and had thereby occasioned an increase of water in the channel, without which its banks would not have given way. *Harrison v. Great Northern Railway Company*, 3 H. & C. 231; 33 L. J., Ex. 266; 10 Jur., N. S. 992; 10 L. T. 621; 12 W. R. 1081. See also *Hodgson v. York (Mayor)*, 28 L. T. 836, ante, col. 532.

A right of action against a canal company for negligently keeping their sluices, by reason whereof the canal overflowed, is not ousted by provisions in the canal act for compensation to parties affected by the works, and especially by the overflowing of the water over the sluices, those provisions relating to the due and proper management of the works, not to their negligent management. *Cockburn v. Erewash Canal Company*, 11 W. R. 34.

— **No Injury due to Negligence.**—Where a mine was flooded by water from a canal owing to an extraordinary rainfall and it was found that no extra injury could be attributed to the precautionary measures adopted by the canal company to prevent the catastrophe:—Held, that it was a case of *injuria absque damno*, and afforded no ground of action and that the compensation clauses did not apply to such a case. *Thomas v. Birmingham Canal Company*, 49 L. J., Q. B. 851; 43 L. T. 435; 45 J. P. 21. See next case.

**Right of Action or Compensation.**—Under a navigation act persons who sustained damage by reason of the navigation were entitled to compensation. The trustees of the navigation had, under their control, a lock, a weir and clows, through which, when raised, the water of the river could be let off. During a flood, after a heavy rain, they kept down the clows, and, by so penning back the water, caused the premises of the prosecutor to be overflowed and damaged:—Held, upon motion to enter a verdict for the trustees non obstante verdicto upon a *mandamus*, that the prosecutor was entitled to judgment; that the *mandamus* was sufficient, though it did not aver that his premises would not have been flooded under similar circumstances before the river was altered by the works of the trustees; that the proximate cause of the damage, the penning back the water, being done on account of the navigation, the trustees were as much liable under the acts as if they had committed a breach of duty, and that it was no excuse that it had been done skilfully, and that, unless it had been done, other works of theirs lower down, and the lands of others, would have been damaged. *Reg. v. Delamere (Lord)*, 13 W. R. 757—Ex. Ch. See *Dunn v. Birmingham Canal Navigation*, *infra*.

**Right to Impede Flow of Water.**—The owners of a canal being threatened by an overflow of flood water from a neighbouring river, and fear-

ing damage to their premises situated on the banks of the canal, placed across it, at a point above their premises, planks reaching from the bottom of the canal to the coping stone, which was some inches higher than the surface of the canal water. The flood water afterwards broke into the canal at a point above the barricade of planks, and opposite to the plaintiff's premises, which were also situated on the banks of the canal above the premises of the owners of the canal, and, being penned back by the planks, the water rose in the canal until it flooded the plaintiff's premises. In an action to recover damages for the injury so caused:—Held, that the owners of the canal were not liable, on the ground that the water which did the mischief was not brought there by them, and that there is no duty on the owners of a canal analogous to that on the owners of a natural watercourse, not to impede the flow of water down it. *Nield v. London and North-Western Railway Company*, 10 L. R., Ex. 4; 44 L. J., Ex. 15; 23 W. R. 60.

**Discharge of Water.**—A company was by statute authorized to make a canal, and required to maintain it in good order for navigation by the public; preparatory to making some necessary repairs and improvements, they turned off the water into a drain (designed for that purpose), from whence it ought to flow, as on a previous occasion it actually did, into a public sewer, which was under the exclusive care and control of the corporation of Dublin; but, owing to an unforeseen obstruction in the sewer, the water was stopped and flooded the plaintiff's premises; and, although the company became aware of the flooding—though not of the immediately efficient cause—it did not appear that they had taken, or could have taken, any steps to prevent or stop the discharge of water from the canal into the drain:—Held, first, that the company while acting in exercise of their statutory powers, could not, in the absence of negligence on their part, be made responsible for the injury done. *Boughton v. Midland Great Western Railway of Ireland Company*, 7 Ir. R., C. L. 169.

The jury having found that the flooding of the plaintiff's premises was caused by the obstruction in the corporation sewer:—Held, secondly, that there was no evidence of negligence by the company which ought to have been submitted to the jury. *Id.*

**Flooding of Mines—Working by Owner.**—A canal company was authorized to be made under the provisions of several acts of parliament. They had also, by a provision of the same statutes, the option of purchasing adjoining coal mines on receiving notice from the owner that he was about to work them. An adjoining coal owner, having given the statutory notice, and the company having refused to purchase, proceeded, as he had a right to do, to work his mines in the usual and proper manner, and thereby water from the canal flowed in and drowned his mine. The company was guilty of no actual carelessness in the management of the canal, unless it was carelessness to allow the water to remain in it while the mines were being worked:—Held, in an action by the adjoining coal owner against the company for negligent management of the canal, whereby damage resulted to his mine, that the action was not maintainable, inasmuch as the injury complained of resulted

from the legitimate exercise by the company of statutory powers. *Dunn v. Birmingham Canal Navigation*, 8 L. R., Q. B. 42; 42 L. J., Q. B. 34; 27 L. T. 683; 21 W. R. 266—Ex. Ch. Affirming 7 L. R., Q. B. 121; 41 L. J., Q. B. 121; 26 L. T. 241; 20 W. R. 573.

Held, also, that the owner was entitled to compensation under the acts. *Id.*

**Obstruction by Weeds—No Liability to Remove.**—By a local navigation act, a corporation was appointed the undertakers for improving and maintaining the navigation of a river, with power to do all things it should think convenient and necessary for making, improving and using the navigation, and to receive tolls from persons conveying merchandize on such river:—Held, that the corporation, not having the ownership of the soil of the river or any right to interfere with the river otherwise than for the purpose of navigation, was not liable for any injury to adjacent land from an overflowing of the river owing to not cutting the weeds therein, and to an accumulation of silt caused by staunches properly and not negligently erected for the navigation, if the weeds and silt so accumulated did not interfere with the navigation. *Cracknell v. Thetford (Mayor)*, 4 L. R., C. P. 629; 38 L. J., C. P. 353.

**Negligent Construction of Sluices.**—But where, by a drainage act, the commissioners were to construct a cut, with proper walls, gates and sluices, to keep out the waters of a tidal river, and also a culvert under the cut to carry off the drainage from the lands on the east to the west of the cut, and to keep the same at all times open, and in consequence of the negligent construction of the gates and sluices, the waters of the river flowed into the cut, and bursting its western bank, flooded the adjoining lands, and the owners of lands on the east side of the cut closed the lower end of the culvert, which prevented the waters overflowing their lands to any considerable extent; but the occupiers of the lands on the west side, believing that the stoppage of the culvert would be injurious to their lands, reopened it, and so let the waters through on to the plaintiff's land to a much greater extent:—Held, that the commissioners were responsible for the entire damage thus caused to the land. *Collins v. Middle Level Commissioners*, 4 L. R., C. P. 279; 38 L. J., C. P. 236; 20 L. T. 442; 17 W. R. 929.

**Altering Size of Tunnels.**—Prior to 1866 a stream was conveyed by a canal company under and across its canal through two wooden tunnels, for which, in 1866, the company substituted metal tunnels of less capacity; in consequence of which, after heavy rains, the stream, in 1873, flooded the plaintiff's lands adjacent to the canal:—Held, that the substitution of the smaller for the larger tunnels was in its inception an innocent act, without either injuria or damnum, and only became tortious upon the subsequent flooding, and that the Statute of Limitations began to run from the time of the flooding in 1873. *Devery v. Grand Canal Company*, 8 Ir. R., C. L. 511. Affirmed, 9 Ir. R., C. L. 194.

**Evidence of Negligence.**—In an action for injury caused by the leaking of water from a reservoir belonging to a canal, it was pleaded that the damage was caused by the leaking of

water through the banks of the reservoir and not in any manner whatsoever by reason of the execution of the powers of the act, but by the default of the plaintiffs themselves in sinking shafts and pits in their own land, and so causing large quantities of water which naturally lay in the underground soil in which the pits and shafts were sunk, and which formed the banks and support of the reservoir, to leak out, and flow into the shafts and pits:—Held, that the plea was bad. *Barber v. Nottingham and Grantham Railway Company*, 15 C. B., N. S. 726; 33 L. J., C. P. 193; 9 L. T. 829; 12 W. R. 376.

— **Act of Servants.**—Where a work of a public character (as a canal) has been constructed under the authority of an act of parliament, a right of action for an injury not occasioned wilfully, nor by any act necessarily causing it, but arising from the user of the work (as, for instance, through the overflow of the water of the canal), must be founded on negligence, and negligence is of the essence of the action; and although the jury has given a verdict for the plaintiff, and it has been proved that the proximate cause of the injury was an act of the company's servants (as raising a flood-gate), yet if it is doubtful whether that act necessarily must have caused the injury, and the jury also finds that there was no negligence, the verdict will be entered for the company. *Whitehouse v. Birmingham Canal Company*, 27 L. J., Ex. 25.

#### 8. LIABILITY FOR OBSTRUCTING AND FOULING WATER.

**Removal of a Sunken Vessel.**—An act constituted a company for the purpose of making and maintaining a navigable canal, which all persons were to be allowed to use, on payment of certain tolls. The act also provided, in case of obstruction by any sunken vessel, the owners of which should not weigh it up without loss of time, that it should be lawful for the company to do so, and to keep the same till payment made of the expenses for so doing:—Held, that the act did not make it compulsory upon the company, after notice, so to weigh up a sunken vessel; but that, as the company had made the canal for their profit, and opened it to the public upon payment of tolls, a duty was imposed on them, at common law, to take reasonable care to prevent danger to the navigation; and that, therefore, they were liable for their neither weighing up nor giving notice of a sunken vessel, which damaged a boat navigating their canal. *Lancaster Canal Company v. Parnaby*, 3 P. & D. 162; 11 A. & E. 223; 1 Railw. Cas. 696—Ex. Ch. *S. P., Mersey Docks v. Gibbs*, 1 L. R., H. L. 93; 35 L. J., Ex. 225; 12 Jur., N. S. 571; 14 L. T. 677; 14 W. R. 872.

Such a common-law duty need not be expressly alleged in the declaration; it was sufficient to allege facts from which the duty can be necessarily implied. *Id.*

**Fouling of Water.**—When a canal company pumped foul water into their canal, so as to make the canal a nuisance, it was no defence that the foulness was caused by other persons. *Att.-Gen. v. Bradford Navigation Company*, 35 L. J., Ch. 619.

A canal company was empowered by an act to take the water of certain brooks and use it for the purposes of their canal; the water in

one of the brooks at the time the act passed was pure, but it afterwards became polluted by drains before it reached the canal, and it was then penned back in the canal and became a public nuisance:—Held, that the company was liable to be indicted for the nuisance, as there was nothing in the act compelling them to take the water, or authorising them to use it so as to create a nuisance. *Reg. v. Bradford Navigation Company*, 6 B. & S. 631; 34 L. J., Q. B. 191; 11 Jur., N. S. 769; 13 W. R. 892.

A declaration alleged that the plaintiff was possessed of steam-engines and boilers, and used, had and enjoyed the benefit and advantage of the waters of a branch canal to supply the same, and which waters ought to have flowed and been without the fouling or pollution thereafter mentioned; yet the defendant wrongfully discharged into the water of the canal foul materials, and thereby rendered the waters foul, whereby the plaintiff's engines and boilers were injured. The defendant pleaded not guilty, and that the waters of the canal ought to have flowed and been without the fouling mentioned. An arbitrator to whom the cause was referred found that the plaintiff, by permission of a canal company, made a cut from the canal to his own premises, by which water got to those premises, and with which water he fed the boilers of his engines. The defendant without any right or permission from the company, fouled the water in the canal, whereby the water, as it came into the plaintiff's premises, was fouled, and by the use of it the plaintiff's boilers were injured. Judgment having been given for the plaintiff:—Held, in the Exchequer Chamber, by Williams, J., Crowder, J., and Willes, J., that the verdict upon the issue joined on the second plea ought to be found for the plaintiff; by Wightman, J., Erle, J., and Crompton, J., that the verdict on that issue ought to be found for the defendant. *Laing v. Whaley*, 3 H. & N. 675, 901; 27 L. J., Ex. 422; 4 Jur., N. S. 930.

Held, also, by Erle, J., Crowder, J., Crompton, J., and Willes, J., that the declaration was good after verdict; by Wightman, J., and Williams, J., that the judgment ought to be arrested. *Id.*

#### 9. TOLLS.

##### a. Taking and Amount.

**Effect of Receipt—Claim for Salary.**—A navigation act directed that the salary of the clerk to the commissioners should be paid by the proprietors of the tolls. A person, seised in fee of a part of the navigation and tolls, granted annuities, and conveyed her part of the tolls to a trustee to secure the annuities, and to permit her to hold the conveyed premises and the profits to her own use till default in payment of such annuities. By a subsequent deed she conveyed the premises in fee to Y., together with other property, in trust to sell as in the deed was directed, and to receive the proceeds of such sale, and the tolls and profits of the navigation, and out of the several receipts and profits to defray the costs and expenses necessary for carrying the trusts into effect; to pay up, and if possible discharge the annuities; to pay off certain creditors, and to hold the surplus, if any, for her benefit. The trustee under the last-mentioned deed entered into receipt of the tolls, appointed a collector, and represented himself

to the commissioners as a mortgagee of the tolls, and as having a control over them, and over the repairs of the navigation, but refused to pay the salary of the clerk. The annuities were still subsisting. The clerk sued the trustee for non-payment of his salary:—Held, that it lay upon the trustee, having conducted himself as above stated, to shew that he was not a proprietor within the meaning of the act. *Tibbitts v. Yorke*, 5 B. & Ad. 605.

Held, also, on reference to the several deeds, that he was such proprietor, although he only held the tolls in trust to pay creditors and discharge incumbrances, and although there was a legal estate outstanding in a trustee to secure the annuities. *Ib.*

**Regulation of, by Statute—Construction.**—Where a canal is made pursuant to an act, the right of the proprietors to toll is derived entirely from the act; and it is to be considered as if there was a bargain between them and the public, the terms of which are expressed in the statute; and the rule of construction is, that any ambiguity in the terms of the contract must operate against the company of adventurers, and in favour of the public. The proprietors, therefore, can claim nothing which is not clearly given to them by the act. *Stourbridge Canal Company v. Wheeley*, 2 B. & Ad. 793; *S. P.*, *Barrett v. Stockton and Darlington Railway Company*, 2 Scott, N. R. 337; 2 M. & G. 134.

A canal was formed upon two levels, which were connected by a chain of locks. Upon the upper level, there was no lock whatever. By the act for making the canal, all persons were at liberty to navigate thereupon with boats, upon payment of such rates and dues as should be demanded by the company, not exceeding the rates therein mentioned; and, by another clause, the company was authorized to take certain rates and duties for every ton of iron and other goods navigated on any part of the canal, and which should pass through any one or more of the locks; and power was given to the owners of adjoining lands to use pleasure-boats on the canal, without paying dues, so as the same did not pass through any lock, and were not used for carrying goods:—Held, that this act gave no right to demand toll for boats navigating the upper level of the canal, in which there were no locks. *Ib.*

A local act imposed the following duties on articles: "For every ton of coals, cinder, lime and limestone, gravel and manure, the sum of 4d.; and for every ton of butter or other goods, wares, merchandize, and commodities, the sum of 9d.:"—Held, that stone sleepers of a certain size and shape, intended for a railway, were only liable to the duty of 4d. a ton. *Fisher v. Lee*, 1 A. & H. 11; 4 P. & D. 447; 12 A. & E. 622.

An act gave a toll of 1d. per ton on "stone, pebbles, sand, clay, manure, limestone," and of 3d. per ton on "other goods, wares, and merchandize" not before mentioned:—Held, that coprolites, which are fossil substances generally supposed to be the dung of animals, and which produce, when mixed with acid, sixty per cent. of phosphate of lime and forty per cent. refuse, and are then used as manure, were not stone or manure within the act, but came within the class of goods, wares and merchandize. *Dant v. Moore*, 9 L. T. 381.

Where a canal act directed, "that no boat navigating thereon, which should not be capable

of carrying a greater burthen than twenty tons, or which should not have a loading of twenty tons on board, should be allowed to pass through any of the locks, unless the owner or navigator of such boat should pay tonnage equal to a boat of twenty tons;" and it did not appear that in any part of the act a boat per se was made liable to any toll, but that all the provisions as to tolls applied exclusively to goods conveyed on the canal:—Held, that the clause in question was confined to boats carrying some loading, and did not attach upon an empty boat passing through the locks. *Leeds and Liverpool Canal Navigation Company v. Hustler*, 2 D. & R. 556; 1 B. & C. 424.

A canal act gave a higher tonnage for light goods than for heavy goods. If a jury finds that certain goods were heavy goods when the act passed, ten years' subsequent consent of the company to consider the same species as light goods will not entitle the canal company to demand for these the toll on light goods. *Staffordshire and Worcestershire Canal Company v. Trent and Mersey Canal Company*, 6 Taunt. 151.

By an act, a toll of one shilling per ton was imposed on all coal, &c. (in addition to the ordinary toll) navigated on any part of the canal from a particular specified place, or from any place within two miles thereof:—Held, that this only applied to voyages commencing within the specified limits, and that no such additional toll was payable for coal loaded at a place more than two miles from the spot specified, although conveyed upon a part of the canal within two miles of that spot. *Brittain v. Cromford Canal Company*, 3 B. & A. 139.

A company was empowered by act to take for tonnage upon all coals and other commodities whatsoever, conveyed upon the canal, duties not exceeding 2½d. per ton, on entering or passing out of the canal; and also not exceeding 1½d. a mile for every ton of coal, except all dung, soil, marl, ashes, and other manure (other than lime, which was to pay half tolls), and except stone and other materials for mending roads, which was to pass toll free. By another section, no boat should pass through any of the locks, unless such boat should pay a duty equal to what would be paid by a vessel loaded with a burden of thirty tons, or unless it should be returning, after having passed on the canal, with a greater burden than thirty tons:—Held, that a boat laden with thirty-eight tons of manure, which had entered the canal and passed along it without paying toll, was not liable to pay any toll on returning through the lock empty, after discharging her cargo. *Grantham Canal Navigation v. Hall*, 3 Railw. Cas. 710; 13 M. & W. 114; 13 L. J., Ex. 283. Affirmed, 14 M. & W. 880; 15 L. J., Ex. 63—Ex. Ch.

Under a canal act, imposing a toll "on coals, lime, timber, bricks, stone, and all other goods, wares or merchandize whatsoever," gravel and materials for the repair of turnpike roads are liable to toll. *Coulton v. Ambler*, 3 Railw. Cas. 724, n.; 13 M. & W. 403; 14 L. J., Ex. 11.

By a canal act a company was empowered to make a canal, to be called the Union Canal, from L. to N., with a cut from G. to M. It being found impracticable to carry the work to N., another act was passed, enabling them to vary the line of the cut from G. to M., which was done accordingly. A third act was afterwards

passed, for joining the Union Canal to the Grand Junction Canal, by means of a canal from G., to be called the Grand Union Canal, which was also done. By the first act the company was authorized to receive for coal navigated upon the Union Canal and cut a mileage tonnage of 2½d., so as not to exceed a certain sum (5s.). By the third act, it was enacted, that they should not be entitled to receive more than 2s. 6d. per ton for coal navigated on the Union Canal, and thence on the Grand Union Canal, for a certain specified distance (to H.); and 2s. 1d. if carried beyond that distance. A mandamus issued, reciting that M. was aggrieved by the tonnage taken by the company on coal being higher from L. to M. by G., than if it were carried after passing G., upon the Grand Union Canal; and commanding the company to establish a uniform rate of tolls along the whole of their line, or to take tonnage on coal from L. to M. only in proportion to that carried from L. to G., and afterwards upon the Grand Union Canal, so long as they took less than 2s. 6d. and 2s. 1d. on coal carried from L. to G., and afterwards upon the Grand Union Canal. The return to the mandamus denied the receipt of unequal tolls:—Held, that, the first act having authorized a mileage toll, and the last act prohibiting in certain cases more than a certain amount of gross toll, the power of making a uniform rate of toll was expressly taken away from the company; and that the first act having imposed such mileage toll on coal on the whole of the Union Canal and cut, and having only exempted it from such toll if it passed along the Grand Union Canal, the original toll still prevailed from L. to M. on the Union Canal. *Reg. v. Leicestershire and Northamptonshire Union Canal Company*, 3 Railw. Cas. 730—Ex. Ch.

By 33 Geo. 3, c. lxxx., the Grand Junction Canal Company was empowered to take tolls for the passage of manure between Bramston and Brentford, and persons occupying lands through which the canal passed might carry manure without payment. By 34 Geo. 3, c. xxiv., for making a cut to Buckingham, the powers and authorities mentioned in the former act were to be exercised by the company and by the owners of lands on the new cut, as if re-enacted, and the like exemptions were to be allowed. By 35 Geo. 3, c. xliii., reciting the first-mentioned act, the company was empowered to make a cut to Paddington, and the several powers, authorities, matters and things in the recited act contained, except the rates, were to be used and exercised by the company, and applied for making the cut, and for ascertaining tolls, and in all respects as if re-enacted, and as if the cut had been part of the works authorized to be made by the first act. By 35 Geo. 3, c. lxxxv., for making a cut from Watford to St. Albans, reciting the before-mentioned acts, the powers granted thereby were to be exercised by the company and by the owners of lands as if re-enacted, and the like exemptions were allowed:—Held, first, that on the construction of the 35 Geo. 3, c. xliii., persons occupying lands on the Paddington cut could not carry manure on the canal free from toll. *Tame v. Grand Junction Canal Company*, 11 Ex. 786; 25 L. J., Ex. 222.

Held, secondly, that the provisions of the several public local acts with respect to tolls on different cuts, parts of the same canal, might be

compared in order to ascertain the meaning of a clause in the Paddington act, alleged to create exemptions from toll upon the Paddington cut. *Id.*

By an act a canal company was authorized to execute certain works for the purpose of making the River Tamar navigable for the distance of thirty miles, and in consideration of the great charge and expense which the company must incur and suffer in making and maintaining the works thereby authorized to be made and maintained, it should and might be lawful to and for the company from time to time, and at all times thereafter, to ask, demand, take, and recover the several rates therein mentioned for the tonnage and wharfage of all minerals, &c. which should be carried upon the navigation, canal, and collateral cut, or any of them. The company only completed the navigation to the extent of about three miles:—Held, nevertheless, that the company was entitled to recover rates in respect of the conveyance of goods along the navigation so completed by the company. *Tamar Navigation Company v. Wagstaff*, 4 B. & S. 288; 32 L. J., Q. B. 295; 9 Jur., N. S. 1324.

#### b. Reducing and Varying.

[According to Statute—Construction.]—An act provided that the Monmouthshire Canal Company should not receive any higher rates of tonnage than should, for the time being, be taken by the Brecknock Canal Company; and the latter, by a resolution of a general meeting, and under their common seal, reduced their tolls:—Held, that the Monmouthshire Canal Company could not question collaterally the validity of such resolution, but was bound by it. *Monmouthshire Canal Company v. Kendall*, 4 B. & A. 453.

Where a canal company was empowered to take such rates as should be fixed at a general assembly of the proprietors, not exceeding 1d. per ton per mile upon coal; and they were also empowered to reduce the rates at a general assembly held on certain notice; but no reduction was to be made without the consent of the major part in value of the proprietors; a contract made by individuals with the company, but not at such general meeting, whereby, in consideration that those individuals would make a navigable cut to convey water from their collieries, through land not within the statutable line of the canal, into the canal, and convey the same to the company, the latter should permit them to carry their coals through the cut and along the canal for 1s. per ton, the company paying back 6d. per ton, is illegal and void; 1st, as a speculation by which the company might gain more or less than the legislature intended they should take, under similar circumstances, from the public in general; 2ndly, as extending in effect the power of the company to purchase land beyond the limits assigned by the act; 3rdly, as enabling them to raise more capital than they were entitled by the act to do, by means of paying for land or works by a total or partial sale of their tolls; which tolls are made a security for the money subscribed or taken upon mortgage; 4thly, because the tolls could, in no instance, be reduced but at a general assembly, and this, in fact, operated as a reduction of the tolls pro tanto. *Lees v. Manchester Canal Navigation*, 11 East, 645.

By an act for making and keeping a river navigable it was enacted, that certain persons therein mentioned should be conservators, and that, for reimbursing them what should be laid out for the purposes of the act with 6l. per cent. interest until they had been paid the principal and interest of what they had disbursed or should thereafter disburse, every vessel navigating the river should pay to the conservators certain tolls, namely, a sum not exceeding 4d. for every weigh of coals; and that, in default of payment of such sums, it should be lawful to detain the vessel, and that, after the conservators should be fully reimbursed, certain less tolls, that is, the sum of 1d. for every weigh of coals, should be paid, and no more. By a subsequent act, reciting that it was necessary to erect a lock on a certain part of the river, it was enacted, "that, from and after the building of the lock, an additional toll shall be collected and paid to the conservators at the lock, viz. the sum of 1s. over and above the sum of 4d. for every weigh of coals granted by the former statute;" and the same remedy was given for nonpayment:—Held, that as the two acts were in *pari materia*, the clause giving the additional toll, in the second act, was to be construed with reference to that giving toll in the first act; and that, so construing it, the true meaning was, that, until the conservators were fully reimbursed, they were not at liberty to take a less toll than that specified in the last-mentioned statute. *Rea v. Tone Conservators*, 1 B. & Ad. 561.

Where rates and duties were imposed on coals, landed within a certain district, to be paid to commissioners therein named, and the commissioners were empowered to sue in the name of their clerk for the time being for "any penalty or sum of money due or payable by virtue of the act:—"Held, that an action might be brought in the name of the clerk for arrears of rates and duties; although, by another clause, a power was given of detaining and selling the vessel and goods in case of neglect or refusal to pay the rates and duties. The act directed, that any surplus of rates remaining in the hands of the commissioners should be annually invested in the funds until it should amount to 3,000l., and that after that sum should be invested they should reduce the rates, so as they should not, together with the dividends of the 3,000l., exceed the charges annually expended in carrying the act into execution:—Held, that the commissioners had impliedly a power, after so reducing the rates, also to raise them again in case of necessity. *Goody v. Penny*, 9 M. & W. 687.

Held, also, that after the passing of the Weights and Measures Act, 5 & 6 Will. 4, c. 63, the commissioners had power to levy the rates by the ton (they having been previously levied by the chaldron), without first applying to the sessions for an inquisition under s. 14. *Ib.*

By an act, a company was entitled to demand a fixed sum for goods carried upon any part of the canal, which rates should be equal throughout the whole length of the intended canal. By 8 & 9 Vict. c. 28, subsequently passed, proprietors of canals were empowered from time to time to alter or vary the tolls granted to them, either upon the whole, or for any particular portion or portions of such canals, according to local circumstances, or the quantity of traffic or otherwise, as they should think fit, with a proviso

that such tolls were to be charged equally to all persons, and after the same rate, whether per mile or per ton per mile, in respect of all boats of the like description passing along or using the same portion of the canal, and all goods of the like description conveyed or propelled in a like boat, passing along or using the same portion of the canal, under the like circumstances:—Held, that it was competent to the company to take a proportionally less toll per ton per mile for goods carried a given distance (five miles) along any part of the canal, than for goods carried less than that distance. *Strick v. Swansea Canal Company*, 16 C. B., N. S. 245; 10 L. T. 460; 12 W. R. 711.

Held, also, that it was competent to the company to agree to carry at a lower rate for a particular individual, in consideration of a large guaranteed minimum toll, in order to enable the company to enter into a successful competition with a rival line of railway. *Ib.*

### c. Distraining for.

**Seizure of Goods—Right to Sell.**—A canal act gave a company tolls for all goods carried along the canal, which tolls, if not paid upon demand, they were empowered to recover by action; or they might seize the goods or other things in respect whereof such rates ought to have been paid, and the boat or other vessel laden therewith, and detain the same until payment of such rates, and all arrears due from the owner of the boats; and if such goods were not redeemed within seven days after the taking thereof, the same were to be appraised and sold as in case of a distress:—Held, that this clause did not empower the company to sell the boats. *Fraser v. Swansea Canal Company*, 3 N. & M. 391; 1 A. & E. 354.

Held, also, that their right to seize was confined to the limits of the canal; and that, therefore, they were not authorized to seize goods after they had been landed. *Ib.*

**Liability to Seizure—Teams.**—A canal company was authorized to demand and sue for certain tolls upon the carriage of goods, and to distrain any carriage or goods in respect of which any such tolls ought to be paid, and to detain the same until payment made of such tolls, and of all arrears of the same then due from the owner of such carriage or goods; and in case such distress should not be redeemed within five days, to appraise and sell the same, as in a case of a distress for rent; they were not expressly authorized to levy any toll upon carriages:—Held, that teams could not be distrained for arrears of tolls due from the owners of goods carried in them, if they were not carrying goods of such owners at the time of the distress. *Jenkins v. Cooke*, 1 A. & E. 372.

**Wrongful Distress—Limitation of Time for Actions.**—The statute enacted that any action, brought for anything done in pursuance of the act, or in execution of the powers and authorities granted by it, should be brought within six calendar months next after the fact committed:—Held, first, that such a distress was a thing done in pursuance of the act. *Ib.*

— **Goods in the Hands of Third Persons.**—Held, secondly, that where an owner of teams

let them to a third person, and during such letting they were illegally distrained for arrears due from the person hiring, while not carrying such person's goods, and afterwards sold, such owner might sue within six months from the time of sale, on a count complaining of injury done to his reversionary interest by the seizure and sale. *Id.*

#### d. Extinguishment.

**Transfer to another Authority.]**—To an action on a bond, the condition of which bound the corporation of London to pay an annuity out of tolls collected on the Thames, a plea that the Thames Conservancy Act had transferred all control of the tolls to a corporation called the conservators of the River Thames, is a good plea, as the performance of the condition had become impossible by the act of law. *Brown v. London (Mayor)*, 9 C. B., N. S. 726; 30 L. J., C. P. 225; 7 Jur., N. S. 755; 3 L. T. 813; 9 W. R. 336. Affirmed on appeal, 13 C. B., N. S. 828; 31 L. J., C. P. 280; 8 Jur., N. S. 1103; 10 W. R. 522—Ex. Ch.

#### 10. RIGHTS AND PRIVILEGES OF TAKING AND USING WATER.

**Under Particular Statute—Construction.]**—By 8 Geo. 3, c. 38, a canal company was established, without power to the proprietors to appropriate to themselves water raised from mines along the line of the canal. By 23 Geo. 3, c. 92, another canal was made, giving to the company power to take gratuitously the water raised from mines within a certain distance of that canal, "provided the produce of such mines was carried along some part of the canal." By 24 Geo. 3, c. 4, both canals were incorporated, but the provisions as to each, contained in 8 Geo. 3, and 23 Geo. 3, were to be kept distinct and separate. The proprietor of a mine in the line of the first canal raised coal, one-third of which was afterwards carried along part of the second canal:—Held, that the company's privilege of taking mineral water did not attach to his mine on the first canal, by reason of the partial conveyance of the produce along the second. *Finch v. Birmingham Canal Company*, 8 D. & R. 680; 5 B. & C. 821.

Where a statute directed that a mill owner should be entitled to receive the surplus water by a weir above a certain lock, which the company was bound to keep water-tight:—Held, that it was to be inferred that the company should not have the right of passing any water through the lock, though necessary to the lower part of the canal, except that which passed when barges were lowered through the lock. *Blake-more v. Glamorgan Canal Company*, 2 C. M. & K. 133; 1 Gale, 78; 5 Tyr. 603; *S. C. (in error)*, 1 C. & F. 283; 5 Bligh, N. S. 547.

**— Pumping Water from Different Levels.]**—A canal had three levels, of which A. was the highest, B. the middle, and C. the lowest level. The canal proprietors (though without authority under their act to do so) erected engines between the C. level and the plaintiff's mill forge, and pumped back the water which, after serving the purposes of navigation in levels A. and B., had flowed into level C. Afterwards a new act, repealing former acts, and re-enacting their provi-

sions with alterations and additions, was passed. The 15th section gave the proprietors authority to maintain engines for supplying the canal with water, and to have reservoirs and feeders supplied from all brooks, streams, &c., from which they were lawfully supplied before the passing of the act, and "from time to time to raise the water of the canals from one level to another, or to any reservoirs, and for any of the purposes aforesaid to use such engines as they should judge proper, making full satisfaction for all damages sustained by the owners of any mills, forges, brooks, streams, &c., taken, used, removed, diverted or injured." By s. 80, the proprietors were forbidden to take for the use of the canal any water out of the river above the plaintiff's forge, and they were directed to maintain flood-weirs, so that all waste water running into level C., not required for that canal, should flow into the river above the plaintiff's forge. The proprietors pumped up as before the water out of the level C. back into the level A., in consequence of which, except on extraordinary occasions, no water escaped over the weirs into the river:—Held, that they were entitled to do so, and that such pumping back of the water from one level of the canal to the other did not give the plaintiff a right to compensation. *Ellwell v. Birmingham Canal Navigation*, 3 H. L. Cas. 112.

**Under an Agreement—Opening of Sluices—Compensation.]**—By an agreement, a canal company was authorized to open the sluices of a lock at other times than when boats or barges navigating the canal were passing, or about to pass, through the lock, and to take water for maintaining the navigation of the canal below the lock, paying to the plaintiff a weekly rent for each occasion when water was so taken. To this there was a proviso, that the company might, once a year, let out the water for the purpose of cleansing and repairing the canal, and refill it for seventy-two successive hours without paying rent. A boat having sunk in the lock, the water was let out of the pond below the lock, the boat emptied, and then the water was let into the lock and pond again:—Held, that this was not a taking of the water at a time other than when a boat was passing through, and consequently, that the plaintiff was not entitled to claim rent. *Llewellyn v. Swansea Canal Navigation Company*, 2 H. & N. 509; 27 L. J., Ex. 85; 3 Jur., N. S. 1005—Ex. Ch.

On another occasion, the company emptied the pond below the lock, with a view of repairing another lock below, and on the repairs being done, they opened the sluices of the lock in question, and let the water down to refill the pond:—Held, that there was a taking of the water for the purposes of maintaining the navigation, and that the plaintiff was entitled to his rent. *Id.*

**Claim by Prescription—When User Illegal.]**—The S. and W. Canal communicated at its highest level with the B. canal at lowest level. Owing to the unscientific construction of the locks on the B. canal, during a period of upwards of seventy years there had flowed into the S. and W. canal from the B. canal, with every barge that passed up or down the latter into or out of the former, a much larger volume of water than need have passed or escaped if the

system of locks had been more ingeniously contrived. The proprietors of the B. canal proposed to improve the machinery on their canal, so as to put a stop to this unnecessary waste or flow of water. The proprietors of the S. and W. canal sought to restrain them, on the ground that they had acquired a prescriptive right by user, during a much longer period than forty years, to that amount of water which they had enjoyed during such period. They also claimed the right by parliamentary contract and by special agreement:—Held, that the true construction of the acts of parliament cited failed to establish the claim under the parliamentary contract, and that no special agreement was proved. *Staffordshire and Worcestershire Canal Navigation Company v. Birmingham Canal Navigation Company*, 1 L. R., H. L. 254; 35 L. J., Ch. 757.

Held, also, that had any such agreement or grant been at any time made by the company, it would have been ultra vires and unlawful. *Ib.*

Held, also, that as no grant could at any time have been lawfully made, no prescriptive right by user could be claimed or be deemed absolute or indefeasible under the Prescription Act, 2 & 3 Will. 4, c. 71, s. 2. *Ib.*

Held, also, that the doctrine as to use of water in natural or artificial streams does not apply to water passing through locks in a canal, such water being accumulated under the authority of the legislature, to be used in a particular manner for the benefit of the public. *Ib.*

— **User for other than Canal Purposes.**—A company incorporated for making and maintaining a canal, and having powers under their act to take water for the purpose of supplying the canal, cannot by user acquire, under 2 & 3 Will. 4, c. 71, s. 2, a prescriptive right to take the water for any other purpose. *National Guaranteed Marine Company v. Donald*, 4 H. & N. 8; 28 L. J., Ex. 185.

By an act a company was incorporated for making a canal, and empowered to supply the canal with water from certain rivers. In 1824, the company made a cut, and erected on it a waterwheel, for pumping water into the canal. The company occasionally used the waterwheel to drive a bone-crushing mill. In 1853, an act, passed for converting the canal into a railway, after repealing the first-mentioned act, re-incorporated the company, for the purpose of making the railway. By that act it was enacted that easements, &c., vested in the canal company should, after the passing of the act, be vested in the company thereby incorporated, for their absolute benefit; that all titles by possession "acquired by the canal company should be as good in favour of the company thereby incorporated as the same were good, immediately before the passing of that act, in favour of the canal company;" and that in case any of the works used for the purposes of the canal should, in consequence of the stopping up of the canal, be no longer required for the purposes of the act, the works which should be no longer required might be sold by the company in the manner provided by the Lands Clauses Act with respect to the sale of superfluous lands. The canal having been stopped up, and converted into a railway:—Held, that on the conversion of the canal into a railway, the right of the company to the flow of water into the cut for driving the wheel ceased,

and that the railway company could not convey to a purchaser any right to such flow. *Ib.*

**Cesser of Easement.**—An easement to take water to fill a canal ceases when the canal no longer exists. *Ib.*

**Under Parliamentary Powers.**—When a corporation acquires riparian lands under parliamentary powers, all riparian rights, whether ordinary or prescriptive, already subsisting in respect of those lands, attach to such corporation; and if the special objects of its incorporation include purposes requiring the use of the water, the supply of water to which the corporation is entitled will be measured by the extent of user necessary for the purposes of the act, if such user would be more extensive than that to which the corporation would be entitled as the successor of the former riparian owner. *Swindon Waterworks Company v. Wilts and Berks Canal Company*, 7 L. R., H. L. 697; 45 L. J., Ch. 638; 33 L. T. 513; 24 W. R. 284. Affirming 9 L. R., Ch. 451; 43 L. J., Ch. 393; 30 L. T. 443; 22 W. R. 444.

A canal company incorporated by act of parliament claimed to be entitled to the flow of water in a certain stream for the purposes of navigation under the act, as the purchasers under the act of a tenement upon which was an ancient mill. A waterworks company, without parliamentary powers, acquired lands higher up the stream than the canal company, and diverted the water of the stream, and stored it in a reservoir for the purpose of selling it to the town of Swindon, claiming to do so as a matter of right:—Held, first, that the canal company was entitled to the flow of water to the extent claimed under both heads. *Ib.*

Held, secondly, the user claimed by the waterworks company not being a user connected with the servient tenement, was inconsistent with the right of the canal company. *Ib.*

Held, thirdly, that such user being claimed as of right might be restrained by injunction without proof of substantial damage already sustained or imminent therefrom. *Ib.*

**Rights of Public—User for Twenty Years.**—A company was established by statute for making and maintaining a navigable canal; and by a section reciting that the erection of steam-engines near to the navigation might promote its interests, it was made lawful for the owners of lands within twenty yards of the canal to draw off water sufficient to supply such engines, for the sole purpose of condensing the steam used for working them, such water to be returned into the canal (allowing for inevitable waste), so that no obstruction should arise to the navigation. The company sued R. for that he being possessed of land within twenty yards of the canal, and of a mill and steam-engine on such land, drew water from the canal more than sufficient for the sole purpose of condensing, and used the same for other purposes than of condensing, whereby the company lost and was deprived of the water. Plea, that the defendant was tenant of land, and was the occupier of a mill erected on the land and abutting on the canal, and of a steam-engine in the mill, and that he and all occupiers of the land, mill and engine had for twenty years used as of right the easement of drawing from time

to time from the canal such quantities of water as were necessary for other purposes than that of condensing, to wit, for the purposes of supplying the boilers of the engine with water, of generating steam to work the engine, of heating the mill, of cleansing the boilers, and of supplying water to a cistern on the roof of an engine-house on the land; and that the defendant, in exercise of his right, drew off the water for the purposes aforesaid. A mill of the defendant, called the Old Mill, with a steam-engine, abutting on the canal, had existed more than twenty years; within twenty years a new mill with another engine had been erected adjoining to and communicating with the Old Mill, water passing from one to the other, and the machinery of one being worked by power from the other; and the water of the canal had been used in both mills (in the old during more than twenty years) for the purposes mentioned in the plea, except that of supplying a cistern on the roof of the engine-house, there being no cistern in that place. The jury found that the buildings constituted one mill, and that the user proved had been as of right, and a verdict was taken for the company. On a motion to enter a verdict for the defendant:—Held, that the justification in respect of "a certain mill" was supported by the proof of the defendant having occupied and used the water for the Old Mill during twenty years, and that if the company meant to rely upon the more modern user in the new mill, they should have new assigned; and that the failure of proof as to the cistern did not entitle the company to an entire verdict on the issue joined, but that the verdict might be entered distributively, with nominal damages for the user not justified in proof. *Rochdale Canal Company v. Radcliffe*, 18 Q. B. 287; 21 L. J., Q. B. 297.

— **When Grant Ultra vires.**—The company moved for judgment non obstante veredicto, on the same issue, and relied upon the act of parliament and others establishing and regulating their canal, which gave the public a right, for the purpose of navigation, to use the canal and adjoining wharfs and ways, paying certain rates, empowered the company to raise money on the security of such rates, and obliged them to convey all their waste water into the Duke of Bridgewater's canal:—Held, that the company could not, consistently with these enactments, have granted the water for other purposes than that permitted by the statute, and that an actual grant, if proved, for the purposes mentioned in the plea, would have been illegal, and no justification; and, therefore, that the grant for such purposes implied from twenty years' user, was no legal defence to the action. *Id.*

**When Wrongful—Right of Action.**—An act empowered a company to purchase lands for making and maintaining a navigable canal, and contained provisions with respect to the conveyance of land, and its vesting in the company on payment of the price assessed by compensation. It was also provided, that manufacturers within a certain distance of the canal might, after notice to the proprietors of the canal, lay down pipes to supply their steam-engines with water for the sole purpose of condensing the steam used for working such engines; and that if any dispute should arise with any person

desirous of taking water for the above purpose, or should be in the use of taking the same, such disputes should be finally determined by commissioners. A declaration by the company stated that the canal had been made and maintained by them in pursuance of the act; that the defendant having steam-engines within the prescribed distance of the canal, had, after notice to the company, laid down pipes communicating with the canal, and that the defendant had used the water drawn off by such pipes for other purposes than condensing the steam of his engines. It was objected that the declaration did not shew any conveyance or ownership of the canal or water; nor did it shew any invasion of a private right, or damage to such a right, inasmuch as the act complained of, if wrongful, was clearly prohibited by statute, so that a repetition of the act could never be used as evidence that it was rightful; also, that the remedy was by indictment as for a violation of a statutory provision; and further, that the complaint was a dispute over which the commissioners under the act had exclusive jurisdiction:—Held, that the declaration was good; that it must be taken that the company was in possession of the canal, and that, without averment of special damage, the wrongful act appeared to be a damage to the company's right; that the disputes over which the commissioners had jurisdiction were disputes with persons either about to use, or in the actual use of the canal water for a rightful purpose, as to the mode of taking such water, and that the provision for reference to the commissioners did not apply to a mere wrongful act. *Rochdale Canal Company v. King (in error)*, 14 Q. B. 122; 15 Jur. 896—Ex. Ch.

## 11. OTHER RIGHTS.

**User by Steamers.**—There is a public right of user of a canal with boats propelled by steam power, if they do no injury to the canal beyond what is occasioned by traction by horses. *Case v. Midland Railway Company*, 27 Beav. 247; 28 L. J., Ch. 727; 5 Jur., N. S. 1017.

**Letting of Boats.**—A canal company cannot grant the exclusive right to let boats for hire over their water, so as to give the grantee a right to sue a third party for the infringement of his right. *Hill v. Tupper*, 2 H. & C. 121; 9 Jur., N. S. 725; 8 L. T. 792.

**Wharfs.**—A canal act empowered the lord of any manor, and the owner of any lands through which the canal should be made, to erect and use any wharfs, quays, landing-places, or warehouses in or upon their lands adjoining or near to the canal, and to land any goods or other things upon such wharf, or upon the banks lying between the same and the canal, and also to make convenient places for boats to lie and turn in, so that the making or using the same did not obstruct or prejudice the navigation of the canal or any towing-paths or sides thereof:—Held, that an owner of land adjoining the towing-paths had a right to erect a wharf on his own soil, and to land goods on the towing-path, and convey them across it to his own wharf. *Monmouthshire Canal and Railway Company v. Hill*, 4 H. & N. 421; 28 L. J., Ex. 283.

**Road over other Person's Land.**—The power given by a canal act, enabling the proprietor of a mineral district to make roads and railways over lands of other persons from his mines to the canal, does not restrict him to the shortest practicable route, but enables him to adopt any more circuitous route which in the bona fide exercise of his judgment he may find expedient, provided the point at which he joins the canal is within four miles of the boundary of his estate. *Richards v. Richards*, 1 Johnson, 255.

Saving time by avoiding a lock is a sufficient reason for preferring a more circuitous route for this purpose. *Ib.*

**Fenders against Floods.**—On indictment for nuisance to a canal established by act of parliament, it appeared that the canal was carried across a river and the adjoining valley by means of an aqueduct and embankment, in which were several arches and culverts; that a brook fell into the river above its point of intersection with the canal, and that in times of flood the water which was then penned back into the brook overflowed its banks, and was carried by the natural level of the country to the arches, and through them to the river, doing however much mischief to the land over which it passed; that except for the nuisance after mentioned, the aqueduct was sufficiently wide for the passage of the river at all times but those of high flood; that the occupiers of land adjoining the river and brook had, for protection of their land, subsequently to the making of the canal aqueduct and embankment, erected or heightened artificial banks called fenders on their properties to prevent the flood-water from escaping as above mentioned, and that the flood-water had come down in time of flood in such force against the aqueduct and canal banks as to endanger them and obstruct the navigation; that the fenders were not unnecessarily high, and that if they were reduced many hundreds of acres would again be exposed to inundation:—Held, that the occupiers were not justified in altering for their own benefit the course in which the flood-water had been accustomed to run, and consequently they were indictable. *Rees v. Trafford*, 1 B. & Ad. 874; *S. C. (in error)*, 1 M. & Scott, 401; 2 C. & J. 265; 8 Bing. 204.

**Rights of Fishery.**—A canal act provided that the lord of every manor through which the canal and reservoirs thereto belonging should be made, should be entitled to the right of fishery in so much of the canal and reservoirs as should be made in, over or through the common waste lands within his manor, and that the owners of any other lands through which the canal should be made, should also have the like right of fishery of and in so much of the canal as should be made in, over or through their lands wherein they had the right of fishery before the act:—Held, that the right reserved to the lord of the manor was confined to common or waste lands where the lord was owner of the soil, and therefore did not extend to open lammas lands, the soil of which was in various owners, the occupiers intercommoning for a certain part of the year. *Grand Union Canal Company v. Ashby*, 6 H. & N. 394; 30 L. J., Ex. 203.

See also sub tit. FISH AND FISHERIES.

### III. STREAMS, NON-NAVIGABLE RIVERS, AND WATERCOURSES.

#### 1. RIGHTS AND INCIDENTS OF.

##### a. Generally.

**Natural Right to Flowing Water.**—Running water is originally publici juris, and an individual can only acquire a right to it by applying so much of it as he requires for a beneficial purpose, leaving the rest to others, who, if they acquire a right to it by subsequent appropriation, cannot lawfully be disturbed in the enjoyment of it. *Williams v. Morland*, 4 D. & R. 583; 2 B. & C. 910.

Flowing water is publici juris in this sense only, that all may reasonably use it who have a right of access to it, and that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only. *Embrey v. Owen*, 6 Ex. 353; 20 L. J., Ex. 212; 15 Jur. 633.

The right to have a stream of water flow in its natural state, without diminution or alteration, is an incident to the property in the land through which it passes; but this is not an absolute and exclusive right to the flow of all the water, but only subject to the right of other riparian proprietors to the reasonable enjoyment of it; and consequently it is only for an unreasonable and unauthorized use of this common benefit that any action will lie. *Ib.*

The right to have a stream of water which flows above ground running in its natural course, is not by a presumed grant from long acquiescence on the part of the riparian proprietors, above and below, but is ex jure nature, and an incident of property; and an action lies for infringement of this right. *Dickinson v. Grand Junction Canal Company*, 7 Ex. 282; 21 L. J., Ex. 241; 16 Jur. 200.

Such a right in no way depends upon prescription or the presumed grant of his neighbour, nor from the presumed acquiescence of the proprietors above and below, as stated by Tindal, C. J., and Maule, J., in *Acton v. Blundell* (12 M. & W. 324); and *Smith v. Kenrick* (7 C. B. 515). *Ib.*

A right to the use of flowing water does not necessarily depend upon the ownership of the soil covered by such water. *Lord v. Sydney (Commissioners)*, 12 Moore, P. C. C. 473; 7 W. R. 267.

The right to the enjoyment of a natural stream of water on the surface ex jure nature belongs to the proprietor of the adjoining land as a natural incident to the right to the soil itself. He has the right to have it come to him in its natural state, in flow, quantity, and quality, and to go from him without obstruction, upon the same principle that he is entitled to the support of his neighbour's soil for his own in its natural state. *Chasemore v. Richards, infra*. And see *Ennor v. Barwell, infra*.

— **Water Percolating through the Soil.**—The principles which apply to the right to water flowing in a certain and defined course, whether in an open and a visible stream, or in a subterranean channel, are inapplicable to water percolating through underground strata, having no certain course or defined limit, but oozing through the soil wherever the rain penetrates. *Chasemore*

v. *Richards*, 7 H. L. Cas. 349; 29 L. J., Ex. 81; 5 Jur., N. S. 873; 7 W. R. 685.

—**Water from Natural Springs.**—In land there was a pond, formed in the gravel bed, and which had existed from time immemorial, and in which the water rose naturally from several springs at its bottom, and thence overflowed the western edge, and formed a rivulet, which ran through and supplied other ornamental ponds, being used for cattle, and supplying the gardens of the house. In 1855 the commissioners of sewers, in order to drain a populous district therabouts, commenced the construction of a sewer in the parish near to these premises, under the centre of the public highway, through the bed of gravel, which bed ran also through the owner's land. This cutting nowhere approached nearer to the owner's property than seventeen yards. The sewer was properly made for attaining its object. The immediate effect, however, was to drain the springs in the bed of gravel, and to prevent them from finding their way into the pond, so that the rivulet ceased to be supplied with water, and in its turn to supply the other ponds on the estate. By 11 & 12 Vict. c. 112, s. 50, where any work by the commissioners done, or required to be done, in pursuance of the provisions of this act, shall interfere with or prejudicially affect any ancient mill, or any right connected therewith, or other right to the use of the water, full compensation shall be made to all persons sustaining damage thereby in manner herein provided:—Held, that the owner of the land was not at common law entitled to compensation from the commissioners in respect of the abstraction of water. *Reg. v. Metropolitan Board of Works*, 3 B. & S. 710; 32 L. J., Q. B. 105; 9 Jur., N. S. 1008; 8 L. T. 238.

Claim by a plaintiff to use water which flowed from his land to the land of the defendant, and was there collected in a reservoir, whence it re-flowed into the plaintiff's land. And a claim also by the plaintiff to the overflow into his land of a pond which flowed through the defendant's land into that of the plaintiff. The claims being supported by evidence of twenty years' use:—Held, that these were not maintainable. *Ennor v. Barwell*, 2 Giff. 410; 6 Jur., N. S. 1233. See *S. C.* on appeal, 1 De G., F. & J. 529; 4 L. T. 597.

But held, that the plaintiff was entitled to water flowing from surface springs on the defendant's lands, and which naturally flowed, but not through perfectly-defined channels, into the plaintiff's lands, and was entitled to an injunction to restrain the defendant from diverting it. *Id.*

Water, as it issues from a well or a spring, is not to be considered as produce of the soil, so as to make the right to take it in alieno solo for domestic purposes a profit à prendre. Such right is an easement only, and may be claimed by custom. *Race v. Ward*, 4 El. & Bl. 702; 3 C. L. R. 744; 24 L. J., Q. B. 153; 1 Jur., N. S. 704.

—**Surface Water.**—A landholder has a right to appropriate surface water which flows over his land in no definite channel, although the water is thereby prevented from reaching a watercourse which it previously supplied. *Broadbent v. Ramsbotham*, 11 Ex. 602; 25 L. J., Ex. 115. See *Ennor v. Barwell*, *supra*.

Water which squanders itself over an indefinite

surface is not a proper subject-matter for the acquisition of a right by user. *Briscoe v. Drought*, 11 Ir. C. L. R. 250—Ex. Ch.

**Rights of Fishing.**—See FISH AND FISHERIES.

## b. Ordinary Streams and Rivers.

### i. Property in Soil.

**Riparian Owners—Rights of.**—In an ordinary case, *prima facie*, proprietors on each side of a river are respectively entitled to the soil, usque ad medium filum aque. *Wishart v. Wyllie*, 1 Macq. H. L. Cas. 389.

The soil of the alveus is not the common property of the respective owners on the opposite sides of a river; the shore of each belongs to him in severalty, and extends usque ad medium filum aque; but neither is entitled to use it in such a manner as to interfere with the natural flow of the stream. *Bickett v. Morris*, 1 L. R., H. L. 47; 12 Jur., N. S. 803; 14 L. T. 835.

A purchaser of land on the banks of a river takes, by his conveyance, the right of ownership of a moiety of the bed of the river ad medium filum aque. *Crossley v. Lightowler*, 3 L. R., Eq. 279.

The more than ordinary breadth of a river does not prevent a conveyance of premises therein described as bounded thereby from operating to convey the portion of the bed and soil of the river abutting thereon, up to midstream. *Dwyer v. Rich*, 4 Ir. R., C. L. 424.

A river was, in general, the boundary of the counties of M. on the west, and E. on the east. It was proved that before 1808 the river had changed its course to the east. Evidence being given that the land left bare on the west side of the river was treated as part of the county of E., the jury found that the land was in the county of E.; and the court refused to grant a new trial, on the ground that the judge had not directed the jury, that if the change of the course of the river had been gradual, the land left on the west side of the river would belong to the county of M. *Ford v. Lacey*, 7 H. & N. 151; 30 L. J., Ex. 352; 7 Jur., N. S. 684.

—**Accretions.**—Accretions from the gradual change of the course of a non-navigable river, where there are no fixed boundaries, will become the property of the owner of the adjoining land. *Id.*

—**Alluvial Lands.**—Alluvial lands which are gradually gained from a river belong, by way of accretion, to the lands of the adjoining proprietor. *Musummat Imam Bandi v. Hargood Ghose*, 4 Moore, Ind. App. 403.

—**Right of Altering Stream.**—Riparian proprietors have a common interest in the water of a running stream, and a separate property in the alveus or channel thereof usque ad medium filum fluminis. *Bickett v. Morris*, 1 L. R., H. L. Sc. Cas. 47; 12 Jur., N. S. 803; 14 L. T. 835.

But no proprietor may so use his property in the alveus as to affect the interest of ex adverso proprietors in the stream; and in order to entitle a riparian proprietor to relief against building

upon the alveus, it is not necessary for him to prove that damage to him has been or is likely to be caused thereby. *Id.*

#### ii. Use of Water.

**Rights of Riparian Owners.]**—Every owner of land on the banks of a river has *prima facie* an equal right to use the water, and cannot acquire a right to throw the water back on the proprietor above, or to divert it from the proprietor below, without a grant, or twenty years' enjoyment, which is evidence of a grant. *Wright v. Howard*, 1 Sim. & Stu. 190.

The owner of land, through which a river runs, cannot, by enlarging a channel of certain dimensions, through which the water had been used to flow before the appropriation of it by another, divert more of it to the prejudice of any other landowner lower down the river, who had at any time before such enlargement appropriated to himself the surplus water which did not escape by the former channel. *Bealey v. Shaw*, 6 East, 208; 2 Smith, 321.

The right to appropriate a stream of water, in exclusion of any owners of the banks of the stream, cannot be acquired in a less period than twenty years. *Mason v. Hill*, 2 N. & M. 747; 5 B. & Ad. 1.

If water has been accustomed to flow along a channel from time immemorial, and it has been appropriated, the first owner of the adjoining lands on both sides who appropriates it, without doing any injury to any one, either above or below him, acquires such a right by his appropriation, that though he may not have enjoyed it for twenty years, he may maintain an action against any owner of the lands above him who wrongfully diverts the water from its ancient channel. *Frankum v. Falmouth (Earl)*, 6 C. & P. 529.

The owner of the banks of a stream has a right to the advantages of that stream, flowing in its natural course, and is entitled to use it for any purpose not inconsistent with similar enjoyment in the owners above and below. *Mason v. Hill*, 2 N. & M. 747; 5 B. Ad. 1.

No proprietor of the banks of a stream has a right to diminish the quantity, or injure the quality of the water, to the detriment of other similar possessors of other parts of the banks. *Id.*

Every riparian proprietor has a right to the reasonable use of the water flowing past his land, namely, for his domestic purposes, and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. He has also the right to the use of the water for any other purpose, provided he does not thereby interfere with the rights of other proprietors, either above or below him. *Miner v. Gilmour*, 12 Moore, P. C. C. 131; 7 W. R. 328.

Subject to this condition, a riparian proprietor may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation; but he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury. *Id.*

Every proprietor of lands on the banks of a natural stream has a right to use the water, provided he so uses it as not to work any

material injury to the rights of the proprietors above or below him on the stream, and may begin to exercise that right whenever he will. *Sampson v. Hoddinott*, 1 C. B., N. S. 590; 26 L. J., C. P. 148; 3 Jur., N. S. 243.

The right of the riparian proprietor is limited to natural streams, and does not attach in the case of artificial cuts or drains. *Id.*

The ordinary right of the riparian proprietor is to take so much water as he requires for domestic or similar purposes:—Held, that the fact that the railway company did not require water for such purposes did not entitle them to take it for other purposes, such as supplying their locomotives. *Att.-Gen. v. Great Eastern Railway Company*, post, col. 571.

**Acquisition of Special Rights.]**—By usage he may acquire a right to use the water in a manner not justified by his natural rights; but such acquired right has no operation against the natural rights of a landowner higher up the stream, unless the user by which it was acquired affects the use that he himself has made of the stream, or his power to use it, so as to raise the presumption of a grant, and so render the tenement above a servient tenement. *Id.* (Affirmed, without argument, by consent, 3 C. B., N. S. 596.)

Where A. being the owner of land through which a stream runs down to the land of B., grants by deed to B. that the stream shall be in the control of B. and his assigns, and shall flow in a free and uninterrupted course through a channel described on the deed, and afterwards A. and B. assign respectively their land to Y. and Z., Y., if he divert the water from such channel, though he does not thereby deprive Z. of the use of any water, is liable to an action at the suit of Z. In such action it is sufficient for Z. to declare that by reason of his possession of the land he is entitled to have the use and benefit of the water flowing in a certain direction along the channel, and that the defendant diverted the water therefrom. It is not necessary to refer to the grant. *Northam v. Hurley*, 1 E. & B. 665; 22 L. J., Q. B. 183; 17 Jur. 672.

**Supplying House at a Distance.]**—A riparian proprietor has a right, by means of water-wheels and machinery erected by him for that purpose, to pump up water from a natural stream flowing past his land to a reservoir, and to convey it thence by pipes to his dwelling-house, upon another estate at a distance from the stream, and he may there apply such water to his domestic and other necessary purposes of utility; provided he takes only a reasonable quantity, with reference to the size of the stream, and the rights of his neighbour; but he has no right to take more water by means of the wheels and machinery than he would have a right to take otherwise. *Norbury (Lord) v. Kitchin*, 9 Jur., N. S. 132; 7 L. T. 685; *S. C.*, at nisi prius, 3 F. & F. 292.

**Supply of Engines.]**—A railway company whose line crossed a stream in the immediate neighbourhood of one of their stations, took water for supplying their engines and for the general purposes of the station. On bill filed by a millowner lower down the stream, it appeared that the abstraction of water did no damage in wet weather, and never shortened the working of the

mill for more than a few minutes a day :—Held, that the company, as riparian owners, were entitled to take a reasonable quantity of water for their purposes, and that in this case the quantity taken was reasonable. *Sandwich (Earl) v. Great Northern Railway Company*, 10 Ch. D. 707; 27 W. R. 616.

Where a public body is, under an act of parliament, entrusted with powers and duties for a public purpose, the court will give credit to them as being the best judges of what they want for that purpose. *Att.-Gen. v. Great Eastern Railway Company*, 6 L. R., Ch. 572; 19 W. R. 788.

A railway company was restrained from taking a large quantity of water for the use of their station from a river under the control of conservators, credit being given to the evidence on their part that taking such water would impede the navigation, against the evidence on the part of the company that taking such water would produce no appreciable effect. *Id.*

**Irrigation.**—Whether a riparian proprietor may use the water for the purpose of irrigation, if he again returns it into the river, with no other diminution than that caused by the absorption and evaporation attendant on the irrigation, depends on the circumstances of each particular case. *Enckly v. Owen*, 6 Ex. 353; 20 L. J., Ex. 212; 15 Jur. 633.

**Use by Non-Riparian Owners.**—The owner of land not abutting on a river, with the licence of a riparian owner, took water from the river, and after using it for cooling certain apparatus returned it to the river undiminished and unpolluted :—Held, that a lower riparian owner could not obtain an injunction against the landowner so taking the water, or against the riparian owner through whose land it was taken. *Northam v. Hurley* (1 E. & B. 665) and *Sampson v. Hoddinott* (1 C. B., N. S. 590) distinguished. *Kensit v. Great Eastern Railway Company*, 23 Ch. D. 566; 52 L. J., Q. B. 608; 48 L. T. 784; 31 W. R. 603; 47 J. P. 534. Affirmed in C. A., W. N., 1884, p. 156.

**Grant to Non-Riparian Landowner.**—A riparian proprietor derives his rights in possession of the water from possession of land abutting on the stream, and if by a deed which conveys only land abutting on the stream, he affects to grant water rights, the grants though valid can create no rights for an interruption of which the grantee can sue a third party in his own name. *Stockport Waterworks Company v. Potter*, 3 H. & C. 300; 10 Jur., N. S. 1005; 10 L. T. 748.

A riparian owner cannot, except as against himself, confer on one who is not a riparian owner any right to use the water of the stream, and any user by a non-riparian proprietor, even under a grant from a riparian owner, is wrongful if it sensibly affects the flow of the water by the lands of other riparian proprietors. *Stockport Waterworks Company v. Potter* (3 H. & C. 300) approved. *Ormerod v. Todmorden Joint Stock Mill Company*, 11 Q. B. D. 155; 52 L. J., Q. B. 445; 31 W. R. 759; 47 J. P. 532—C. A.

**Rights under Special Act—Construction.**—By an act of parliament authorizing the construction of a railway, it was provided that

nothing in the act should authorize or empower the railway company "to obstruct the navigation of a river, or any part thereof, or to divert any of the waters therein or which now supply the river :—Held, that this clause applied only to the time of construction of the railway, and did not take away the rights of the company as riparian proprietors. *Att.-Gen. v. Great Eastern Railway Company*, 23 L. T. 344; 18 W. R. 1187. Affirmed, 6 L. R., Ch. 572; 19 W. R. 788.

### c. Subterranean Streams.

**General Principles.**—The principles which regulate the rights of owners of land in respect of water flowing in known and defined channels, whether upon or below the surface of the ground, do not apply to underground water which merely percolates through the strata in no known channels. *Chasemore v. Richards*, 7 H. L. Cas. 349; 29 L. J., Ex. 81; 5 Jur., N. S. 873; 7 W. R. 685.

Where, therefore, a landowner and a millowner, who had for above sixty years enjoyed the use of a stream which was chiefly supplied by such percolating underground water, lost the use of the stream after an adjoining owner had dug on his own ground an extensive well, for the purpose of supplying water to the inhabitants of the district, many of whom had no title as landowners to the use of the water :—Held, that the millowner had no right of action. *Id.*

No action lies for interfering with the course of an underground stream unless its course is known. *Dickinson v. Grand Junction Canal Company*, 7 Ex. 282; 21 L. J., Ex. 241; 16 Jur. 200.

Although water flows subterraneously in a channel which was, and by excavation could have been ascertained to be defined, the principle of *Chasemore v. Richards* (7 H. L. C. 349) applies, if the channel is not actually known. *Bwart v. Belfast Poor Law Guardians*, 9 L. R., Ir. 172—C. A.

**— Abstraction by Mining Operations.**—The owner of land through which water flows in a subterranean course has no right or interest in it which will enable him to maintain an action against a landowner, who, in carrying on mining operations in his own land in the usual manner, drains away the water from the land of the first-mentioned owner and lays his well dry. *Acton v. Blundell*, 12 M. & W. 324; 13 L. J., Ex. 289.

Although a landowner will not in general be restrained from drawing off the subterranean waters in the adjoining land, yet he will be restrained if, in so doing, he draws off the water flowing in a defined surface channel through the adjoining land. *Grand Junction Canal Company v. Shugar*, 6 L. R., Ch. 483; 24 L. T. 402; 19 W. R. 569.

The Grand Junction Canal was, near Tring, supplied with water from a mill-pond, which pond was supplied partly by water flowing above ground from a horse-pond, and partly by subterranean springs. The local board of health of Tring constructed a sewer, which, through defective construction as the canal company alleged, diminished both supplies of water to the mill-pond, and so injured the canal company, who

filed a bill to restrain the local board:—Held, that there was no remedy for the abstraction of the underground water, but that there must be an injunction to restrain the interference with that flowing above ground. *Ib.*

**Right of Support.]**—An owner of land has no right at common law to the support of the subterranean water. *Popplewell v. Hodgkinson*, 4 L. R., Ex. 248; 38 L. J., Ex. 126; 20 L. T. 578; 17 W. R. 806—Ex. Ch.

#### d. Watercourses.

**General Principles.]**—The right to the water of a river flowing in a natural channel through a man's land, and the right to water flowing to it through an artificial watercourse constructed on his neighbour's land, do not rest on the same principle. In the former case each successive riparian proprietor is *prima facie* entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land, as a natural incident to his ownership of it. In the latter any right to the flow of the water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some other legal origin:—Held, in this case, that the plaintiff's legal right to the enjoyment of water overflowing from an artificial reservoir through an artificial watercourse on his neighbour's (the defendant's) land should be presumed from the circumstances under which the same were presumably created and actually enjoyed; subject to the defendant's right to the use of the water for the purpose of irrigating his lands by proper and requisite channels and other proper means. *Rameshur Pershad Narain Singh v. Koonj Behari Pattuk*, 4 App. Cas. 121—P. C.

**What Constitutes.]**—Water passing from the opening of the lock of a canal does not constitute a watercourse within 2 & 3 Will. 4, c. 71, s. 2. *Staffordshire Canal Company v. Birmingham Canal Company*, 1 L. R., H. L. 254; 35 L. J., Ch. 757.

To constitute a watercourse, in which rights may be acquired by user, the flow of water must possess that unity of character by which the flow on one person's land can be identified with that on his neighbour's land. *Briscoe v. Drought*, 11 Ir. C. L. R. 250—Ex. Ch.

A claim by an owner of a copper mine to sink pits on his own land, to fill such pits with iron, and to cover the same with water pumped from the mine, for the purpose of precipitating the copper contained in such water, and afterwards to let off the water impregnated with metallic substances into a watercourse upon the land of another, is a claim to a watercourse within 2 & 3 Will. 4, c. 71, s. 2. *Wright v. Williams*, 1 M. & W. 77; 1 Gale, 410.

**—Tributary Streams.]**—S. was convicted upon an information laid under 14 Geo. 3, c. 96, which was one of several acts passed to improve the navigation of the rivers Aire and Calder. By s. 97, any person who wilfully throws any ballast, &c., into any part of these rivers, or of any watercourses thereunto belonging, is liable to a penalty. S. carried on the business of a tanner, and it was proved that on a certain

day a quantity of rubbish was discharged by him into a beck, adjoining the premises, at a point about four miles from the river Aire, into which it flows at a place where that river is navigable:—Held, that the conviction was wrong, inasmuch as the words "watercourses thereunto belonging" did not include "tributary streams," unless they formed part of the navigation. *Smith v. Barnham*, 34 L. T. 774.

Seemingly, that the section points to a knowingly wilful act on the part of the doer, and, as S. merely exercised a supposed right, there was no wilful throwing in of rubbish at all within the meaning of the section. *Ib.*

**Natural or Artificial—Rights in.]**—A watercourse, though artificial, may have been originally made under such circumstances and have been so used as to give all the rights that the riparian proprietors would have had if it had been a natural stream; and, therefore, in an action by one riparian proprietor against another for the pollution and diversion of a watercourse, it is a misdirection to tell the jury, that, if the stream was artificial and made by the hand of man, the plaintiff would have no cause of action. *Sutcliffe v. Booth*, 32 L. J., Q. B. 136; 9 Jar., N. S. 1037.

The plaintiff was the owner of a farm supplied with water by a small watercourse, originating in a natural spring on the plaintiff's land, flowing, first, through the plaintiff's land, next through the defendant's land, and then through the plaintiff's land to the plaintiff's house. For seventy years and upwards, prior to 1879, the plaintiff had almost exclusively enjoyed the watercourse. In 1879, however, the defendant, by means of a pipe, appropriated nearly all the water for the use of newly-built houses. The plaintiff claimed the exclusive use of the water, and alleged that the watercourse through the defendant's land was artificial, and constructed, at a time immemorial, for the sole benefit of the plaintiff and his predecessors:—Held, that as no one could tell when the artificial part (if any) of the watercourse was made, the watercourse must be deemed to be a natural stream; or, if in part artificial, to have been made so as to give all the rights of a riparian proprietor to the defendant and his predecessors in title. *Sutcliffe v. Booth* (32 L. J., Q. B. 136) considered and approved. *Roberts v. Richards*, 50 L. J., Ch. 297; 44 L. T. 271. In C. A., order discharged on undertaking. See W. N., 1881, p. 156; 51 L. J., Ch. 944.

#### e. Drains.

**Rights of Landowners.]**—An owner of land has an unqualified right to drain it for agricultural purposes in order to get rid of mere surface water, the supply of the water being casual, and its flow following no regular or definite course; and a neighbouring proprietor cannot complain that he is thereby deprived of such water which otherwise would have come to his land. *Rawstron v. Taylor*, 11 Ex. 369; 25 L. J., Ex. 33.

**—Alteration after Twenty Years.]**—The flow of water from a drain, made for the purposes of agricultural improvements, for twenty years, does not give a right to the neighbour, so as to preclude the proprietor from altering the level of his drain for the improvement of his land. *Greatrex v. Hayward*, 8 Ex. 291; 22 L. J., Ex. 137.

— **Entry on Lands for Repairs.**—The right of one proprietor to an uninterrupted flow of water, by means of pipes which run through the land of another, carries with it the right to enter upon that land for the purposes of cleaning and repairing or otherwise for the preservation of the pipes; and the court will grant an injunction to restrain the servient owner from the commission of any act which causes the dominant owner greater difficulty and expense in the exercise of his rights, or which, if suffered, might materially affect his rights in future. *Goodhart v. Hyett*, 32 W. R. 165.

See also DRAINAGE.

## 2. ACQUISITION OF RIGHTS.

### a. By Prescription.

**When Right may be Acquired.**—After twenty years' uninterrupted enjoyment of a spring of water, an absolute right to it is gained by the occupier of the close in which it issues above ground; and the owner of an adjoining close cannot lawfully cut a drain, whereby the supply of water to the spring is diminished. *Balston v. Bensted*, 1 Camp. 463.

A person who has used the water of a river, uninterruptedly, though for less than twenty years, gains a title to it by appropriation, and may maintain an action for obstructing it. *Cunham v. Fisk*, 2 C. & J. 126; 2 Tyr. 155.

Claim by a plaintiff to use water which flowed from his land to the land of the defendant and was there collected in a reservoir whence it reflowed into the plaintiff's land; and a claim also by the plaintiff to the overflow into his land of a pond which flowed through the defendant's land into that of the plaintiff; the claims being supported by evidence of twenty years' use. Held, that these were not maintainable. *Ennor v. Barwell*, 1 De G., F. & J. 529; 4 L. T. 597; Affirming 2 Giff. 410; 6 Jur., N. S. 1233.

**Artificial Watercourses.**—The law of easements in respect of watercourses is generally the same, whether they are natural or artificial. *Magor v. Chadwick*, 3 P. & D. 367; 11 A. & E. 571; 4 Jur. 482.

A party acquires by twenty years' enjoyment a right to the use of water flowing through his land in a defined artificial channel, which was originally made for the benefit of all the persons by or through whose land the water was by means of it caused to flow. *Powell v. Butler*, 5 Ir. R., C. L. 309.

A right to the flow of water along an artificial cut over the soil of another cannot be acquired under 2 & 3 Will. 4, c. 71, unless the circumstances under which the cut was made shew that it was intended to be of a permanent character. *Gaved v. Martyn*, *infra*.

**When Temporary and Artificial.**—In 1705, certain adventurers undertook to continue and extend an underground drain, called Cromford Sough, for the purpose of unwatering a portion of the mineral field in the wapentake of Wirksworth. They secured their remuneration in the shape of ore raised from the mines lying near and benefited by the sough, in consequence of an agreement with the owners of the mines. The mouth of the sough was close to a stream called the Bonsall Brook, and discharged into it

a constant flow of water. Below the junction of these waters, an ancient corn mill stood, which was worked by their united power. In 1738, the then proprietors of the sough, through whom the plaintiffs claimed a reversionary interest, granted it for 999 years to S., with covenants that he should open, and cleanse, and repair it. This lease contained a proviso that no forfeiture for not opening and cleansing the sough should accrue, provided a new sough was made, which should have the same effect of unwatering the mines. In 1771, the lord of the manor, being owner of the land through which the Cromford Sough was made, and of a piece of land between the mouth of the sough and Bonsall Brook, demised the same to A., the father of the plaintiffs, together with the stream issuing from the sough. This lease contained a proviso, that if by the bringing up of any other sough, or by any other unforeseen and unavoidable accident, the stream from the Cromford Sough should be taken away, or lessened, the lessee should have power to take down the mills, and rebuild them on another site. In 1772, A. erected extensive cotton mills on the land in question, and in 1789 purchased that land, and the fee simple in the mills, together with the manor of Cromford, including the land through which the sough was made. The plaintiffs were owners in fee of the Cromford manor and estates including the cotton mills. In the meantime, another company of adventurers had begun to construct another mining sough, called the Meer Brook Sough, on a much lower level, in the adjoining parish of Wirksworth. In 1813, the defendants representing this company, and being proprietors of mines to be drained by means of this sough, agreed with the proprietors of Cromford Sough, and the owners of the mines formerly drained by that sough, to unwater a further portion of the mineral field. Accordingly, they extended the Meer Brook Sough, the result of which was, that the water which formerly ran through the Cromford Sough to the plaintiffs' mills was diverted into the Meer Brook Sough, at a lower level.—Held, that although the plaintiffs, by a grant of the watercourse from the owner of the surface, or by twenty years' user, might acquire a right as against him, still that, this being an artificial and temporary watercourse, subsisting for the convenience of the mines, they did not acquire a right to it at common law, as against the owners of the mines. *Arkwright v. Gell*, 5 M. & W. 203; 2 H. & H. 17.

Held, also, that the plaintiffs did not acquire a right to the watercourse under 2 & 3 Will. 4, c. 71, s. 2, as there was no enjoyment without interruption, and of right, since the mine owners were incapable of interrupting the enjoyment, and had no interest to do so. *Id.*

Riparian rights identical with those attaching to natural streams may be acquired by prescription in artificial watercourses of a permanent character. These rights depend upon the character of the watercourse and the purposes for which it was constructed. If the watercourse be of a permanent nature, and constructed for lasting purposes, and for the general benefit of those in its vicinity, and not merely with the temporary and private object of benefiting the property of those by whom it was constructed, riparian rights may be acquired in its waters just as in a natural stream. From the

time beyond the memory of living men a stream appeared to have flowed in its present channel, which, so far as it was artificial, bore all the appearances of having been constructed for permanent use. There was no proof that there was any temporary purpose for which the watercourse could have been formed, or that there was any person who formed it for private use:—Held, that the watercourse, assuming it to be artificial, was one of that permanent nature that admitted of the existence of riparian rights in its waters of the same nature as those attaching to a natural stream, including the flow of the stream through the lands of a lower riparian proprietor in a pure, unpolluted state. *Blackburne v. Somers*, 5 L. R., 1r. 1.

**Who may Acquire.**—One who by lease or by licence from the owner of the soil has the right of digging and working clay (or minerals) thereunder, has such an interest in the soil as will entitle him to claim under 2 & 3 Will. 4, c. 71, a right to the flow of water over the surface by a twenty years' user. *Gaved v. Martyn*, 19 C. B., N. S. 732; 34 L. J., C. P. 353; 11 Jur., N. S. 1017; 13 L. T. 74.

**Tenant cannot acquire Right against Landlord.**—By deed in 1791 A. obtained a demise from B. of an underground goit or drain to be then constructed in B.'s land for the purpose of conducting water from A.'s mill so long as an annual rent of 2l. 2s. should be paid by A. to B. In 1836 the demise of 1791 was put an end to, and liberty was given to A., who was at that time yearly tenant from B. of the land through which the goit ran, to change the goit or drain of 1791, and to substitute a new cut for conducting pure and clean water at the like rent of 2l. 2s. The new cut was made and used for pure water, and the old goit (as the plaintiff alleged) continued to be used for foul water. In 1866 the land through which the goits ran was sold to C., and in 1867 A.'s yearly tenancy of the land was determined. In an action by A. in 1879 to restrain C. from interfering with his use of the old goit, to which he claimed title by prescription from alleged open and uninterrupted use and enjoyment thereof from 1836:—Held, that until 1867 A. could not acquire an easement in the land of which he was yearly tenant, distinct from the use and enjoyment of such land, as against B., his landlord, and accordingly that, assuming the open and uninterrupted user from 1836 to have been proved, he had failed to establish any title by prescription as against C. *Outram v. Maude*, 17 Ch. D. 391; 50 L. J., Ch. 783; 29 W. R. 818.

**Evidence of Enjoyment.**—A. occupied clay works, and for the more convenient use of them, in 1830, under an agreement with B. (with the consent of B.'s landlord) made a leat, or an artificial cut, for the purpose of conducting water from a brook flowing over the land in B.'s occupation to his works. The plaintiff, in 1835, succeeded A. in the occupation of the clay works, and continued for upwards of twenty years, without interruption, the enjoyment of the leat:—Held, that, notwithstanding the plaintiff had no notice of the agreement between A. and B., there was evidence from which the jury might find that the plaintiff had not

enjoyed the stream for twenty years as of right. *Gaved v. Martyn*, *supra*.

The enjoyment of water drawn from a brook along an artificial channel, and acts done by the owner of the dominant tenement upon the servient tenement, which without the existence of an easement would be tortious and actionable, may be evidence of a right in the owner of the dominant tenement to the use of the water. *Beeston v. Weale*, 5 El. & Bl. 986; 25 L. J., Q. B. 115; 2 Jur., N. S. 540.

**Enjoyment as of Right.**—Before 1800, a canal company, under powers of an act of parliament, diverted for the purposes of the canal a considerable part of the water from a brook which flowed through the plaintiff's land, at a point above his land, the rest of the water continuing to flow in its natural channel. In 1817, an act was passed authorizing a railway company to purchase the canal, to discontinue the use of it, and to fill it up, and sell such parts as were not used for the railway. Under these powers the use of the canal was discontinued in 1853; and, in 1864, the railway company made a cut by which they restored to the brook at a point above the land the water which had been diverted from it. In 1865, the railway company conveyed the part of the canal on which they had made the cut to a purchaser in fee. The bed of the stream, owing to the diminished scour of the water from 1800 to 1853, had been silted up, so as to be insufficient to carry off the water coming down in extraordinary floods. In 1866, such a flood occurred; the water overflowed the land and damaged the owner's crops; upon which he brought an action against the railway company:—Held, that, there being no obligation imposed upon the canal company to continue the diversion, the owner of the land had no right of action. By *Blackburn and Hannon, JJ.*: On the ground that, though the claim to have the water, which would otherwise have come down to his land, diverted over other land, was a claim to a watercourse within the Prescription Act (2 & 3 Will. 4, c. 71), s. 2, yet the enjoyment was not as of right, and therefore, though for more than forty years, conferred no right on the plaintiff. And by *Cockburn, C. J.*: On the ground that the owner of the land, the owner of the servient tenement, could acquire, by the mere existence of the easement, no right as against the owner of the dominant tenement to the continuance of the diversion. *Mason v. Shrewsbury and Hereford Railway Company*, 6 L. R., Q. B. 578; 40 L. J., Q. B. 293; 25 L. T. 239; 20 W. R. 14.

**Interruption.**—Action for disturbing a watercourse, which of right ought to flow into the plaintiff's close to irrigate it. On the trial it appeared that the watercourse was not ancient, but that the water had flowed in its present course for more than twenty years past the plaintiff's close. There was evidence that during that period the plaintiff, and those under whom he claimed, had been constantly in the habit of drawing off the water to irrigate his close, and that the owners of the watercourse resisted it. On one occasion, when the plaintiff's servant drew off the water, he was summoned before a justice for so doing, and the plaintiff's son, by his direction, attended and defended the servant, and paid a fine of one shilling. The conviction was under a

local act, from which there was a power of appeal. The plaintiff did not appeal. The conviction was tendered in evidence and rejected. In summing up the judge explained that the enjoyment to defeat an adverse right must be for twenty years without interruption, acquiesced in for a year. One of the jury asked what would be the effect in law of a state of perpetual warfare between the parties; which question the judge did not answer. The jury found that the watercourse had been enjoyed as of right for twenty years, and without interruption for a year, and was directed to find for the plaintiff:—Held, that interruptions, though not acquiesced in for a year, might shew that the enjoyment never was of right, but contentious throughout, though, if once the enjoyment as of right had begun, no interruption for less than a year could defeat it, and consequently that the manner in which the question was left, and the verdict found, was not satisfactory. *Eaton v. Swansea Waterworks Company*, 17 Q. B. 267; 20 L. J., Q. B. 482; 15 Jur. 676.

**Unity of Possession.**—Where the same person is owner of land bound to supply water, and also one of the persons for whose use it is supplied, if his title to the easement is not as extensive as his title to the land charged, there is no unity of possession so as to cause an extinguishment of the easement. *Iceimey v. Stocker*, 1 L. R., Ch. 396; 35 L. J., Ch. 467; 12 Jur., N. S. 419; 14 L. T. 427; 14 W. R. 743.

Seemingly, nothing of absolute necessity to a building, e. g., a gutter in alieno solo, to carry off water, is extinguished by unity of ownership. *Physey v. Vicary*, 16 M. & W. 484.

**Existence of Easement at Time of Severance of Property.**—S., whilst owner of certain adjoining premises, A. and B., laid down a four-inch pipe to carry surface water from A. to a main sewer running along a highway. This pipe ran into another pipe, which passed under B., and thence into the sewer. A socket joint was placed midway in the four-inch pipe, but this was not at the time connected with any other drain. In 1877 S. sold B. to the respondent, and some days afterwards the appellant purchased A. The conditions of sale in each case provided that the sale was subject to all existing easements. There was no express reservation of a right of drainage in the conveyance to the respondent. The appellant subsequently connected the soil pipe of a water-closet on A. with the socket joint in the four-inch pipe, and at the same time laid down a larger pipe in place of the latter. The respondent thereupon stopped the flow of all drainage from appellant's pipe into his own. In an action by the appellant for damages and an injunction:—Held, that the appellant was not entitled to send sewage through the pipe on respondent's premises, inasmuch as no easement of that nature existed at the time of the severance of the properties and there was then no junction by means of which sewage could pass into the pipe, although S. might have contemplated using the socket joint to make a connexion for this purpose. *Watson v. Troughton*, 48 L. T. 508; 47 J. P. 518—C. A.

In 1860, the owner of properties A. and B. made a drain from a tank on property B. to a lower tank on the same property, and laid pipes

from the lower tank to cattle-sheds on property A., for the purpose of supplying them with water, and they were so supplied till 1863, when the owner sold property A. to the plaintiff, with all waters, watercourses, &c., to the same hereditaments and premises belonging or appertaining, or with the same or any part held, used, enjoyed, or reputed as part, or as appurtenant. The plaintiff had the use of the water after his conveyance, until a subsequent purchaser of property B. stopped it:—Held, that the watercourse was a continuous easement necessary for the use of property A., and would have passed by implication; that the plaintiff was entitled to the use of the water on the conveyance of that property without any words of grant; and that, supposing it only convenient and not necessary, the general words were sufficient to pass it. *Watts v. Kelson*, 6 L. R., Ch. 166; 40 L. J., Ch. 126; 24 L. T. 209; 19 W. R. 338.

**Alteration of Dominant Tenement—Effect of.**—Held, also, that the right was to have the accustomed flow of water through the pipes, without regard to the purpose for which the plaintiff used it; and that the right, therefore, was not lost by his erecting cottages instead of cattle-sheds. *Id.* See next case.

**Stopping Excessive User—Suspension of Right.**—A. having a prescriptive right to a flow of water, led by means of a gutter laid in a mill-stream at a point where an ancient weir was erected, lengthened the gutter for the purpose of irrigating more land. The flow of water down C.'s mill-stream was diminished, and he in consequence pulled down the ancient weir, which prevented the water from flowing down A.'s gutter:—Held, that no suspension of his right to the enjoyment of the flow of water as it had formerly existed was caused by his having become a wrongdoer, and C. was not justified in stopping the excessive user by means which altogether prevented C.'s enjoyment of the water, but only in stopping it by the least injurious means in his power. *Hill v. Cock*, 26 L. T. 185.

**Alteration of Stream.**—A right to a watercourse is not destroyed by the owner's altering the course of the stream; and the owner may establish his claim, notwithstanding an interruption within twenty years of his action brought to enforce the right. *Hall v. Swift*, 6 Scott, 167; 4 Bing. N. C. 381; 1 Arn. 157.

**Right to Pollute Streams.**—See *infra*, INFINGEMENT OF RIGHTS BY POLLUTION, *post*, col. 593 *et seq.*

#### b. By Grant.

**In Conveyance of Land.**—Water flowing over a close *prima facie* passes with it by a conveyance of the land. *Canham v. Fisk*, 2 C. & J. 126; 2 Tyr. 155.

A grant by the crown of land bounded by a stream may include by implication the soil of the stream, *ad medium filum aquæ*. *Lord v. Sydney (Commissioners)*, 12 Moore, P. C. C. 473; 7 W. R. 267.

The right to the use of flowing water in respect of lands below is not lost by the acceptance of the grant of land above, although such latter

grant may expressly reserve to the grantor the right to divert the water generally. *Id.*

A deed of conveyance of land for building purposes contained a covenant by the grantee to build to secure the rent reserved:—Held, that the adjoining owner, who claimed under the same grantor, was nevertheless at liberty to drain his own land, although the result of his doing so was to cause a subsidence in the surface of the land of the first grantee. *Poppell v. Hodgkinson*, 4 L. R., Ex. 248; 38 L. J., Ex. 126; 20 L. T. 578; 17 W. R. 806—Ex. Ch.

Before 1834, a natural stream called the S. brook, flowed to and into farm A. S. was then owner of farms A. and B., and the defendant was owner of land adjoining the brook, and lying between it and farm B. In 1834, the whole of the water of the brook was, by agreement between S. and the defendant, diverted from the brook by a stone culvert, constructed through the defendant's land into and through farm B., and thence into and over other land of the defendant's to certain dye-works of his. So much of the water as was required for the use of farm B. was taken from the culvert on the farm by means of a pipe; the rest, the larger portion, flowing on, down the culvert, to the dye-works. Matters so continued down to September, 1856, when, S. being dead, the then owner of farms A. and B. conveyed farm B. to the defendant in fee, together with "all waters, watercourses, easements, and appurtenances belonging to or held, used, occupied, or enjoyed therewith." In March, 1857, the same person conveyed farm A. to the plaintiff in fee. Between September, 1856, and the time of action, the culvert remained in the same state, and the water from it continued to be used by the defendant as before, both on farm B. and at the dye-works. The plaintiff having thereupon sued the defendant for a wrongful diversion of the water of the brook:—Held, that the conveyance of September, 1856, passed to the defendant the right to have the accustomed flow of the water down the culvert, through farm B., continued; that that right was not limited to the use of so much of the water as was wanted for farm B.; that, consequently, the flow of the water down the culvert from farm B. to the dye-works was no infringement of any right of the plaintiff, and that the action was not sustainable. *Wardle v. Brocklehurst*, 1 El. & El. 1058; 29 L. J., Q. B. 145; 6 Jur., N. S. 319; 8 W. R. 241—Ex. Ch.

**Channel unknown, though defined—Construction of Grant.]**—T., who was lessee for lives renewable for ever of a parcel of ground, expressed in the original lease to be demised, "together with the free use of all springs and streams of water arising in or running through the demised premises, or any part thereof, for any bleach-green or other works which then were, or at any time thereafter should be, erected on the premises," made two sub-leases of portions of the premises to different persons, for lives renewable for ever, the first sub-lease being made in 1851, and describing the premises therein comprised as "that parcel of ground formerly used as a bleach-green, together with the free use of all waters running in or running through the demised premises or any part thereof, theretofore used for the purposes of linen manufacture on the said lands, as fully as T. was entitled thereto;" and the second being made in 1853, of

the remaining portion of the lands "together with the free use of all water, if any, arising in or running through the demised premises, or any part thereof, as fully as T. was entitled thereto." The interest in both sub-leases, as well as the equity of redemption in the superior lease (which had been mortgaged), afterwards became vested in W., who was subsequently adjudicated a bankrupt, and the lands were sold by the Court of Bankruptcy. The plaintiff purchased the portion of the lands comprised in the sub-lease of 1851; and one C., under whom the defendant claimed, became the purchaser of the portion included in the sub-lease of 1853. Both portions of the lands were put up for sale by auction on the same day, one of the conditions of sale providing that each would be sold "subject to existing easements;" but the court, having refused the plaintiff's first tender, he subsequently increased it, and was not actually declared the purchaser until a few days after the confirmation of the sale to C. By deed of the 15th March, 1876, made between the assignee of W. and certain other persons and the plaintiff, which recited (inter alia) the superior lease, the sub-lease of 1851, with the water rights thereby respectively granted, and the sub-lease of 1853, the grantors conveyed to the plaintiff the parcel of land formerly used as a bleach-green, together with the full use of all water rising in or running through the demised premises, or any part thereof, theretofore used for the purposes of linen manufacture, as fully as T. was entitled thereto under the recited superior lease or otherwise; and all other (if any) the premises comprised in the lease of 1850, "excepting thereout and out of this grant" the premises purchased by C. By deed of the 11th of April, 1876, made between the same grantors and C., and containing similar recitals to those in the conveyance to the plaintiff, the grantors conveyed to C. the lands comprised in the sub-lease of 1853. The testatum of this deed made no mention of water rights. The plaintiff's lands were at a lower level than the lands of C., and in the plaintiff's lands, a few feet from the fence dividing them from C.'s lands, a copious stream of pure water issued from the ground. This water was peculiarly suitable for bleaching purposes; and the plaintiff, who was a bleacher, deposed that he intended to use it for bleaching; and, at the time of action brought, it was used for domestic purposes in the dwelling-house on the plaintiff's grounds, and for the supply of a large mill thereon. The defendants, who were the local sanitary authority, entered into an agreement with C. to permit them to bore for water on his lands, and they made a cutting on them a few feet from the fence, and obtained a large supply of water, whereupon the stream on the plaintiff's land ceased to flow. The plaintiff having applied for an injunction to restrain the defendants from diverting and obstructing the water from his stream, Chatterton, V.-C., decided that the conveyance to the plaintiff expressly granted him this water, and that, as the grantors could not derogate from their own grant, neither C., who derived his title from those grantors, nor the defendants claiming through him, could lawfully deprive the plaintiff of the use of the water in question:—But held, on appeal, that the conveyance to the plaintiff did not grant him the right claimed, and that he would not

have been entitled to it even if the conveyance to C. had contained an exception of all existing easements. *Ewart v. Belfast Poor Law Guardians*, 9 L. R., 1r. 172—C. A.

**When Implied.]**—S., owner in fee of two mills, in 1855 leased one to P., who used it as bleaching works, a drain, partly covered and partly open, carrying off the water used in the works into a stream from 300 to 400 yards distant, on which, a little lower down, the other mill was situate. This discharge of refuse took place about seven times a fortnight. In 1858, by arrangement between S., P., and the defendant, P. surrendered his lease, and S. granted a new lease to the defendant of the premises late in P.'s occupation; the defendant being described in the lease as a bleacher, and there being a clause in it that all buildings erected by the defendant for the purpose of bleaching should be the property of S. at the end of the term. In 1859, the plaintiff purchased the fee in both mills. The defendant carried on the business of a bleacher, and used his premises as P. had done, the premises, including the drain, remaining precisely as in P.'s time. The plaintiff occupied the other mill himself, and used it as a paper mill, and brought an action against the defendant for fouling the stream by discharging the refuse into it:—Held, that the lease might be explained by the state of the premises, and the mode in which they had been used at the time it was granted; and that by the lease, thus explained, there was an implied grant by S. to the defendant of the right to use the drain and stream in the manner he had done; and that consequently the plaintiff, who stood in S.'s place, could not maintain the action. *Hall v. Lund*, 1 H. & C. 676; 32 L. J., Ex. 113; 9 Jur., N. S. 205; 7 L. T. 692; 11 W. R. 271.

**Rights of Purchaser from same Vendor.]**—The purchase of the right to the use of a portion of the water of a river cannot prevent a subsequent purchaser from the same vendor of another portion from diverting the water by virtue of a right which existed prior to the first purchase. *Miner v. Gilmour*, 12 Moore, P. C. C. 131; 7 W. R. 328. And cases ante, col. 579.

**Deed Operating as Grant.]**—By a deed between A., owner of Greenacre, and B., owner of Blackacre, it was agreed that A. should have during the first ten days of every month, for the purpose of irrigation, all the water of a stream which flowed through Greenacre into Blackacre, and that at all other times the water should be under the control and at the disposal of B., his heirs and executors, and allowed to flow in a free and an uninterrupted course towards and into Blackacre, through a channel therein partially described, and that the owner of Greenacre should cleanse and repair the channel, with liberty to B., and his heirs, to do so on his default:—Held, that this deed operated as a grant to B. of an easement of the watercourse therein described at all times, except the first ten days of each month, and that he thereby acquired a right in respect of that channel, and that an alteration of this channel was an injury to his right, in respect of which B. might maintain an action, although no actual damage had occurred. *Northam v. Hurley*, 1 El. & Bl. 656; 22 L. J., Q. B. 183; 17 Jur. 672.

For upwards of twenty years water had flowed through an old drain on the defendant's land, and along an ancient watercourse, and thence along a close of the defendant, called Gin Bank, and had thence contributed to supply the plaintiff's mills after their erection in 1845. In that year the defendant conveyed to the plaintiff the close Gin Bank, "together with all ways, watercourses, liberties, privileges, rights, members, and appurtenances to the same close belonging or appertaining," subject to the proviso, that it should be lawful for the defendant to use for any manufacturing, domestic, or agricultural purposes, any water flowing from or through the contiguous lands of the defendant unto and into the close Gin Bank, returning the surplus, or so much as remained after being used for the purposes aforesaid, into its usual channel at a certain point, so that the water should not be diverted from its then course, but be allowed to flow into the close Gin Bank. The defendant erected a lock-up tank upon his land, and caused the water which arose on his land, near to the close Gin Bank, and which had previously been accustomed to flow along the old drain and ancient watercourse into the close Gin Bank, to be conveyed from the tank to a lower part of his land to be used by his tenants. This water was used by them for the purposes mentioned in the proviso to the deed, but the surplus could not be returned to the close Gin Bank:—Held, that by the deed the defendant granted to the plaintiff the use of the water, subject only to the use by himself of it as specified in the proviso; and that, by locking it up, he had diverted it, and was liable to an action for a breach of his covenant by reason of such diversion. *Rawstron v. Taylor*, 11 Ex. 369; 25 L. J., Ex. 33.

**Grant of Artificial Channel.]**—A landowner granted to a company all the watercourses, dams and reservoirs upon lands of his, which watercourses, dams and reservoirs were laid down upon an annexed plan, which was to be taken as part of the deed, and were thereon coloured blue, and also the several streams and springs of water flowing into or feeding the watercourses, dams and reservoirs, with right for the company solely to take and use the water from the springs or streams of water, watercourses, dams and reservoirs, with powers to cleanse and repair, and with all such other powers as should be requisite for enabling the company to enjoy the premises thereby granted. The grantor was to be at liberty to use the waste or overflow water from the dams or reservoirs of the company, but was not to exercise this power if the company resolved that its exercise would be injurious to them. The property coloured blue on the plan consisted of an artificial watercourse, partly covered and partly open, the dimensions of various parts of which were specified on the plan, and in some cases it was noted on the plan that they might be enlarged to a certain extent. Several springs and streams feeding the watercourses were marked on the plan. The watercourse was large enough to carry off all the water which flowed into it except after heavy rain, but at one point of its course underground there was a contraction of the channel which after heavy rain backed up the water and caused a considerable overflow over a weir, of which overflow the grantor for many years had the benefit. The grantees having occasion for more water, proceeded to remove

the obstruction, so as to allow the whole of the water which came into the watercourse during heavy rains to run down into their reservoir:—Held, that the grant was a grant of the artificial channel, of the definite springs and streams on the land, and of such other water as should find its way into and run down the channel as it stood, and not a grant of all the water on the land, and that the grantees had no right to alter the levels of or enlarge the channel so as to enable it to carry off all the water that ran into it in times of heavy rain. *Taylor v. St. Helens (Corporation)*, 6 Ch. D. 264; 46 L. J., Ch. 857; 37 L. T. 253; 25 W. R. 885—C. A.

**Reservations in Lease, Extent of.]**—In a lease of premises with their appurtenances the lessor reserved, out of the demise, "the free running of water and soil coming from any other buildings and lands contiguous to the premises, in and through the sewers and watercourses made or to be made within, through or under the premises:—"—Held, first, that the reservation extended to water and soil coming from contiguous lands and buildings, whether that water and soil in the first instance actually arose on or from such contiguous lands or buildings or not. *Chadwick v. Marsden*, 2 L. R., Ex. 285; 36 L. J., Ex. 177; 16 L. T. 666; 15 W. R. 964.

Held, secondly, that it did not extend beyond water in its natural condition, and such matters as are the product of the ordinary use of land for habitation, and that therefore it did not give to the occupier of certain tan-pits, who claimed under the lessor, a right of passage for the refuse of those pits. *Id.*

#### c. By Licence.

**Grant by Parol.]**—In an action for obstructing a drain, the plaintiff claimed right and title to the drain by virtue of a licence granted to his land-lords, their heirs and assigns, to make the drain, and have the foul water pass from their scullery through the drain across the defendant's yard, into another yard appurtenant to the premises in the plaintiff's occupation:—Held, that the interest, as declared upon by the plaintiff, being in its nature freehold, and the licence to support it being merely by parol and not by deed, the action was not maintainable. *Hevins v. Shipham*, 7 D. & R. 783; 5 B. & C. 221.

Where one declared in an action for obstructing a watercourse, upon his possession of a mill with the appurtenances, and that by reason of such his possession he had a right to the use of the water running in a tunnel to the mill; such allegation is not supported by proof that the tunnel was made on the defendant's land, which he had agreed to let the plaintiff have for this purpose for a consideration, but of which no conveyance was made by him to the plaintiff; and he had since refused assent, because the plaintiff had not the water by reason of the possession of the mill, but by parol licence or contract, which could not pass the title to the land, and as the licence was revocable, and was in fact revoked. *Fentiman v. Smith*, 4 East, 107.

**Revocation of.]**—The plaintiff having been allowed to form a watercourse on L.'s land, L. subsequently leased part of the land to the defendant, who thereupon gave notice to the

plaintiff to discontinue the watercourse over the land leased to him. The flow of water being wrongfully continued, and it being necessary to enter upon the land of L. to stop it, the defendant entered the land, and there dammed up the water, so that it was penned back and flooded the plaintiff's land:—Held, that the lease was a revocation of the licence, and that the fact that the defendant might have stopped the water at another point on L.'s land, so that less damage would have been done to the plaintiff, did not give him any cause of action, as the nuisance could not have been abated at the latter point without doing damage to the land of L. *Roberts v. Rose*, 1 L. R., Ex. 82; 35 L. J., Ex. 62; 12 Jur., N. S. 78; 13 L. T. 471; 14 W. R. 225; 4 H. & C. 103—Ex. Ch.

A general licence to take water at any place is revocable, except as to such places where it has been acted upon, and expenses have been incurred. *Mason v. Hill, infra.*

The plaintiff's father, by oral licence, permitted the defendant to lower the bank of a river, and make a weir above the plaintiff's mill, whereby less water than before flowed to his mill:—Held, that he could not sue the defendant for continuing the weir. *Liggins v. Inge*, 5 M. & P. 712; 7 Bign. 682.

**Effect of.]**—A licence to take a quantity of water at any particular place will not authorize the taking away the same quantity of water at another place. *Mason v. Hill*, 2 N. & M. 747; 5 B. & Ad. 1.

**Memorandum in Writing.]**—In 1804, by a memorandum in writing, not under seal, a riparian proprietor agreed to allow the occupier of a mill erected on land abutting on a natural stream, to make a goit through the land of the former, the latter paying for the privilege an annual sum of 5s. The goit was made, and thence the water of the stream flowed through it to the mill which it worked, and then returned into the stream at a point below. The defendant abstracted the water above the point where the goit commenced, whereby the flow to the mill was diminished:—Held, that the owner of the mill was not a mere licensee, but acquired under the agreement a right in respect of which he could maintain an action against the defendant for abstracting the water. *Nuttall v. Bracewell*, 2 L. R., Ex. 1; 36 L. J., Ex. 1; 12 Jur., N. S. 989; 15 L. T. 313; 4 H. & C. 714.

**Enforcing.]**—A. and B. occupied adjoining premises under C., their landlord, and B.'s premises were supplied with water by means of a pipe from A.'s premises. A. and B.'s premises were put up for sale by auction in different lots, it being made a condition that the premises were to be sold subject to rights of water and other easements subsisting thereon. A. and B. purchased at the sale the premises severally occupied by them:—Held, that B.'s supply of water from A.'s premises was not an easement which could be enforced against a purchaser, it being simply a licence from the landlord for B. thus to obtain water during his tenancy. *Russell v. Harford*, 2 L. R., Eq. 507; 15 L. T. 171; 14 W. R. 982.

#### 3. DUTY OF KEEPING CLEAN.

**To Prevent a Nuisance.]**—A watercourse,

whether called by the name of sewer or brook, cannot be allowed to remain in such a state as to be a nuisance to the neighbourhood, or to be covered over and turned into a sewer so as to take away from the occupiers of adjoining lands any rights they may have to use it as a watercourse. *Att.-Gen. v. Hackney Board of Works*, 20 L. R., Eq. 626; 44 L. J., Ch. 545; 33 L. T. 244.

**Obligation of Incorporated Body.**—A local act incorporated certain persons for the purpose of securing a regular and proper supply of water to millowners whose works were situated on the banks of the river Bann. These persons had powers given them to collect the waters of several small streams into a reservoir, and, as often as necessary, to send down those waters to the Bann through the channel of a stream called Muddock. The 2nd clause directed them to "make, erect, construct, maintain, repair, and keep," by means of a reservoir, a due and adequate supply of water for the river Bann at all seasons of the year; and to enter on the lands of the different streams named, to do what was necessary for the conveyance and due regulation of the supply of such waters, and "to make, erect, alter, maintain, repair, widen, deepen, scour, cleanse, and keep proper and sufficient conduits, aqueducts, channels and watercourses, drains, feeders, weirs, dams," &c. The 82nd clause gave similar directions, and ordered that the surplus water should be returned into the different streams from which it had been taken, and also made provisions for supplying with water the cattle depasturing in fields adjoining. The persons incorporated under the act erected the reservoir, collected the waters of the different streams, and sent them through the channel of the Muddock to supply the Bann, but, after a time, neglected to cleanse the channel of the Muddock, so that at times it overflowed its banks and did damage to the lands of the adjoining proprietors:—Held, that under the words of the act there was an obligation on the persons so incorporated to take care that the due execution of the works and operations intended by the act should not be injurious to the lands lying along the banks of the Muddock, and that the bed or channel of the Muddock must be cleansed and kept in a proper state for the flow and reflow of the water that had to pass through it. *Geddis v. Bann Reservoir Company*, 3 App. Cas. 430—H. L. Reversing 11 Ir. R., C. L. 160.

**Under Inclosure Act—Authority to Occupiers.]**

—By an award, made by commissioners under an inclosure act, drains were set out, and it was directed that the owners or occupiers of the land over which such drains passed should make and cleanse and keep the same of sufficient width and depth to carry off the water intended to run down the same:—Held, that this did not authorize the plaintiff to make a sough or under-drain on his land, so as to cause an increased quantity of water to pass into one of the awarded drains. *Sharpe v. Hancock*, 8 Scott, N. R. 46; 7 M. & G. 354.

**4. INFRINGEMENT OF RIGHTS.**

**a. Diversion and Abstraction of Water.**

**Rights of Inhabitants—Spout in Highway.]**

—The inhabitant householders of a district were

entitled by custom to a flow of water to a spout in a highway, and the use of such water, for domestic purposes, in their houses. A riparian proprietor, through whose land the water flowed on its way to the spout, on various occasions diverted the water so as sensibly and materially to diminish the flow, and various inhabitants of the district were on such occasions inconvenienced by failing to obtain water at the spout when they wanted it. Certain occupiers of a house in the district brought an action against a riparian proprietor for an infringement of their right, but the jury found that they had not personally sustained any actual inconvenience from the want of water:—Held, that the action was nevertheless maintainable, inasmuch as the acts of the defendant would, if continued, be evidence of a right in derogation of the rights of the occupiers as inhabitants of the district. *Harrop v. Hirst*, 4 L. R., Ex. 43; 38 L. J., Ex. 1; 19 L. T. 426; 17 W. R. 164.

**Right of Action by Riparian Owner.]**—The proprietor of lands contiguous to a stream may, as soon as he is injured by the diversion of the water from its natural course, maintain an action against the party so diverting it; and it is no answer to the action, that the defendant first appropriated the water to his own use, unless he has had twenty years' undisturbed enjoyment of it in the altered course. *Mason v. Hill*, 3 B. & Ad. 304. And see *S. C.*, 2 N. & M. 747; 5 B. & Ad. 1.

**Unreasonable Use of Water—What is.]**—To an action by the plaintiff, the occupier of a water grist mill, against a riparian proprietor for diverting the stream, the defendant pleaded not guilty; and that at certain periods of the year, when the water was more than sufficient for the use of the mill, the defendant diverted small and reasonable quantities of the water for the purpose of irrigating closes belonging to her on the bank of the stream; which quantities of water, except that which was absorbed and used in the irrigation, were returned into the stream above the mill; that the diversion was not continuous, but only intermittent; that the quantity of water absorbed and lost was small and "inappreciable," and that the diversion caused no damage to the plaintiff's mill. At the trial, it was proved that the diversion was not continuous, and that it caused no diminution of the water cognizable to the senses. The judge, in directing the jury, left it to them, with respect to the issue on not guilty, to say whether there was any sensible diminution of the water by reason of the diversion; and with respect to the other issue, he told them that he had a difficulty in affixing the legal meaning to the term "inappreciable," but suggested that it might mean a quantity so inconsiderable as to be incapable of value or price:—Held, that this was not, under all the circumstances, such an unreasonable use of the water as to be prohibited by law, and therefore that the issue on not guilty was rightly found for the defendant. *Embrey v. Owen*, 6 Ex. 353; 20 L. J., Ex. 212; 15 Jur. 633.

Semble, that the word "inappreciable" meant "incapable of being estimated or valued," and in that sense the plea was not proved. *Id.*

**By a Corporation—Breach of Duty.]**—A corporation was empowered by statute to erect a reservoir near a river, and on completion to

divert the waters of the river, discharging down the river seventy-five cubic feet of water per second for twelve hours of every working day. The corporation began, but was prevented by the nature of the ground from completing the reservoir. They diverted the water, and discharged down the river more than its natural flow, but less than the quantity required by the statute:—Held, that riparian proprietors could recover at common law for any damage sustained by the diversion of the water, but could not recover for failure to comply with the statutory requirement. *Waller v. Manchester (Mayor)*, 6 H. & N. 667; 30 L. J., Ex. 293; 7 Jur., N. S. 635.

**From Artificial Watercourse, Permanent or Temporary.**—No action will lie for an injury by the diversion of an artificial watercourse, where from the nature of the case it is obvious that the enjoyment of it depends upon temporary circumstances, and is not of a permanent character, and where the interruption is by a person who stands in the nature of a grantor. *Wood v. Wagh*, 3 Ex. 748; 18 L. J., Ex. 305; 13 Jur. 742.

Where water has flowed in an artificial and a covered watercourse for more than sixty years, from a colliery into an immemorial and a natural stream, upon whose banks the plaintiff's mills are situate, the plaintiff, in such case, has no right of action for diversion of the water of such artificial watercourse, against a party through whose land it passes, but who does not claim under, or who is unauthorized by the colliery owners. The case, however, would be different if the water was polluted; and the abstraction of the water to the amount of 5 per cent., or its detention so as to occasion sensible inconvenience, will support an action for such injury. *Id.*

A watercourse, though artificial, may have been originally made under such circumstances, and have been so used as to give all the rights that the riparian proprietors would have had if it had been a natural stream; and, therefore, in an action by one riparian proprietor against another for the pollution and diversion of a watercourse, it is a misdirection to tell the jury, that, if the stream was artificial and made by the hand of man, the plaintiff could have no cause of action. *Sutcliffe v. Booth*, 32 L. J., Q. B. 136; 9 Jur., N. S. 1037.

**Erection of a Dam—Liability for Act of Lessee.**—The defendants were owners of the soil of a stream which supplied water to two print-works. A., whilst the occupier of both works, erected a weir across the stream, and thereby diverted the water from one of the works. The plaintiff, becoming lessee of the last-mentioned works, and entitled to the water of the stream, removed the weir. A. afterwards, without any authority from the defendants, and against their will, replaced the weir:—Held, that they were not responsible for the act of A., or for the continuance of the nuisance. *Sazby v. Manchester and Sheffield Railway Company*, 4 L. R., C. P. 198; 38 L. J., C. P. 153; 19 L. T. 640; 17 W. R. 293.

**Pleadings.**—Where a declaration alleged that the defendant placed and raised a dam across the stream, and thereby diverted and turned the water, and prevented it from running along the

usual course to the plaintiff's mill, and from supplying the same with water for the necessary working thereof, as the same of right ought and otherwise would have done:—Held, that such an allegation was supported by proof, that, in consequence of the dam, the water was prevented from being regularly supplied to the mill, although the stream was not diverted, as the dam was erected above the mill, and the water returned to its regular course long before it reached the mill, and there was no waste of water occasioned by the erection of the dam. *Shears v. Wood*, 7 Moore, 345.

**Irrigation of Field—Removal of Stakes.**—The plaintiff, who had a right to irrigate his meadow by placing a dam of loose stones across a small stream, and occasionally a board or fender, fastened the board by means of two stakes which had never been done by his predecessors. The defendant, who had rights on the same stream, removed the stakes and the board also. A verdict having been given for the plaintiff in an action for such removal, the court refused to set it aside, holding that the defendant had no right to remove the board as well as the stakes, on the ground that the stakes gave the board a character of permanency incompatible with her own rights. *Greenlade v. Halliday*, 6 Bing. 379; 4 M. & P. 71.

**Injury to Watercourse.**—If one has anciently pits which are separated by a rivulet, he may cleanse them, but cannot change or enlarge them to the injury of the watercourse. *Brown v. Best*, 1 Wils. 174.

**Abstraction—By Digging a Well.**—Where water is taken from a river after it has formed part of its stream, not by the reasonable use of it by another riparian proprietor, but by the digging of a well, an action at common law will lie by a riparian proprietor for injury to his right, against the party digging the well; as it also may for the abstraction of water which never did form part of the river, but has been prevented from becoming so in its natural course by the excavation of the well; and this whether the water was part of an underground watercourse, or percolated through the strata. *Dickinson v. Grand Junction Canal Company*, 7 Ex. 282; 21 L. J., Ex. 241; 16 Jur. 200.

Such an action may however be maintained on an agreement not to diminish the supply of water of the river, or on the provisions of a special act of parliament to that effect. *Id.*

In any of these cases the action is maintainable for injury to the right, though no actual loss may have been occasioned. *Id.*

**From a Well—Covenant not to Disturb.**—M. sold to B. a well on M.'s land, with the right to B. to draw water therefrom through pipes in M.'s lands, and covenanted for himself, his heirs, or assigns, not to disturb B.'s right. M. voluntarily sold to a railway company some land near, and, owing to their operations, the springs that supplied the well were intercepted, and the well became dry:—Held, that B. had not broken his covenant, for it only applied to the water that flowed from the well after reaching it and not before it reached it. *Brain v. Marfell*, 44 J. P. 56—C. A.

— **By Licensee of Landowner.**—The water from a spring flowed in a gully or a natural channel to a stream on which was a mill. The spring having been cut off at its source, and the water received into a tank as it rose from the earth, by the licence of the owner of the soil on which the spring rose:—Held, that an action lay by the mill-owner against the person so abstracting the water. *Dudden v. Clutton Union (Guardians)*, 1 H. & N. 627; 26 L. J., Ex. 146.

— **By Riparian Proprietor.—Action by Conservators.**—By 13 Geo. 2, c. 36, s. 2, a corporation was empowered to do all things necessary to make the Medway navigable; and the river so to be made navigable, and all lands to be by them made use of for the benefit of the navigation, were thereby vested in the corporation, their successors, heirs and assigns, for ever:—Held, that the act conferred upon the corporation such an interest in all the water of the river for the purposes of the navigation as were interfered with by the abstraction of any part by the riparian proprietors, and that it was not necessary that there should be an actual damage to the navigation to entitle the corporation to sue for such abstraction. *Medway Navigation Company v. Romney (Earl)*, 9 C. B., N. S. 575; 30 L. J., C. P. 236; 7 Jur., N. S. 846; 4 L. T. 87.

**Liability to Indictment for.**—Where an action would lie at the suit of an individual for a diversion of a watercourse, an indictment will lie where the act affects the public. *Rea v. Trafford*, 1 B. & Ad. 874. See *S. C. (in error)*, 1 M. & Scott, 401; 8 Bing. 204; 2 C. & J. 265; 2 Tyr. 201.

#### b. Obstruction.

**Rights of Riparian Owner.—Erection of Mill-Dams.**—The owner of the banks of a non-navigable river may, without any illegality, build a mill-dam across the stream within his own property, and divert a mill-lade, without asking the leave of the proprietors *above* him, provided he does not obstruct the water from flowing as freely as it was wont, and without asking the leave of those proprietors *below* him, if he takes care to restore the water to its natural course before it enters their land. *Orr Ewing v. Colquhoun*, 2 App. Cas. 839.

— **Filling up Bed of River.**—By an act, if any person shall build, erect, or place any building or erection within fifteen feet of the centre of the bed of the stream of a river, he shall be summoned before justices, who may order the removal of the obstruction and impose a penalty on the offender. A flood washed away the bed of the river, and B., who had mills or works adjoining and was owner of the land on both sides of the stream, restored the bed to its original level by laying large stones side by side without cement or fastening:—Held, that this was not a building or erection and therefore justices were right in declining to convict. *Colbran v. Barnes*, 11 C. B., N. S. 246.

— **Transfer on Sale.—Evidence of Damage.**—A mill on the bank of a river had been supplied for more than twenty years by water flowing from a stream through an ancient divergent channel, and conducted thence through a reservoir and a tunnel constructed in his own land by

a former proprietor of the mill, who was also the owner of both banks of the divergent channel. At the place where the reservoir was constructed the divergent stream had formerly, after filling and overflowing a cattle-trough, been allowed to waste itself over adjoining land, whence it found its way by percolation to the river, into which the stream itself also flowed:—Held, that an action was maintainable by the present owner of the mill, who had purchased it with all existing water rights, against a riparian proprietor above the point of divergence in the original stream, for obstructing the flow of water to the mill. *Holker v. Porritt*, 8 L. R., Ex. 107; 42 L. J., Ex. 85; 21 W. R. 414. Affirmed, 10 L. R., Ex. 59; 44 L. J., Ex. 52; 33 L. T. 125; 23 W. R. 400—Ex. Ch.

A natural stream divided itself at a point called E. into two branches; one branch ran down to the river Irwell; the other passed into a farm-yard, where it supplied a watering-trough, and the overflow from the trough was formerly diffused over the ground, and found its way ultimately into the Irwell. The second branch appeared to have been made by artificial means, but had existed from time immemorial. In 1847 the owner of the land on which the watering-trough stood, collected the overflow into a reservoir, and conducted it by a culvert to a mill situated on the banks of the Irwell. In 1865 he became owner of all the rest of the land through which the second branch flowed. In 1867 he sold the mill, with all water rights. In an action brought by the purchaser against a riparian owner on the stream above E. for obstructing the flow of the water:—Held, that he was entitled to maintain the action. *Id.*

In a claim by the plaintiffs, as riparian proprietors, and as having prescriptive right to use of water, for injunction and damages:—Held, that there was evidence of actual damage, but that, even if there had been merely evidence of injury to the riparian and prescriptive rights of the plaintiffs, an injunction and not damages would still have been awarded. *Pennington v. Brinsop Hall Coal Company*, 37 L. T. 149; 25 W. R. 874.

— **Forcing Water back on a Mill.**—The occupier of a mill may maintain an action for forcing back water and injuring his mill, although he has not enjoyed it precisely in the same state for twenty years; and therefore it was holden to be no defence to such an action, that the occupier had, within a few years, erected in his mill a wheel of different dimensions, but requiring less water than the old one, although the declaration stated the plaintiff to be possessed of a mill, without alleging it to be an ancient mill. *Saunders v. Newman*, 1 B. & A. 258.

— **Right of Mill-Owner to Stem Water.**—Semble, that if a mill-head pens back the water upon the adjoining lands, and injures them, but in consequence of defective construction and want of repair in the wheels and waste gates, the mill-pond is, by the working of the mill, at seasons wholly selected by the miller without the control of the landowner, so soon and so frequently exhausted, that the adjoining lands are frequently relieved from the stagnating water, and suffer but small damage; the miller is justified in repairing and improving the construction

of his mill, and thereby penning back the water upon his neighbour's land on the same level for longer periods, although he thereby occasions him a greater damage. *Alder v. Savill*, 5 Taunt. 454.

If an ancient ditch has at one end anciently opened into a stream, and the owner of a mill on the stream has kept the opening at the end of the ditch closed for twenty years and more, without interruption, that would give the mill-owner such a right to keep it closed, that the owner of the land adjoining the ditch would not be justified in re-opening the communication, although it might appear that the communication between the ditch and the stream was ancient. *Drewett v. Sheard*, 7 C. & P. 465.

**Of Surface Water.]**—When a prescriptive right to discharge surface water across adjacent property by a specific channel has been acquired, the obstruction of the channel on the servient tenement, by the tenant of the latter, is an invasion of a legal right, for which an action is maintainable without proof of actual perceptible damage. *Claxton v. Claxton*, 7 Ir. R., C. L. 23.

**Of Artificial Watercourse.]**—A. immemorially had, for watering his lands, a channel through his own field, in a porous soil, through the banks of which channel, when filled, the water percolated, and thence passed through the contiguous soil of B., below the surface, without producing visible injury. B. built a new house in his land, below the level of his soil, in the current of the percolating water:—Held, that A. could not justify filling his channel, if the percolating water thereby injured the house of B. *Cooper v. Barber*, 3 Taunt. 99. See also *Bouvers v. Hill*, 1 Bing. N. C. 549; 2 Scott, 535; 1 Hodges, 334.

#### c. Pollution.

**Rights of Riparian Proprietor.]**—A riparian proprietor has a right to the natural stream of water flowing through the land in its natural state, and if the water is polluted by a proprietor higher up the stream, so as to occasion damage in law, though not in fact, to the first-mentioned proprietor, it gives him a good cause of action against the upper proprietor, unless the latter has gained a right by long enjoyment or grant. *Wood v. Waud*, 3 Ex. 748; 18 L. J., Ex. 305; 13 Jur. 472.

**Right to Pure Water.]**—The abstraction of water from a natural stream openly, and under a claim of right, for a period of twenty years, to a tenement not abutting on the stream, will create no easement to have pure water flow down the stream to the point of abstraction. *Stockport Waterworks Company v. Potter*, 3 H. & C. 300.

W. occupied bleaching works on the O. B. under a lease. The Improvement Commissioners of Harrogate, who had adopted the Local Government Act, and thereby were constituted the Local Board of Health for Harrogate, commenced a system of drainage for Harrogate in 1862, and the sewage flowing through the C. stream into the O. B. polluted its waters so that they could not be used for bleaching purposes. In 1868 W. filed his bill, praying for an injunction to restrain the commissioners from

permitting the sewage to flow into the O. B. The suit was compromised, and by an agreement, dated the 1st of March, 1869, the commissioners agreed to pay him a certain sum for damages, and that they would not, after the 31st of that month, permit the sewage to flow through the drains under their control into the O. B. The commissioners adopted the irrigation system for the disposal of their sewage, which proved wholly inadequate. Sewage flowed down the C. stream into the O. B., and also the overflow from the irrigation farm. W. was obliged to take other bleaching works, as the waters of the O. B. were so polluted by the drainage that he could not use them. He therefore filed his bill against the commissioners, praying for an injunction in the terms of the agreement, and for an inquiry as to damages sustained by him. Relying on the performance of the agreement, W. took a new lease of the bleaching works:—Held, that he was entitled to an injunction and an inquiry as to damages as prayed. *Wood v. High and Low Harrogate Improvement Commissioners*, 22 W. R. 763.

In an action by mill-owners, riparian proprietors, to restrain the discharge of water containing acid into a stream, where the defendant asked that damages, in lieu of an injunction, might be given, an injunction was granted. *Pennington v. Brinsop Hall Coal Company*, 5 Ch. D. 769; 46 L. J., Ch. 773; 37 L. T. 149; 25 W. R. 874.

**Of Underground Stream.]**—A. was possessor and occupier of an ancient mill and lands adjoining, and carried on therein the business of a manufacturer of paper, which had from time immemorial been carried on in them. The mill and lands were situate in a valley at the foot of a range of hills sloping towards and terminating in a tall precipitous rock abutting upon them. Inside this rock, and at the elevation of a few feet above the lands, was, from time immemorial, a natural cavern, and the water produced by the rainfall on a portion of the hills ran by underground passages into it, and, after traversing the floor of the cavern in a defined stream, flowed by an underground passage out of the cavern into an open natural basin in the lands of A., and thence in an open and a defined stream to the mill in a pure and unpolluted state. In 1857 B. became possessor and occupier of land and premises on the summit of the hills, at a higher elevation than the cavern, and worked on them a machinery for extracting from the soil minute particles of lead intermixed with it. In working this he constructed eight buddles, or circular pits, in the surface of the ground, into which water was brought through artificial cuts. From these buddles polluted water was discharged into drains communicating with two swallets or natural rents existing from time immemorial in the limestone rock of the hills, and having an underground passage for water communicating with an outlet, at which the water escaped in an open stream at their foot. The water passages from these two swallets communicated with the cavern through which the polluted water flowed, and thence mingled with the stream flowing through the cavern into the basin, and thence to A.'s lands and mill, whereby the water was fouled:—Held, that an action for fouling the stream was maintainable by A. against B. *Hodgkinson v. Ennor*, 4 B. & S. 229; 32 L. J.,

Q. B. 231; 9 Jur., N. S. 1152; 8 L. T. 451; 11 W. R. 775.

**In Working of Mines.]**—The rights of tin-borders according to the customary law of Cornwall to the use of water within their tin bounds, for the purpose of streaming their tin, will not prevent the acquisition by another of a prescriptive right under 2 & 3 Will. 4, c. 71, to the enjoyment of the water by a twenty years' user; nor will this right be affected by an agreement with the tin-borders for a money payment to abstain from fouling the water by streaming their tin therein. *Gaved v. Martyn*, 19 C. B., N. S. 732; 34 L. J., C. P. 353; 11 Jur., N. S. 1017; 13 L. T. 74. See *Irimey v. Stooker*, 2 Drew. & S. 537; and on appeal, 1 L. R., Ch. 396; 34 L. J., Ch. 633; 12 Jur., N. S. 419; 14 L. T. 427; 14 W. R. 743.

**Of Wells.]**—In an action for disturbing the plaintiff in the use of a well, by putting rubbish into it, he will be entitled to recover, if, by means of the rubbish, the water has been shallowed, and the well rendered less convenient for use; but if the effect only was to make the water temporarily muddy, that is too minute a damage to support the action. *Taylor v. Bennett*, 7 C. & P. 329.

**Under Statutory Authority—Local Boards.]**—By the Leeds Improvement Amendment Act, 1848, it was provided that the clauses of the Towns Improvement Clauses Act, 10 & 11 Vict. c. 34, as to making and maintaining public sewers and the drainage of houses, should be incorporated with and form part of the act "except so far as they or any of them are inconsistent with the provisions of this act, or are expressly varied or excepted by this act;" and by s. 6, the corporation of Leeds was authorized to construct one or more trunk or other sewer or sewers, sufficiently capacious to receive the foul and drainage water and filth of the town, and to convey the same into the river Aire:—Held, that the power to drain into the river was controlled by the Towns Improvement Clauses Act, s. 24, and also by s. 107, though that clause was not expressly incorporated in the local act; and that the corporation was not authorized by the local act to create a nuisance by draining into the river. *Att.-Gen. v. Leeds Corporation*, 5 L. R., Ch. 583; 39 L. J., Ch. 711; 19 W. R. 19. Affirming 39 L. J., Ch. 254; 22 L. T. 330; 18 W. R. 517.

Held, that though the river Aire was polluted before it received the drainage of Leeds, the landowners on the banks were entitled to restrain the further pollution. *Ib.*

Held, that though the sewer had been completed, and in operation sixteen years before proceedings were taken, the court would interfere at the suit of the landowners. *Ib.*

**—Nature and Extent of Liability.]**—A sanitary authority in whom the sewers are vested have only a limited ownership in them; they are not in the same position as to responsibility for fouling a stream as a private individual, because they cannot stop the sewers on account of the damage to the inhabitants of the neighbourhood. And although, perhaps, the sanitary authority might obtain an injunction to restrain persons from using the sewers

who had no right to do so, a landowner complaining of the nuisance cannot bring an action against them for not doing so; because an action cannot be maintained either at law or in equity to compel a person to bring an action for the purpose of restraining a nuisance which he cannot himself prevent. Where a sanitary authority have not themselves constructed sewers which are a nuisance, but only permitted them to be used as formerly by the inhabitants, they are not doing an act which can be restrained under the Public Health Acts or the Rivers Pollution Act, 1876. *Att.-Gen. v. Dorking Guardians*, 20 Ch. D. 595; 51 L. J., Ch. 585; 46 L. T. 573; 30 W. R. 579—C. A.

**Right of Local Board to Drain into Metropolitan Sewers.]**—The Metropolitan Board of Works took into their drainage system a natural brook, called the Stamford Brook. That brook was the natural means of drainage for the Acton district, which was outside the metropolitan area, and the inhabitants of that district, and the defendant board, on becoming the sanitary authority of the district, had used for that purpose that part of the brook which was in their district. By this means, as the Acton district increased, the sewers of the Metropolitan Board, as they said, became overburdened with sewage coming from outside their area, and they requested the defendant board to send their sewage some other way. They, however, refused to do so, and claimed a right to drain into the Metropolitan Board's sewers. These proceedings then were instituted by the Metropolitan Board:—Held, that the defendant board, although they had a statutory duty to compel the drainage of their district, were in no different position as regards the plaintiff board than an ordinary riparian owner was as regards another riparian owner lower down on the same stream, and that, apart from the sewage of such persons as had acquired a prescriptive right to drain into the sewers of the plaintiff board, they could not be made to receive the sewage of the Acton district; and that an injunction must be granted to restrain the defendant board from draining into the plaintiff board's sewers in the future. As to existing drains, as to those which were made before the defendant board came into existence, they could not be interfered with; and as to those made since, under the circumstances of the case, they would not be interfered with. *Att.-Gen. v. Acton Local Board*, 32 Ch. D. 221; 52 L. J., Ch. 108; 47 L. T. 510; 31 W. R. 153.

**By Gas Company—Penalties.]**—When noxious matter percolates through the soil from gasworks, so as to foul a well, such percolation will render the defendants liable under the 3 & 4 Will. 4, c. 90, which imposes a penalty of 200l. on any gas company, "who shall suffer any washings, &c., to be conveyed into any well." *Millington v. Griffiths*, 30 L. T. 65.

A well which, on account of its having become contaminated, has been disused by the owner for several years, and has been covered over, does not cease to be a well within the meaning of the act. *Ib.*

Non-user, and closing of his own well in consequence of its being polluted, even coupled with the acceptance by the plaintiff of the use of substituted wells of the defendants, is not such an abandonment of the former as to alter its cha-

racter and make it no longer a well, nor can any licence to pollute be inferred from such a state of facts. *Id.*

A local act for the establishment of a gas company, enacted that if the company should at any time cause or suffer to be conveyed or to flow into any stream or place for water, any washing or thing produced by making gas, or should do any act to the water contained in such stream, &c., whereby it should be fouled or corrupted, the company should forfeit for every such offence 200*l.*, and an additional penalty of 20*l.* for every day such washing, &c., should be conveyed or should flow after the expiration of twenty-four hours from notice of the offence served on the company:—Held, that the former penalty was not confined to the case of water wilfully or knowingly fouled, but extended to the case of water in a well fouled by water escaping through fissures in a gas tank, occasioned by mining operations in the vicinity. *Hipkins v. Birmingham and Staffordshire Gas-light Company*, 5 H. & N. 74; 29 L. J., Ex. 169; 8 W. R. 182. Affirmed on appeal, 6 H. & N. 250; 30 L. J., Ex. 60; 7 Jur., N. S. 213; 9 W. R. 168—Ex. Ch.

**Claim of Right by Prescription.**—There can be no prescriptive right to pollute a stream by the discharge of sewage in such a manner and to such an extent as to be injurious to public health. Even assuming that a prescriptive right to foul a stream with sewage can be acquired, such right must be restricted to the limits of it when the period of prescription commenced; and if the pollution be substantially increased, whether gradually or suddenly, the court will interfere by injunction to prevent the wrongful excess; and if it be possible to separate the illegal excess from the legal user, the wrongdoer must bear the consequences of any restriction necessary to prevent the excess, even if it unavoidably extends to a total prohibition of the user. *Blackburne v. Somers*, 5 L. R., Ir. 1.

Where a man has a right to the use of an ancient stream of water flowing through his land, and sewage is so precipitated into it as to pollute it, it is not competent to the persons causing the nuisance to claim as against him a prescriptive right to discharge the sewage into the stream. *Goldsmid v. Tunbridge Wells Improvement Commissioners*, 1 L. R., Ch. 349; 35 L. J., Ch. 382; 12 Jur., N. S. 208; 14 L. T. 154; 14 W. R. 512.

—**Evidence of.**—Action by the owner of a mill on the river Calder, which mill of right ought to be supplied with a flow of water from a millpool on the Calder, against an owner of works higher up the stream, for placing cinders and scoria at his works, so as to fall into the stream of the Calder, whence they were carried down into the plaintiff's millpool, and filled it up, to the obstruction of his right to water. Plea, that the occupiers of the defendant's works had, for more than twenty years, as of right placed cinders and scoria, the refuse of their works, on the banks of the stream, and in its channel, and that the cinders and scoria complained of were such refuse so placed:—Held, that the plea was bad, non obstante veredicto, as not shewing that the defendant had during twenty years, as of right, caused the refuse to go into the pond; for till the occupiers of the mill

sustained some damage from the defendant's user, no right as against them began to be acquired. *Murgatroyd v. Robinson*, 7 El. & Bl. 391; 26 L. J., Q. B. 233; 3 Jur., N. S. 615.

When a prescriptive right to foul a stream has been acquired, the fouling must not be considerably enlarged to the prejudice of other people. *Crossley v. Lightowler*, 2 L. R., Ch. 478; 36 L. J., Ch 584; 15 W. R. 801.

The fact that the stream is fouled by others, is not a defence to a suit to restrain the fouling by one. *Id.*

C. wishing to prevent the water of a river from being fouled by some dye works, purchased from the owners of the dye works a piece of land on the banks of the river, without communicating to them his object:—Held, that in the absence of any express reservation by the owners of the dye works of the right of fouling, C. could maintain a suit in equity to restrain it. *Id.*

**Loss of Rights by Non-User.**—The mere suspension of the exercise of a prescriptive right is not sufficient to destroy the right, without some evidence of an intention to abandon it; but where dye works had not been used for more than twenty years, and had been allowed to go to ruin:—Held, that any right of fouling a stream attached to them was lost. *Id.*

Where, through an artificial watercourse made for the purpose of draining mines, the drainage water has flowed for twenty years in a pure state, in consequence of the working of the mines having been discontinued, over premises of a person who has used it for that period, the working of the mines cannot be resumed (unless there is a custom to warrant it), so as to foul the water and disturb the enjoyment. *Magor v. Chadwick*, 11 A. & E. 571; 3 P. & D. 367; 4 Jur. 482.

See also cases sub tit. NUISANCE.

## 5. PROCEEDINGS AND EVIDENCE.

**Injunction before Undoubted Nuisance.**—Where a man has a right to the use of an ancient stream of water flowing through his land, and sewage matter is so precipitated into it as to pollute it, and to prevent his using it, he may apply to a court of equity for an injunction to restrain the pollution before it has become an undoubted nuisance. *Goldsmid v. Tunbridge Wells Improvement Commissioners*, 1 L. R., Eq. 161; 13 L. T. 332; 14 W. R. 92. Affirmed, 1 L. R., Ch. 349; 35 L. J., Ch. 382; 12 Jur., N. S. 208; 14 L. T. 154; 14 W. R. 562.

**Venue.**—It is not necessary to give a local description to the nuisance in an action for diverting the water of a navigation, though the venue is local. *Mersey and Irwell Navigation v. Douglas*, 2 East, 497.

The plaintiff's cause of action arises so entirely for nuisance in the county where the injury is sustained, as to retain the venue there. *Williams v. Land*, 4 Taunt. 729.

If a trench cut in the county of N. causes the plaintiff's lands to be overflowed in the county of W., although a statute requires all actions to be brought and tried in the county where the cause of action arises, the action may be brought and tried in W. *Sutton v. Clarke*, 6 Taunt. 29; 1 Marsh. 429.

**Declarations.**—If a plaintiff, in a count, claims

the right to the use of a well as appurtenant to a certain dwelling-house; and, in a second count, complains that the defendant obstructed a watercourse, which the plaintiff claims as appurtenant to a certain other dwelling-house; the word "other" is here not matter of description, and therefore it is no ground of nonsuit that both the rights claimed were appurtenant to the same house. *Taylor v. Bennett*, 7 C. & P. 329.

A count for diverting and turning a stream of water is not supported by proof of penning back and checking its course, whereby the water was made to overflow the plaintiff's meadow. *Griffiths v. Maron*, 6 Price, 1.

The wrongful act complained of was the digging and continuing the sewer, and thereby diverting the water from the pond. The evidence was, that the water was not diverted by digging the sewer, but previously, for the purpose of making the sewer; and since the sewer had been made, the water in the pond could not rise to its former height:—Held, that there was no variance between the declaration and the proof, so far as it related to the continuing of the sewer. *Dukes v. Gostling*, *infra*.

An allegation that the plaintiff was possessed of mines, lands and premises, and of right ought to have had and enjoyed, and still of right ought to have and enjoy, the water of a stream which had been used to flow alongside the lands and premises, is not supported by proof that the plaintiff was a lessee of mines under lands adjoining the stream, with a grant from the surface owner of the use of the water for colliery purposes. *Insole v. James*, 1 H. & N. 243.

Where the plaintiff brought an action for diverting a watercourse, stating that the locus in quo was in the possession of S., as his tenant:—Held, that the averment was satisfied by proof of a mortgage from S., the tenant for life, to the plaintiff, who was entitled to the reversion. *Partridge v. Bere*, 1 D. & R. 272.

Where the owner of land through which a stream flows has, within twenty years, built mills upon its bank, and applied the water of the stream to the working of them, he may recover upon an issue raised by a traverse of an allegation, that his right to the water was "by reason of the possession of the mills." *Wood v. Waugh*, 3 Ex. 748; 18 L. J., Ex. 305; 13 Jur. 472.

**Pleas.**—A plaintiff declared that he was possessed of a mill; and by reason thereof was entitled to the use of a stream for the mill, and that the water ought to run and flow to the mill, and that the defendant wrongfully and injuriously diverted the same:—Held, that, under the plea of not guilty, the only matter in issue was the fact of the diversion, and that the right to the use of the stream, as claimed, was admitted. *Frankum v. Falmouth (Earl)*, 4 N. & M. 330; 2 A. & E. 452; 1 H. & W. 1.

In a declaration, the plaintiff stated, by way of inducement, that the defendant was possessed of a close used as a private road, and then the injury was stated to have been sustained by the defendant digging a sewer in the close used as a private road, and thereby withdrawing the water from a pond on the plaintiff's close. It was in evidence that, at the time of digging the sewer, the close was not used as a private road:—Held,

that, under the plea of not guilty, the defendant admitted all matters of inducement; and semble, that the allegation of the user of the defendant's close was surplusage. *Dukes v. Gostling*, 1 Scott, 570; 1 Bing. N. C. 589; 1 Hodges, 120.

A declaration stated that the plaintiff was lawfully possessed of a mill, and by reason thereof ought to have and enjoy the benefit of the water of a watercourse which ran and flowed by means of a weir therein, erected a little above the mill, being kept at a certain height, unto the mill, for supplying it with water for the working thereof, and complained that the defendant wrongfully pulled down the weir, and placed and kept it at a lower height than it ought to have been. The defendant pleaded that he was the occupier of a close adjoining the watercourse, and that he and all others the occupiers for the time being of the close, for twenty years next before action, enjoyed as of right, and without interruption, the right of, from time to time, as occasion required, removing a part of the weir, and placing and keeping it at a lower height than the rest, to such an extent and for such a time as was necessary for diverting enough of the water to irrigate the close; that the irrigation being necessary for the close, wherefore the defendant removed the part of the weir, and placed and kept it at such lower height to such an extent and for such a time as, and no more or longer than, was necessary for diverting the water for the irrigation of the close:—Held, that this plea was good; that it was not an argumentative traverse of the right alleged, inasmuch as it set up a right which, under 2 & 3 Will. 4, c. 71, was not complete until the commencement of the action, and, therefore, was not inconsistent with the plaintiff's right to have the weir at a greater height at the time of the act complained of. *Ward v. Robins*, 15 M. & W. 237.

To an action for polluting a stream, and impregnating it with noxious substances, whereby the plaintiff's cattle were unable to drink the water, the defendant pleaded an immemorial right to use the water of the stream for the purposes of his trade of a tanner, and returning it polluted to the stream when so used, and also prescriptive rights for twenty and forty years. At the trial, it appeared that the defendant and his father and grandfather had for a long series of years carried on the business of tanners at the place in question, using the water of the stream as they wanted it; but that, within the last twelve years, the tannery business had been considerably enlarged, and the business (and consequently the pollution of the stream) increased fourfold:—Held, that whether the pleas were to be understood as claiming an immemorial or a prescriptive right, not limited to the purposes of the tannery, or the more limited right to use the water for the purposes of the business as carried on more than twenty years ago, the verdict was not warranted by the evidence. *Moore v. Webb*, 1 C. B., N. S. 673.

A declaration alleged that the plaintiff was reversioner of a house, garden and premises, occupied by his tenant; that the defendant was possessed and in the occupation of a close near to the house; and that there was a watercourse in the close, and the defendant, by reason of his possession of the close, ought to have scoured and kept open the watercourse so often as was necessary, to prevent the water from being obstructed, and from running out of the watercourse unto, into, and under the house. Breach,

that the defendant, during the tenant's occupation, wrongfully permitted the watercourse to be obstructed for want of proper cleansing, inasmuch that the water was penned back, and ran into and damaged the house, to the injury of the reversion. Plea, that a wall, parcel of the plaintiff's premises, was situate near to the watercourse and to the defendant's close; and by reason of the wall being, through the neglect of the tenant, ruinous, part of the wall near to the watercourse fell down, and by means thereof rubbish, part of the materials, fell into the watercourse, and the same was thereby choked up as alleged, and the water for a short time unavoidably was penned back, and ran out as in the declaration mentioned. Averment, that the defendant, in a short and reasonable time after he had notice that the watercourse was so choked up, and before action brought, cleansed out the same, so that the water flowed as it ought to do:—Held, that the alleged default of the tenant was no answer, the plea not shewing that the owners and occupiers of the estate for the time being were bound to repair the wall which fell. *Bell v. Twentymen*, 1 Q. B. 766; 1 G. & D. 223; 6 Jur. 336.

And the defendant could not excuse himself by averring that he repaired as soon as he had notice of the injury, for that he became liable at the time when the injury occurred. *Id.*

So, if he had alleged that he repaired as soon as possible after the injury. *Id.*

If a defendant in one plea claims to have water flow in a mill-stream to a ditch at all times, and in another plea claims the right only at the time of flashes, and the jury finds the right in his favour at all times, the judge will discharge the jury as to the claim at the time of flashes. *Drewett v. Sheard*, 7 C. & P. 465.

**Replication.**—To an action by a reversioner for widening a channel, the defendant pleaded that A. and all prior occupiers of a mill, whilst such occupiers, had, as of right, for twenty years enjoyed a watercourse, and whilst such occupiers had for twenty years as of right scoured and amended the channel, when and so often as the same required scouring, as to the mill appertaining. Replication, traversing in the terms of the plea the enjoyment of the watercourse, and the scouring as of right, for twenty years:—Held, that the replication was not bad for duplicity, it being rightly a traverse of one whole quasi prescription alleged in the plea. *Peter v. Daniel*, 5 C. B. 568; 5 D. & L. 501; 17 L. J., C. P. 177; 12 Jur. 604.

**Evidence.**—In an action for breaking the plaintiff's close and destroying a hatch, the defendant pleaded that the water of the stream ought to have flowed to his mill, and because the hatch prevented its so doing he pulled it down:—Held, that evidence might be given of what a former tenant said as to asking permission to have the water, as this was an act done, and might be proof of an exercise of a right by one side, and an acquiescence in it by the other. *Wakeman v. West*, 8 C. & P. 105.

In an action for diverting water from the mill of A., he obtained a verdict; A. and B., afterwards in possession of the mill, brought an action for a similar injury against the same defendants:—Held, that as A. and B. were in possession of the mill formerly in the posses-

sion of A., it must be presumed they were privy in estate with him, and that consequently the record was admissible in the second action. *Blakemore v. Glamorgan Canal Company*, 1 Gale, 78; 2 C., M. & R. 133; 5 Tyr. 603.

Where the plaintiff claimed the whole bed of a river, flowing between his land and the defendant's, the defendant contending that each was entitled ad medium flum aquæ:—Held, that evidence of acts of ownership exercised by the plaintiff upon the banks of the river, on the defendant's side, lower down the stream, and where it flowed between the plaintiff's land and a farm of C. adjoining the defendant's land; and also of repairs done by the plaintiff, to a fence which divided C.'s farm from the river, and was in continuation of a fence dividing the defendant's land from the river, was admissible for the plaintiff. *Jones v. Williams*, 2 M. & W. 326; M. & H. 51.

A defendant was owner of a close containing a well, the water of which had flowed immemorially into an old pond, situate in one of three closes belonging to the plaintiff. The defendant's predecessor of the land having, about 1812, changed the course of the water, whereby it ceased to flow into the old pond as before, the plaintiff made three new ponds, one in each of his three closes, and having conducted the water into them, ceased to use the old pond, which became filled with rubbish and overgrown with grass. In 1843, the defendant diverted the water from the three ponds, whereupon the plaintiff brought his action. The declaration stated, that, at the time of the grievance, three closes of land, and certain, to wit, three ponds filled with water, one pond thereof being in and upon each of the closes respectively, were in the possession and occupation of the plaintiff's tenant; and it then stated the diversion complained of:—Held, that the plaintiff, who had failed to prove a right to the overflow of water into the three ponds, was entitled to give evidence of the immemorial right to the overflow of water into the old pond. *Hale v. Oldroyd*, 14 M. & W. 789; 15 L. J., Ex. 4.

**Record of Conviction.**—In an action for disturbing a watercourse, it was proved that the water had flowed in its present course for more than twenty years. The plaintiff had been in the habit of drawing off the water, but on one occasion he had been summoned and fined one shilling from which he did not appeal:—Held, that the conviction was improperly rejected, as the conviction unappealed against was, under the circumstances, evidence of an acknowledgment by the plaintiff that the usage to draw off the water for irrigation was not as of right. *Eaton v. Swansea Waterworks Company*, 17 Q. B. 267; 20 L. J., Q. B. 482; 15 Jur. 675.

#### IV. WATERWORKS COMPANIES.

##### 1. GENERAL POWERS.

**Taking of Streams—Compensation.**—The 10 & 11 Vict. c. 17, places the taking of streams upon the same footing as the taking of lands under the Lands Clauses Act (8 & 9 Vict. c. 18); and a waterworks company was restrained from diverting a stream belonging to the plaintiff, without first paying compensation for the same, or making deposit and giving a bond in accord-

ance with the provisions of the 8 & 9 Vict. c. 18. *Ferrand v. Bradford (Mayor)*, 21 Beav. 412; 2 Jur., N. S. 175.

— **Rights of Duke of Cornwall.**—By an act a company had power to take water from the river Chew on paying compensation for it; but it was enacted that it should not be lawful for the company to divert, or take, or in any manner interfere with water flowing or passing, or which, but for the powers of the act, might flow or pass into the river Chew, unless and until the water, after the rate of twelve cubic feet per second for twelve hours for each and every day, should be passing down the river from and out of reservoirs for the use of mills. By a subsequent act it was provided that nothing in that act or the present act should extend to authorize the company to purchase, take, use or interfere with any land, soil or water, or any rights in respect thereof, belonging to the Duke of Cornwall, without his written consent:—Held, that the company did not by the exercise of the powers conferred by the first act, acquire any right as against the Duke of Cornwall to the water of the Chew, without obtaining the authority of the Duke of Cornwall in the manner provided for by the last act. *Att.-Gen. (Prince of Wales) v. Bristol Waterworks Company*, 10 Ex. 884; 24 L. J., Ex. 205.

**Taking of Lands—Waterworks Clauses Act.]**

—The meaning of the Waterworks Clauses Act, 1847, s. 12, is, that subject to a company having authority to take lands and construct works, then, if the company has power and space and room enough in the land which they are authorized to take to afford them an area for additional works, they may be empowered to make the collateral and auxiliary works referred to in the section. *Simpson v. South Staffordshire Waterworks Company*, 4 De G., J. & S. 679; 34 L. J., Ch. 380; 11 Jur., N. S. 453; 13 W. R. 729.

— **Limitation to Plans.**—A waterworks company, before applying to parliament, deposited plans, shewing that a certain field would be affected by a tunnel passing forty-five feet below the surface, and gave a notice to the owner accordingly. The company obtained its act, authorizing it to construct its works according to the plans, and afterwards proposed to take the field, sink a well, and erect pumping machinery thereon:—Held, that the company could not, by the exercise of its compulsory powers, take any portion of the field, other than so much as was required for the tunnel. *Ib.*

**Breaking up Roads for Works.**—Under s. 31 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), it is incumbent upon the undertakers intending to break up a road to communicate beforehand their proposed plan or method of executing the work to the road authority; and this in a sufficient manner to enable the road authority to judge whether what is proposed ought to be done without modification. If the plan is not approved of by the road authority, it rests with the undertakers to apply for the determination of two justices before proceeding to operations. *Edgware Highway Board v. Colne Valley Water Company*, 46 L. J., Ch. 889.

— **By Owner or Occupier—Liability for.**—By 10 & 11 Vict. c. 17, s. 52, the owner or occupier, defined in s. 48, is empowered to break up so much of the pavement of any street as is between the main of the waterworks company and his premises, to effect a communication therewith, and such communication is to be made under the superintendence of an officer of the company. Where an owner, acting under this power, opened a street to lay a service-pipe, and carelessly filled up the hole, and the connexion with the main was, at the same time, effected by a waterworks company:—Held, that the owner, and not the company, was responsible for reinstating the street, and that the word "pavement" in s. 52 was not confined to a foot pavement. *Glover v. East London Waterworks Company*, 17 L. T. 475; 16 W. R. 310.

**Laying down Pipes.**—An act for supplying with water the town and port of C. and the neighbourhood, after reciting that the town of C. and the neighbourhood were insufficiently supplied with water, incorporated a company, and gave it the usual powers, and enacted that the limits of the act for the supply of water should comprise "the whole of the town and port of C., and the parishes and places within and adjoining to such town:—Held, that the word "port" was used in its popular sense, and did not extend to the district fixed by the commissioners of the Treasury as the port of C. for the purposes of the customs duties. *Cardiff (Mayor) v. Cardiff Waterworks Company*, 5 Jur., N. S. 953.

The company was proceeding to lay down pipes, which they alleged were necessary for the supply of C., but which they admitted they intended to use for the purpose of carrying water beyond the limits of their powers. At the suit of the board of health of C., the court restrained the company from laying down pipes under the streets of C. for the purpose of supplying with water any parish or place not being part of the port of C., or any parish or place within or adjoining such town. *Ib.*

**Construction of Works by Local Authority—Necessary Notices.**—The Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 75, is not materially extended by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 52, and therefore a local authority, desiring to construct waterworks, and having, before the passing of the latter act, given the notices required by s. 75 of the former act, is not, in consequence of the passing of the latter act, required to give the notices under s. 52 of that act. *Richmond Waterworks Company and the Southwark and Vauxhall Waterworks Company v. Richmond (Vestry)*, 3 Ch. D. 82; 45 L. J., Ch. 441; 34 L. T. 480.

**Employment of Engineer.**—A company was incorporated for supplying a town with water. The act fixed the share capital of the company at 15,000*l.*, and defined the area from which the water was to be supplied. Some years after the works were completed, the committee of management of the company, in consequence of complaints of the defective supply, resolved, with the sanction of the shareholders, to apply to parliament for power to make fresh works, so as to include a largely extended area, both in re-

spect of the sources and the supply of water, with a large additional capital; and having power to enter into contracts, on behalf of the company, employed an engineer to prepare the necessary parliamentary plans:—Held, that the employment of the engineer for the above purpose was not ultra vires, and (the contract being in other respects valid) that he was entitled to recover as for work and labour from the defendant, who had (by another statute) become liable to pay the debts and perform the agreements of the company. *Bateman v. Ashton-under-Lyne (Mayor)*, 3 H. & N. 323; 27 L. J., Ex. 458.

**Paying off Share Capital.]**—Under various deeds and acts of parliament waterworks became vested in a corporation, the company to whom the works originally belonged being secured payment of interest on their share capital. The corporation had power to pay off the share capital on giving six months' notice. Notice to pay off was given, but the money was not paid:—Held, that the option to pay off could not be exercised again. *Ward v. Wolverhampton Waterworks Company*, 13 L. R., Eq. 243; 41 L. J., Ch. 308; 25 L. T. 487; 20 W. R. 385.

## 2. LIABILITY.

### a. Compensation.

**For Abstraction or Diversion of Water—In what Cases.]**—The abstraction by a waterworks company of water from a stream does not entitle a riparian proprietor below to require the company to treat under the Waterworks Clauses Act, 1847, s. 6, for the purchase of his interest in the stream, but entitles him only to compensation as for land injuriously affected. *Bush v. Trowbridge Waterworks Company*, 10 L. R., Ch. 459; 44 L. J., Ch. 645; 33 L. T. 137; 23 W. R. 641.

**—When no Action Lies.]**—By 10 & 11 Vict. c. 17, s. 12, powers for the execution of certain works are given, and it is provided that the undertakers shall make full compensation to all parties interested for all damage sustained by them through the exercise of such powers. In the execution of works authorized by a local act, incorporating that section, A. intercepted water which would otherwise have percolated through the strata of earth into a well upon the premises of B., and drained off water which had accumulated in the well. Upon a complaint by B., before justices, in order to recover compensation for the damage she had sustained, A. was ordered to pay her a sum of money and costs:—Held, that this order was wrong; for that, inasmuch as no action would lie against A., in respect of either quantity of water, supposing no act, authorizing the execution of the works, had been passed, the claim for compensation could not be sustained. *New River Company v. Johnson*, 2 El. & El. 435; 29 L. J., M. C. 93; 6 Jur., N. S. 374; 8 W. R. 179.

**Purchasable Interest—What is.]**—A corporation under its local waterworks act, with which were incorporated the Lands Clauses Act, 1845, and the Waterworks Clauses Act, 1847, was empowered to purchase, enter upon, take, use, divert and appropriate certain streams, one of

which, arising at a distance, came down to and turned a mill, of which plaintiff was tenant for life. The corporation gave the owner notice of their intention to take and divert the whole of the stream, and actually diverted part. In pursuance of an agreement made between the parties, two valuers were appointed (in accordance with s. 9 of the Lands Clauses Act, 1845), to assess the compensation to be paid in respect of the damage, both present and future, caused by the abstraction of the whole of the stream. The valuers disagreed, and a third valuer was appointed by justices, with the consent of both parties, who awarded "the sum of 939l. 5s. as the compensation money to be paid by the corporation for the permanent damage and injury which the owner or owners for the time being of the above-mentioned mill, lands, and premises, may have sustained, or shall or may sustain, by the abstraction of the whole of the stream." In an action on this award, claiming a mandamus to the corporation to pay the money into the bank:—Held, that the interest of the owner and his remainderman was a purchasable interest, within the meaning of the special act and the acts incorporated with it, and that it was competent to the corporation to pay for the whole stream at once, though they had only diverted part. *Stone v. Yeovil (Mayor)*, 2 C. P. D. 99; 46 L. J., C. P. 137; 36 L. T. 279; 25 W. R. 240—C. A. Affirming 1 C. P. D. 691; 45 L. J., C. P. 657; 34 L. T. 871; 24 W. R. 1073.

Held, also, that the parties proceeded rightly under s. 9 of the Lands Clauses Act, and that that section applies not only to cases where lands in the occupation of a tenant for life are purchased and taken, but also to cases of compensation for permanent injury to such lands, the words "such lands" in that clause being equivalent to "lands so occupied." *Id.*

Held, also, that the agreement between the parties amounted to a binding agreement, on the part of plaintiff to accept, and on the part of the corporation to pay, the sum assessed by the two valuers, or in case of disagreement, by the third valuer. *Id.*

**Damage by Severance of Minerals.]**—When a corporation was under an act empowered to make a conduit for water through a field at some distance below the surface:—Held, that it was not necessary for it to make compensation for damage by severance of minerals where it was not required by the provisions of the Waterworks Clauses Act, 1847, to purchase them. *Huddersfield Corporation and Jacomb, In re*, 17 L. R., Eq. 476; 43 L. J., Ch. 748; 30 L. T. 78; 22 W. R. 255. Affirmed, 10 L. R., Ch. 92; 44 L. J., Ch. 96; 31 L. T. 466; 23 W. R. 100.

### b. Injuries Due to Defective Works.

**Action for Damages—When Allowed—Arbitration.]**—A provisional committee of a waterworks company agreed with B., on his withdrawing his opposition to their bill in parliament, to purchase lands for their works at a fixed sum per acre, including damage for severance, and in addition to pay for any damage he should sustain from the water of the company being near his house or dwelling, and also to make good to him or his tenants all loss or damage which the erection of the intended works might cause to any

property belonging to or in the occupation of him or them which the company might not purchase (except damage occasioned by severance), whether caused by the order or neglect of the company, the damage in all these cases to be assessed by arbitrators. The act was obtained, and it incorporated the Lands Clauses Act; and the purchase-money was paid, and the compensation money under the above heads was ascertained by the arbitrators and paid to B. He subsequently brought an action against the company, claiming damages for taking so little care of a reservoir that the water oozed out over his land, causing offensive smells and vapours, and rendering his buildings damp and unwholesome, and permanently injuring their value, and for obstructing a drain, and thereby penning back the sewage of his house, so that it could not flow away by means of the drain as it ought; and further, that by reason of making the reservoir and works authorized to be made by the act, a drain whereby his adjoining house and lands were drained, was interrupted and rendered useless, and the company neglected to substitute another drain according to their duty, whereby his house and lands were insufficiently drained; and also for cutting a channel across, and thereby, and also, by means of the reservoir and works, depriving him of the use of an agricultural road, forming a communication between his lands, and for not substituting another road in lieu of it; and also by the reservoir and works obstructing a public footpath, and depriving him of the use of it, and thereby causing him particular damage and inconvenience:—Held, first, that the action was maintainable, the damages claimed not being those directed by act of parliament to be settled by arbitration, or such as were contemplated by or within the scope of the previous agreement between the parties. *Blagrove v. Bristol Waterworks Company*, 1 H. & N. 369; 26 L. J., Ex. 57.

— **Notice of Injury.**—Held, secondly, that with respect to the right of action for the damage occasioned by the interruption of the drain and non-substitution of another, it was immaterial that the company had no notice that the interrupted drain was for the drainage of the house, or that he required another substituted drain; and so also with respect to the interruption and non-substitution of the occupation-road, that it was no answer that he had not required any way to be substituted. *Id.*

— **Nature of Injury.**—Held, thirdly, that a claim against the company for wrongfully and maliciously raising the level of the water of a stream so as to prevent its flowing at its accustomed speed at the place where it arrived at B's lands, might be a loss or damage caused by the erection of the works, which by the agreement was to be assessed by arbitration. *Id.*

— **Fraudulent Representation to Arbitrators.**—A count alleged that B. and the company referred to arbitration the amount of compensation to be paid for the damage which he would sustain by the construction of a reservoir near his house and lands, for which damage the company would have been bound to compensate him, and that the amount of compensation depended in part upon the height to which the reservoir would be constructed; and that the company wrongfully, maliciously and fraudu-

lently caused it to be represented to the arbitrators that they intended to construct the reservoir to the height of thirty feet, whereas they either had not determined on the height, or intended to construct it to a greater height, and did afterwards so construct it, by reason of which representation the arbitrators awarded to B. much less compensation than they otherwise would have done:—Held, that the count disclosed no cause of action. *Id.*

— **Remoteness of Damage.**—A waterworks company under its act laid down one of its mains along and under a turnpike road, made under an act which declared the soil to be in the owners of the adjoining land, subject only to the right to use and maintain the road. K. was owner of land on both sides, at a spot where the road was carried across a valley on an embankment, and wanting to connect his land on either side he employed C., at an agreed sum, to make a tunnel under the road. In doing the work it was discovered that there was a leak in the main of the company higher up the road, and on C. digging out the earth, the water from the leak flowed down upon the work and delayed it, so as to cause pecuniary damage to C., for which he brought an action against the company:—Held, that, assuming K. could have maintained an action against the company for injury to his property, the damage sustained by C. by reason of his contract with K. becoming less profitable, or a losing contract, in consequence of the injury to K.'s property, gave him no right of action against the company. *Cattle v. Stockton Waterworks*, 10 L. R., Q. B. 453; 44 L. J., Q. B. 139; 33 L. T. 475.

— **Indictable Nuisance.**—The tunnel was formed by digging through half the width of the road, forming the tunnel, and then completing the other half in the same way. Before commencing the work K. obtained the consent of the road surveyor and the trustees:—Held, assuming K. could, under the circumstances, have been indicted for the nuisance to the high road, the partial obstruction to the highway did not render the whole proceeding so illegal as to prevent C., who was engaged in it, from recovering damages for a wrong. *Id.*

### c. Escape of Water.

— **When no Negligence.**—A water company having observed the directions of the act of parliament in laying down their pipes, is not responsible for an escape of water from them not caused by their own negligence. *Blyth v. Birmingham Waterworks Company*, 11 Ex. 781; 25 L. J., Ex. 212; 2 Jur., N. S. 333.

The fact that their precautions proved insufficient against the effects of a winter of extreme coldness, such as no man could have foreseen, is not sufficient to render them liable for negligence. *Id.*

— **Damage to Lands by extraordinary Flood—*Damnum fatale.***—By the 43rd section of the Kirkcaldy and Dysart Waterworks Act, 1867, it was provided that the commissioners under the act, "should be bound to make good to the Countess of Rothes and her heirs, &c., all damage which may be occasioned to her or them, by reason of or in consequence of any bursting, or

flow, or escape of water from any reservoir, or aqueduct, or pipe, or other work connected therewith" which may be constructed by the commissioners. The countess is proprietrix of lands situated below the site of one of the reservoirs, and during an extraordinary rainfall a great quantity of water was continuously discharged from the reservoir, through a waste weir into the watercourse of a burn, and did much damage to the countess's lands. She claimed compensation. There was no failure or insufficiency of the works and no negligence:—Held, reversing the decision of the court below (Lord Blackburn dissenting), that on the construction of the above clause the countess was entitled to compensation for damage by flood waters from the reservoir, no matter how caused. *Roths (Countess) v. Kirkcaldy Waterworks Commissioners*, 7 App. Cas. 694—H. L. (Sc.)

Per Lord Watson: Statutory provisions, such as here, in a local and personal act must be regarded as a contract between the parties, whether made by their mutual agreement, or forced on them by the legislature. *Id.*

**Absence of Reasonable Care—Evidence of.]—**Although a water company is not liable for the unforeseen results of an extraordinary frost, yet the company is bound to take reasonable care to provide against the consequences of ordinary frost. *Steggles v. New River Company*, 11 W. R. 234. Affirmed, 13 W. R. 413—Ex. Ch.

Where it was known that the effect of frost would be to cause the plugs in the water pipes to start, and thus to let the water out at the side, and some precautions might have been taken, if not to prevent this, at all events to prevent the water from escaping through the soil, and no such precautions having been taken, the plugs started in a frost of extraordinary severity, and the water, thus escaping, ran through the soil into a cellar:—Held, that there was some evidence of negligence on which a jury might hold the company liable. *Id.*

**Obligation to Cleanse Channel of River.]—**A company was authorized by its special act to construct a reservoir, to divert into it the water of the river Muddock and of other streams, and from the reservoir to supply, through the channel of the Muddock, sufficient water to enable the mills on the river Bann to be worked at all seasons of the year; and these works it executed without negligence, and in the due exercise of its parliamentary powers. In consequence of these works, the channel of the Muddock passing near the plaintiff's land became choked, and, for want of cleansing, incapable of discharging the increased volume of water so sent through it, and the plaintiff's land was thereby flooded and injured:—Held, that there was an obligation on the company to cleanse the channel of the river. *Geddis v. Bann Reservoir Company*, 3 App. Cas. 430. Reversing 11 Ir. R., C. L. 160—Ex. Ch.

#### d. Pollution of Water.

##### **Not within Statutory Powers—Liability for.]**

—A waterworks company was authorized by its private act to take and use the water of certain springs which supplied a river upon the banks of which certain mills were situate. The act provided that the company should not abstract

more than a certain amount of water before it had constructed a compensation reservoir for storing the water during floods for the benefit of the mill-owners. The act gave the company compulsory powers for acquiring land, streams and springs for its undertaking, and powers to acquire by consent lands for constructing its compensation reservoir. The act contained a reservation of the rights of the owners and occupiers of any lands, mills or works, to the use of the waters of the stream, except so far as provided and declared by the act. The Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), was incorporated with this act. The company constructed a compensation reservoir, and a subsequent act of parliament which gave it further powers, including powers of emptying and cleansing the reservoir, recognized this reservoir as a sufficient compensation reservoir for the mill-owners, and directed it to be maintained. The owner of some dye works situate on the river below the reservoir filed a bill against the company, complaining that the effect of the reservoir was to make the water of the river more muddy than it was before its construction, and to render it unfit for the process of dyeing, and praying for an injunction to restrain the company from fouling the stream. These allegations being in the judgment of the court established:—Held, that the acts gave the company no power to foul the water; that the compensation clauses in the Waterworks Act, 1847, did not apply, inasmuch as the injury was such as the company was not authorized to commit; and that the owner of the dye works was entitled to an injunction. *Clowes v. Staffordshire Potteries Waterworks Company*, 8 L. R., Ch. 125; 42 L. J., Ch. 107; 27 L. T. 521; 21 W. R. 32. Reversing 27 L. T. 298.

**—Assessment of Damages.]—**The plaintiff was owner of two dye works, which were situate upon the banks of a river, and had carried on flourishing businesses until the construction of a reservoir by the defendants higher up the river. The consequence of the construction of the reservoir was that a deposit of mud was formed at the bottom of it, which, escaping into the river, so fouled it that the water became unfit for use in the plaintiff's works, and the business consequently fell off, until the plaintiff was obliged to sell the works very much below their former value. The plaintiff brought an action and the judge at the trial directed the jury to find a verdict for the plaintiff, and the jury awarded 400*l.* for damages and 1,000*l.* for the depreciation of the property. On motion for a new trial:—Held, that the plaintiff was not entitled to recover anything for the depreciation of his property, and that the rule must be made absolute for a new trial, unless he would consent to reduce his damages to the 400*l.* lawfully recoverable. *Tutton v. Staffordshire Potteries Waterworks Company*, 44 J. P. 106.

#### e. Rates.

See RATES AND RATING.

#### 3. RIGHTS AGAINST OTHER PERSONS.

**User and Diversion of Water by Canal Company.]—**A waterworks company purchased a mill on the upper part of a stream, and thereby

became riparian owners. They collected the water from the stream into a reservoir and applied it for the purpose of supplying a neighbouring town with water. A canal company being the riparian owners lower down the stream, finding their flow of water affected, brought a suit for an injunction, and the waterworks company by their pleadings claimed the right to use the water in the manner complained of:—Held, that such user of the water by them was neither a user in connexion with the tenement of the waterworks company, nor a reasonable user such as an upper riparian owner had a right to make, and that the canal company was entitled to an injunction to restrain such user of the water. *Swindon Waterworks Company v. Wilts and Berks Canal Navigation Company*, 7 L. R., H. L. 697; 45 L. J., Ch. 638; 33 L. T. 513; 24 W. R. 284. Affirming, with variation, 9 L. R., Ch. 451; 43 L. J., Ch. 393; 30 L. T. 443; 22 W. R. 444.

A canal company was established by acts of parliament which gave them the right of taking water from streams within the distance of 2,000 yards, for the purpose of making and maintaining their canal. They purchased a mill on the stream in question, and so became riparian owners. They afterwards ceased to use the mill:—Held, that by the purchase of the mill they acquired all the rights incident thereto, in the same way as such rights would have been acquired by a private individual, and not fettered or restricted within the limits of their statutory powers as a canal company. *Id.*

**Injury to Pipes by Railway Company—Interest in Land.**—A railway company, under the powers of an act of parliament, took land in which were laid certain pipes belonging to a waterworks company. These pipes were not removed by either of the companies at the time the railway company took the land, but the ground in which they lay was overlaid by that company by additional soil to the depth of several feet. Subsequently, the railway company, in tunnelling through the ground, came upon the pipes and removed them, but did not hand them over to the waterworks company or pay them their value. On these facts they took proceedings under the Lands Clauses and the Railways Clauses Acts for settling the amount of compensation to which they were entitled as for an injuriously affecting their interest in the land:—Held, that the facts stated gave them no interest in the land, and that they consequently could not maintain proceedings for compensation for injuriously affecting it. *New River Company v. Midland Railway Company*, 36 L. T. 539; 25 W. R. 502—C. A.

**By Landowners—Sinking of Wells.**—A local act authorized a company to enter upon lands within a manor, and to dig and search for any spring of water, and to convey the water from such springs into a town for the use of the inhabitants of the town and the shipping in the harbour. It provided that the company should not take the water from any spring, streams or ponds, so as to deprive the occupiers of the lands of water for their own necessary uses, and for the cattle depasturing therein. The company had power to lay down pipes, and the inhabitants, with the consent of the company, might obtain the water by pipes, to communicate with the company's pipes at certain charges, according to

the bore of the pipes:—Held, that the owners or occupiers of lands within the manor were not prevented by the act from sinking wells in such lands, though the effect might be to draw off the water from the company's springs. *South Shields Waterworks Company v. Cookson*, 15 L. J., Ex. 315.

**Right to have Pure Water.**—The abstraction of water from a natural stream, openly and under a claim of right, for a period of twenty years, to a tenement not abutting on the stream, will create no easement to have pure water flow down the stream to the point of abstraction. *Stockport Waterworks Company v. Potter*, 3 H. & C. 300; 10 Jur., N. S. 1005; 10 L. T. 748.

#### 4. SUPPLY OF WATER.

##### a. General Powers and Duties.

**Supply for a Township—Amount.**—A corporation obtained parliamentary power to collect all the water from the gathering grounds of a district, but was bound to supply to a particular township not less than 25,000 gallons, or more than 75,000 gallons of water per day, at the price of 6d. per 1,000 gallons, and the amount to be supplied between the maximum and minimum limits was to be at the option of the purchaser:—Held, that the township might enforce the supply of more than 25,000 gallons per day for the purpose of selling part of it at a profit to a neighbouring township. *Halifax (Mayor) v. Soothill Upper Local Board*, 30 L. T. 513. Affirmed, 31 L. T. 6.

In 1845, a company was formed for supplying water to a town, under an act which contained no provision for supplying water at high pressure. In 1850, the works of that company were authorized to be extended by an act which declared that the 10 & 11 Vict. c. 17, with respect to the construction of the waterworks, should be incorporated therewith. In 1855, a new company was formed for the better supplying with water the same town, the suburbs, and the parishes and places adjacent thereto, by an act, which enacted that the 10 & 11 Vict. c. 17, should, except as therein otherwise provided, be incorporated with and form part of that act; and that the water to be supplied from any pipe of the company need not be constantly laid on under pressure. In 1856, the two companies were amalgamated under an act which contained a general provision incorporating 10 & 11 Vict. c. 17, therewith:—Held, that the amalgamated company was not liable to the high-pressure obligation contained in 10 & 11 Vict. c. 17, ss. 35 and 42. *Purnell v. Wolverhampton New Waterworks Company*, 10 C. B., N. S. 576; 4 L. T. 513.

**Supply for Domestic Purposes—Fixed Bath—Power to make Extra Charge.**—The defendants, a waterworks company, were required by their special act to supply water for domestic purposes to the inhabitants of the borough, at specified rates, it being also provided that a supply for domestic purposes should not include a supply for baths, washhouses, or public purposes, &c. The plaintiff erected in his house a fixed bath connected with the water service. The company demanded, in addition to the ordinary water rate, an extra charge for the supply to this bath, on the ground that a supply for such a purpose was not a supply for domestic purposes within the

meaning of the act :—Held, that the company were not entitled to make such extra charge. *Weaver v. Cardiff (Corporation)*, 48 L. T. 906 ; 47 J. P. 599.

— **Use of Water to wash Carriage.**—A local act required a water company to furnish to occupiers of houses, who should demand supply of water for domestic use, a sufficient supply thereof, at rents fixed according to the assessment of the houses to the poor rate. The act incorporated the 10 & 11 Vict. c. 17. An occupier was assessed upon his house and premises, including a coach-house, stable and yard. He kept, for private use, a carriage in the coach-house and a horse in the stable ; and, on the premises, he applied for the horse, and for washing the carriage, water supplied by the company for domestic use :—Held, that he was entitled to do so, the water being, within the meaning of the act, applied to domestic use. *Busby v. Chesterfield Waterworks and Gaslight Company*, EL. Bl. & EL. 176 ; 27 L. J., M. C. 174 ; 4 Jur., N. S. 757.

**Liability for Deficient Supply in Case of Fire.**—A Waterworks Act, 1853, s. 79, provided that the company should, at the request of an owner or occupier of any premises situate in or adjoining any street in which any main or service-pipe of the company was or should be laid, and who required a supply of water, afford a supply of water. The plaintiff declared upon this section, and alleged that he was such an owner and occupier, and that he requested and required a supply of water ; but notwithstanding the fulfilment of all conditions the company wrongfully, improperly, and negligently made default in affording to the plaintiff the supply, by reason whereof he was unable to extinguish a fire which destroyed his premises. The company pleaded that the main or service-pipe had a fire-plug properly fixed in it, and that the fire-plug was opened for the purpose of supplying water for extinguishing another fire, which was the cause of default. They also pleaded that they were prevented from affording the supply of water from unavoidable cause or accident :—Held, that the former of these two pleas was good, but that the latter was bad. *Campbell v. East London Waterworks*, 26 L. T. 475.

By the Waterworks Clauses Act, 1847, the undertakers are : (1) to fix and maintain fire-plugs ; (2) to furnish to the town commissioners a sufficient supply of water for certain public purposes ; (3) to keep their pipes to which fire-plugs are fixed at all times charged with water at a certain pressure, and to allow all persons at all times to use the same for extinguishing fire without compensation ; and (4) to supply to every owner or occupier of any dwelling-house, having paid or tendered the water-rate, sufficient water for domestic purposes. By s. 43, a penalty of 10l. (recoverable summarily before two justices, who may award not more than half the penalty to the informer and are to give the remainder to the overseers of the parish) is imposed on the undertakers for the neglect of each of the above duties, and for the neglect of (2) and (4) they are further to forfeit to the commissioners or ratepayer a penalty of 40s. a day, for each day during which such neglect continues after notice in writing of non-supply. A person brought an action for damages against a waterworks com-

pany for not keeping their pipes charged as required by the act, whereby his premises situate within the limits of the company's act were burnt down :—Held, that the statute gave no right of action to the party. *Atkinson v. Newcastle and Gateshead Waterworks Company*, 2 Ex. D. 441 ; 46 L. J., Ex. 775 ; 36 L. T. 761 ; 25 W. R. 794—C. A. Reversing 6 L. R., Ex. 404 ; 20 W. R. 35.

**Obligation to Provide Meter—Cutting off Supply—Failure to Pay or Tender Rate in Advance.**—The special act of a water company provided for the supply of water to the inhabitants of the district for "family use" at certain rates calculated on the rental of the house supplied. The act contained further provisions for the supply of water for schools, manufactories, &c., &c., and for other purposes than family consumption, and for baths, &c., and for the purposes of any trade or business whatsoever, at certain rates per thousand gallons. The supply of water under these latter provisions having been held obligatory upon the company unless prevented by causes beyond their control :—Held, that there being no provision in the special act throwing upon the consumer the obligation of providing a meter to measure the water supplied for the purposes of a bath, no such obligation could be implied from the 14th section of the Waterworks Clauses Act, 1863, incorporated with the special act, which section provides that where the undertakers are authorized by the special act to supply water by measure they may let for hire to any consumer of water so supplied any meter or instrument for measuring the quantity of water supplied. *Sheffield Waterworks Company v. Carter*, 8 Q. B. D. 632 ; 51 L. J., M. C. 97 ; 30 W. R. 889 ; 46 J. P. 548.

The occupier of a house within the district of the above-mentioned company had a bath connected by means of a pipe with the house cistern, to which water was conveyed from the company's mains for "family use." The company required him to put up a meter for the purpose of measuring the water used for the bath, but he refused to do so. He had paid to the company in advance the proper amount in respect of the water supply for "family use" for the quarter ending the 29th of September, but had not paid or tendered any sum in respect of the water supply to the bath during such period. The company in consequence of his refusal to put up a meter or disconnect the bath cut off the communication pipe from their main to his house upon the 20th of September. On the 29th of September, having cut off the pipe connecting the cistern with the bath, but not the waste or outlet pipe from the bath, he gave notice to the company of what he had done and paid to the company in advance the proper amount for the supply of water for "family use" during the ensuing quarter, but did not restore the communication pipe between the company's mains and his cistern. The company refused to restore the supply on the ground that he had not cut off the waste pipe from the bath, which he refused to do. The supply of water was not renewed till the 4th of November, when the company restored the communication pipe under protest :—Held, that the company were not entitled to insist on the consumer's providing a meter, but that they were not liable to a penalty under the Waterworks Clauses Act, 1847, s. 43, for not supplying water during the period

between the 20th and the 29th of September, inasmuch as no payment or tender in respect of the water supply to the bath for such period had been made. But held, that the company were liable to a penalty in respect of the period subsequent to the 29th of September: that they had no right to refuse the supply of water after that date, and that they were not justified in cutting off the supply, and were, therefore, not entitled to require the consumer to renew the communication. *Id.*

— **Cost of Providing or Hiring Meter.**—The Sheffield Waterworks Company was authorized to receive payment by measure and not by a rate for water supplied to fixed baths in private houses. There is no express provision in the principal or general acts as to how the water for such a purpose is to be measured, or whether the company or the consumer shall bear the cost of providing a meter for measuring the water, but by the Waterworks Clauses Act, 1863, s. 14, where the company supply water by measure, they may let to a consumer a meter for such remuneration in money as they may agree upon:—Held, that a consumer taking water from the company for a fixed bath in his private house was bound at his own expense to measure the water so used by some automatic and self-registering meter or other instrument, or in some other equally accurate way, and to record the amount from time to time taken. *Sheffield Waterworks Company v. Bingham*, 25 Ch. D. 443; 52 L. J., Ch. 624; 48 L. T. 604.

**Reinstating Supply of Water after being Cut off for Non-Payment of Rates.**—A tenant of premises supplied by a company with water having failed to pay the water-rate, the company under the powers conferred upon them by s. 74 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), severed the communication with their main pipes. A subsequent tenant demanded a supply of water for the same premises, tendering to the company the current quarter's rate and the estimated expense of restoring the communication, but the company refused to supply the water until the arrears due from the former tenant were paid. A magistrate having convicted the company under s. 43 of the Waterworks Clauses Act for such refusal:—Held, that, although the company were not warranted in refusing to supply water to the incoming tenant until the arrears due to them as above stated were paid, they could not be made liable to the penalties imposed by s. 43 until he himself had restored the communication with their main pipes. *Sheffield Waterworks Company v. Wilkinson*, 4 C. P. D. 410; 48 L. J., M. C. 45.

— **Jurisdiction to Compel.**—A company was established by act of parliament for supplying the inhabitants of several districts with water, at such terms as they should mutually agree upon; and a subsequent act provided, that the company should only demand reasonable sums:—Held, that a court of equity had no jurisdiction, upon an offer to pay either a reasonable price or that which was originally agreed upon, to compel the company to continue a supply to any inhabitant beyond the term of his contract, or to restrain them from discontinuing such supply until the decision of the

question by a trial at law. *Weale v. West Middlesex Waterworks Company*, 1 J. & W. 358. See *Hoddesdon Gas and Coke Company v. Haselwood*, 6 C. B., N. S. 239; 28 L. J., C. P. 268, as to the right at law, in the analogous case of gas.

**Duty to Supply "Pure and Wholesome" Water—Contamination from Lead Pipes—Right of Action.**—The defendants were empowered by a special act (32 & 33 Vict. c. cx.), incorporating the Waterworks Clauses Act of 1847 (10 & 11 Vict. c. 17), with the exception of certain provisions, to supply water for domestic use within the limits and from the sources described in their act. By s. 66 of the special act the defendants were entitled to prescribe the material to be used for service pipes by persons supplied with water, and by bye-laws the defendants prescribed that the material might either be lead or cast-iron. Lead service pipes were, upon the application of the landlord of the plaintiff's house and of the plaintiff, laid down by the defendants from their mains to the house at the expense of the landlord and the plaintiff. The service-pipes when laid belonged to the consumer of the water supplied through them. By the Waterworks Clauses Act, 1847, s. 35, "the undertakers shall provide and keep in the pipes to be laid down by them a supply of pure and wholesome water, sufficient for the domestic use of all the inhabitants of the town or district within the limits of the special act, who shall be entitled to demand a supply, and shall be willing to pay water-rate for the same." Water which was pure and wholesome in the mains of the defendants was supplied by them to the plaintiff, but in its passage from the mains through the service-pipes it was contaminated by the lead, and he, using the water, suffered from lead poisoning. He sued the defendants for injuries sustained from impure and unwholesome water:—Held, that he had no cause of action. *Milnes v. Huddersfield (Mayor)*, 10 Q. B. D. 124; 52 L. J., Q. B. 64; 47 L. T. 697; 31 W. R. 568. Affirmed, 12 Q. B. D. 443; 53 L. J., Q. B. 12; 32 W. R. 265—C. A.

**Delegation of Powers—Company Able and Willing to Supply.**—A waterworks company is not, within the meaning of the Public Health Act, 1875, s. 52, able and willing "to supply water within the district of a local authority," unless it has both the necessary powers and the requisite supply of water. *Richmond Waterworks Company and Southwark and Vauxhall Waterworks Company v. Richmond (Vestry)*, 3 Ch. D. 82; 45 L. J., Ch. 441; 34 L. T. 480.

When company R. had the necessary powers but no water, and company S. had the requisite supply of water but no powers within the district, and company R. sold its plant to company S., and certain members of company S. bought all the shares in company R. with the intention of allowing company S. to exercise the powers of company R.:—Held, that the powers could not be so delegated, and that neither company was able and willing within the meaning of the act, and consequently that neither was entitled to notice under the Public Health Act, 1848, s. 75, or under the Public Health Act, 1875, s. 52 *Id.*

### b. Rights against Consumers.

**Taking Water from Unoccupied House—Liability.]**—The respondent, a child of fourteen years of age, was charged with unlawfully taking water from an unoccupied house at H., such water being alleged to belong to the appellant company. The information was laid under 10 & 11 Vict. c. 17, s. 59; but the stipendiary magistrate for S., before whom the case was brought, dismissed it on the ground that the alleged offence did not come within the 59th section. The water company appealed.—Held, that the magistrate was right in dismissing the charge, for the 59th section of 10 & 11 Vict. c. 17, under which it was laid, provides no penalty for the taking of water from an unoccupied house. *Piercy v. Pope*, 45 L. T. 477; 30 W. R. 60; 46 J. P. 102.

**Taking Water from a Fountain—Dedication to Public.]**—A fountain having been erected on a highway by an individual for the benefit of a town, the local board of health, as the owners of the waterworks, gratuitously supplied the fountain with water for the use of cattle in the cattle market on market days, and for horses if yoked when passing to and fro.—Held, that the board might so limit their dedication of the use of the water, and that it did not amount to a dedication to the gratuitous use of the public. *Hildreth v. Adamson*, 8 C. B., N. S. 587; 30 L. J., M. C. 204; 8 W. R. 470.

A housekeeper, therefore, in the town, who takes water from such fountain, he not having agreed to be supplied with water by the board, is liable to the penalty fixed by 10 & 11 Vict. c. 17, s. 59, that act being incorporated with the Local Board of Health Act. *Id.*

**Tampering with Pipe—Liability of Owner.]**—A., acting as owner of premises, made a contract with a water company to supply the premises with water to a certain height. In his absence, his men, to the injury of the company, fixed the pipe at a higher level. After it was done, A. knew of it; A. was not in fact the owner of the premises.—Held, that he was liable to an action brought by the company. *West Middlesex Waterworks Company v. Suickerrop*, 4 C. & P. 87.

### c. Rates.

**Water for Public Purpose—Rate fixed by Agreement.]**—By the New River Company's Act, 1852 (15 & 16 Vict. c. clx.), s. 35, the company must supply houses within their limits with sufficient water for domestic purposes at certain fixed rates. By s. 38, domestic purposes are not to include engines or railway purposes, or baths, cattle, or fountains, or flushing sewers or drains, or any trade or business requiring an extra supply of water. By s. 41, the company shall, at the request of any consumer of water for purposes other than the purposes for or in respect of which the rates or charges are thereinbefore provided or limited, or at their own instance, afford a supply of water by means of a meter, and charge for the same at certain limited rates, according to the quarterly consumption. By s. 37 of the Waterworks Clauses Act, 1847 (incorporated in the Act of 1852), the undertakers shall provide a sufficient supply of water for cleansing sewers and drains, for cleansing and

watering streets, and for other public purposes at rates and upon conditions to be agreed to by the undertakers or to be settled by justices or by an inspector. The Metropolitan Board of Works demanded from the company a supply of water by meter, under s. 41, for watering the roads and gardens on the Victoria Embankment, such supply being required only during one-third of the year and the driest weather.—Held, that the company was not bound to afford this supply at the limited rates fixed by s. 41; but that they were entitled to claim rates for such supply, to be fixed by agreement or settlement, under s. 37 of the Waterworks Clauses Act, 1847. *Metropolitan Board of Works v. New River Company*, 37 L. T. 124.

**— Supply to a Workhouse—Rateability.]**—By a special act incorporating the Waterworks Clauses Act, 1847, a waterworks company were bound at the request of the owner or occupier of any house to supply such person with water for domestic purposes at a minimum rate, to be increased if such house should be occupied by more than one family, and the act further provided that a supply of water for domestic purposes should not include a supply of water for baths, washhouses, or public purposes. The Waterworks Clauses Act, 1847, deals with the supply of water for cleansing sewers and drains, cleansing and watering the streets, supplying any public pumps, baths, or washhouses, and imposes a penalty for neglect to supply water "for the public purposes aforesaid."—Held, that a workhouse was a house of which the guardians were owners, and the company were bound to supply them with water for domestic purposes, such supply not being a supply "for public purposes" within the meaning of the special act or of the Waterworks Clauses Act, 1847, and that for the purposes of the special act the inmates of the workhouse were to be treated as one family, and the rate assessed accordingly. *Lisheard Union v. Lisheard Waterworks*, 7 Q. B. D. 505; 30 W. R. 292; 45 J. P. 780.

**Assessment—Rateable Value—Annual Value.]**—A water company were by their special acts compelled to supply water to occupiers of dwelling-houses for domestic purposes at the following rates, viz., "where the 'annual value' of the dwelling-house should not exceed 200l. at a rate per cent. per annum on such value not exceeding 4l., and where such 'annual value' should exceed 200l., at a rate per cent. per annum on such value not exceeding 3l." It was also provided by their special act (9 Geo. 4, c. cxl. s. 27), that the water-rate was to be payable "according to the actual amount of the rent of the premises where the same could be ascertained, and where the same could not be ascertained according to the actual amount or annual value upon which the assessment to the poor-rate was computed." In a case where there was no actual rent paid within the meaning of the act, the occupier being lessee of the house for a long term at a ground rent.—Held, reversing the decision in the Court of Appeal, and affirming that in the Queen's Bench division, that, whether the later act repealed the provisions of the former act or not, the case must be dealt with under the later act; and that the words "annual value" in the later act meant "net annual value" as defined

in the Parochial Assessments Acts, 1836 (6 & 7 Will. 4, c. 96), s. 1:—Held, also, that annual value had the same meaning in the earlier as in the later act. *Dobbs v. Grand Junction Waterworks Company*, 9 App. Cas. 49; 53 L. J., Q. B. 50; 49 L. T. 541; 48 J. P. 5. Reversed, 31 W. R. 359—C. A.

By the special act of a water company, which incorporated the Waterworks Clauses Act, 1847, save so far as the clauses or provisions thereof were expressly varied or excepted, the company were obliged to supply water to the occupiers of dwelling-houses for domestic purposes at a rate not exceeding 6l. per cent. per annum upon the "annual rack rent or value" of the premises supplied. It was further provided in a subsequent section of the act that the rate should be "payable according to the annual value at which the premises were from time to time assessed to the poor-rate if the same were so assessed, or if not, according to the net annual value of the premises." By the 68th section of the Waterworks Clauses Act, 1847, "the water rates, except as hereinafter and in the special act mentioned, shall be payable according to the annual value of the tenement supplied with water."—Held, that the water rate charged by the company must be calculated on the "rateable value," not on the "gross estimated rental" of the premises supplied with water. *Warrington Waterworks Company v. Longshaw*, 9 Q. B. D. 145; 51 L. J., Q. B. 498; 46 L. T. 815; 31 W. R. 11; 46 J. P. 773.

— **Houses lying Vacant—Owner Compounding for Rates—Repairs and Insurance.**—It was provided by a water act that the charge to be made for the supply of water for domestic use should be at a rate varying according to the "annual rent" of the premises supplied. The appellant was the owner of certain houses supplied with water by the respondents under the act. The houses were let at weekly rents, the appellant paying all rates charged thereon, and also for all repairs and insurances in respect thereof. He was allowed, as an owner, under 32 & 33 Vict. c. 41, s. 4 (The Poor-Rate Assessment and Collection Act, 1869), a deduction of 30 per cent. from the full amount of the poor-rate which an occupier if rated would have paid. The respondents charged the appellant with water-rates calculated on the following basis: they multiplied the weekly rents by fifty-two and deducted from the amount so arrived at the actual sums paid by the appellant for rates, and then charged the water-rates upon the balance:—Held, that, in order to arrive at the "annual rent" upon which the water-rate was to be computed, an allowance should be made in respect of "voids," i.e., houses lying vacant from time to time; and that the actual amount of the poor-rates and other rates paid by the appellant was rightly deducted, but that the appellant was not entitled to deduct the full amount of the rates which an occupier if rated would have paid; nor the amount which he paid for repairs and insurances. Meaning of the terms "annual rent" and "annual value" discussed. *Dobbs v. Grand Junction Waterworks Company* (in C. A.) followed. *Smith v. Birmingham Corporation*, 11 Q. B. D. 195; 52 L. J., M. C. 81; 49 L. T. 25; 31 W. R. 788; 47 J. P. 645.

— "Annual Value"—Deduction of Rates

from Rent.]—By its act, a waterworks company was bound to supply the houses within a certain district with water "at the following rate per annum, that is to say, where the rent of such dwelling-house" should not amount to 7l. per annum, at a rate not exceeding 6 per cent. per annum on such rent, but not exceeding 7s. 2d. per annum; and so on in a graduated scale. The owner of numerous small houses was supplied with water, in respect of which he paid, either under statutory obligation or by voluntary agreement, the poor-rate, water-rate and district-rate:—Held, that "rent" in the act was equivalent to "annual value;" and that, in estimating the rents on which the water-rate was payable, the owner was entitled to deduct the rates so paid by him. *Sheffield Waterworks Company v. Bennett*, 8 L. R., Ex. 196; 42 L. J., Ex. 121; 28 L. T. 509; 21 W. R. 686—Ex. Ch. Affirming 7 L. R., Ex. 409; 41 L. J., Ex. 233; 27 L. T. 199; 21 W. R. 74.

By the Liverpool Corporation Waterworks Act, the rates at which water is to be supplied for domestic purposes, are to be assessed upon the annual value of the premises; and by an act which amended the former, if the owner of any dwelling-house, the yearly rent or value whereof shall not amount to 13l., or which, whatever may be the annual value thereof, shall be let to weekly or monthly tenants, or in separate apartments, shall be desirous of paying a reduced water-rent by the year for the same, whether occupied or not, the council may compound with such owner for the payment of the water-rents payable by virtue of the acts in respect of such dwelling-house, at any sum not less than three-fourths of the annual water-rent for the same; and all such compositions shall be entered in the books of the council, and shall be recoverable in like manner as the rents and charges authorized by the act are by law recoverable. By a composition-paper, A., as the owner of dwelling-houses, let to weekly tenants, agreed with the corporation to compound for the water-rates, and in a schedule thereto stated the "rental to be 4s. 6d. per week, and 3s. 6d. per week, respectively." The composition-paper contained a stipulation, that, "if at any time it should be ascertained that the rental of such houses was not truly and correctly set forth in the schedule, the corporation might be at liberty to amend the same by inserting therein the true and correct amounts of such rental," and might recover against A. the additional water-rents due in respect thereof. The rents of the houses were, in point of fact, 6d. per week, respectively, more than the sums stated in the schedule. A., claiming to deduct that sum in respect of poor and other rates, which, by agreement with the tenants, were paid by him:—Held, that A. was not entitled to make such deduction, but that the corporation was entitled, under the agreement, to receive the composition upon the amount of rent paid by the tenants. *Rook v. Liverpool (Mayor)*, 7 C. B., N. S. 240.

Held, also, that the production of the composition-paper, and proof that no demand of water-rates had been made upon the tenants, was sufficient evidence that the composition had been made, without shewing that any entry thereof had been made in the books of the council. *Id.*

Right to Sue—Necessity of—Decision of

**Justices.**—The Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 68, enacts that the water-rate shall be payable according to the annual value of the tenement supplied with water, and that, "if any dispute arise as to such value, the same shall be determined by two justices." This act incorporates the Railways Clauses Act, 1845 (8 & 9 Vict. c. 20), ss. 140 and 142 of which give the mode and procedure before the justices. By the New River Company's Act, 1852 (15 & 16 Vict. c. clx.), s. 46, which incorporates the Waterworks Clauses Act, 1847, it is enacted that "nothing in this act or any act incorporated herewith contained shall prevent the company from recovering any sum of money not exceeding 50*l.* which shall be due to them for water rates or rents, or for damages, costs, or expenses, by action or proceeding in such manner as is by law provided for the recovery of debts not exceeding 50*l.*:"—Held, that where a bonâ fide dispute arises as to the annual value, the company must, before they can sue for the rate under s. 46 of the special act, obtain a decision of justices on that dispute under s. 68 of the general act. *New River Company v. Mather*, 10 L. R., C. P. 442; 44 L. J., M. C. 105; 32 L. T. 658.

**Right to Levy—Completion of Works.**—To an action for breaking and entering the plaintiff's mill and taking his goods, the defendants pleaded a justification under a local act of parliament; that they, as commissioners under the act, completed one of three reservoirs mentioned therein; that the mill was benefited by the supply of water therefrom; that a rate was made; and that the trespass was committed, and the goods were taken as a distress for nonpayment of the rate. The plaintiff replied that only one reservoir had been completed. The act enacted, "that no rate shall be levied or assessed, until the reservoirs shall be actually made and in use, and water supplied therefrom:"—Held, that the completion of one reservoir entitled the commissioners to levy a rate on the class of persons mentioned in the act actually benefited by it; and, therefore, that the plea was good. *Sidebottom v. Glossop Reservoir (Commissioners)*, 1 Ex. 611—Ex. Ch.

## V. INJURIES BY WATER.

**Liability for Storage—General Principle.**—If a person brings on his own land any matter which, if it escapes, may prove injurious to his neighbour's property, such as a large body of water, he is liable to make compensation for any injury that may accrue from its escape out of his land; and it is no defence, if it escapes and causes damage to his neighbour, that the injury was caused without any default or negligence on his part. *Fletcher v. Rylands*, 1 L. R., Ex. 265; 35 L. J., Ex. 164; 12 Jur., N. S. 603; 14 L. T. 523; 14 W. R. 799; 4 H. & C. 263—Ex. Ch. Affirmed in Dom. Proc., nom. *Rylands v. Fletcher*, 3 L. R., H. L. 330; 37 L. J., Ex. 161; 19 L. T. 220.

A. was the lessee of mines. B. was the owner of a mill standing on land adjoining that under which the mines were worked. B. desired to construct a reservoir, and employed competent persons, an engineer and a contractor, to construct it. A. had worked his mines up to a spot where there were certain old passages of disused

mines; these passages were connected with vertical shafts which communicated with the land above, and which had also been out of use for years, and were apparently filled with marl and the earth of the surrounding land. No care was taken by the engineer or the contractor to block up these shafts, and shortly after water had been introduced into the reservoir it broke through some of the shafts, flowed through the old passages and flooded A.'s mine:—Held, that he was entitled to recover damages from B. in respect of this injury. *Id.*

— **Vis major.**—One who stores water on his own land, and uses all reasonable care to keep it safely there, is not liable for damage effected by an escape of the water, if the escape is caused by the act of God or vis major; e.g., by an extraordinary rainfall, which could not reasonably have been anticipated, although, if it had been anticipated, the effect might have been prevented. *Nichols v. Marsland*, 2 Ex. D. 1; 46 L. J., Ex. 174; 35 L. T. 725; 25 W. R. 173—C. A.

— **Tanks in India—Immemorial Rights.**—The principle that if a man brings and accumulates upon his land anything which, if it escapes, may cause damage to his neighbour, he does so at his peril, is not applicable to the case of water stored in tanks in India, which have existed from time immemorial, and are preserved and repaired by the landowners by reason of their tenure, as essential to the welfare and existence of the people. *Madras Railway Company v. Carrington (Zemindar)*, 30 L. T. 770; 22 W. R. 865—P. C.

— **Damage caused by Public Authority in Lawful Exercise of Powers.**—The defendants, under the powers conferred upon them by the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), ss. 135, 136, constructed, and properly constructed, a sewer having its outfall at Deptford Creek, a little above the plaintiff's coal wharf, with water-gates, which it was the duty of the person in charge of them to open when the water within them became eight feet deep,—a depth which was reached only in heavy rainfalls. On the 29th of August, 1879, there was an exceptionally heavy rainfall, and it became necessary to open the water-gates to prevent a large district from being flooded. This having been done, and the rain increasing in violence, the rush of water from the sewer carried away a portion of the plaintiff's wharf, with a barge moored thereto and a quantity of coals deposited therein and thereon:—Held, that the injury complained of was occasioned by the opening of the water-gates, and not by the act of God, and therefore the defendants were primâ facie liable for the damage done, within the principle of *Rylands v. Fletcher* (3 L. R., H. L. 330): but that, as they were a public body acting in the discharge of a public duty, and as that which happened was only the inevitable result of what parliament had authorized them to do, they were not liable. *Dixon v. Metropolitan Board of Works*, 7 Q. B. D. 418; 50 L. J., Q. B. 772; 45 L. T. 312; 30 W. R. 83; 46 J. P. 4.

— **Injury by Canal Company—Injuria absque damno.**—The plaintiffs, owners of collieries, sued the defendants, proprietors of

a canal constructed under an act of parliament, for damage caused to their mines by water which overflowed from the canal into a brook, and thence into the mines. They also in the alternative claimed to be entitled to a mandamus for the summoning of a jury to assess compensation for the same injury, as being one caused by the works which the canal company were authorized to construct and maintain. It was found in the special case stated by an official referee, that on the occasion of an extraordinary rainfall the defendants opened a sluice and discharged from the canal into a brook more water than the latter was able to carry off, the consequence being that the brook overflowed into the plaintiffs' mines. It was found, further, that if the sluice had not been so opened the canal bank would shortly have burst; that the adjacent country and the plaintiffs' mines would have been inundated; that the course which the defendants adopted to avert such a catastrophe was a prudent one, and the only effectual one which could have been adopted in the emergency; that so far as the plaintiffs' mines were concerned the opening of the sluice caused them to be flooded some hours sooner than they would otherwise have been, but that no additional damage was caused thereby to the plaintiffs, the inundation being inevitable by reason of the excessive rainfall and consequent accumulation of water:—Held, upon these findings, that even assuming the defendants' act to have been a wrongful one, it was *injuria absque damno*, and, therefore, not a ground of action:—Held, secondly, that the compensation clauses of the acts of parliament did not apply to such a case. *Thomas v. Birmingham Canal Company*, 49 L. J., Q. B. 851; 43 L. T. 435; 45 J. P. 21.

**—Injury Due to Negligence of Third Person.**—A company undertaking for their own profit to maintain a channel for carrying off water, and neglecting to do so effectually, are responsible for damage done to the adjoining land by reason of the banks giving way after an unusual rainfall, although other persons who were bound to keep the outlet of the channel of certain dimensions had failed to perform their duty, and had thereby occasioned an increase of water in the channel, without which its banks would not have given way. *Harrison v. Great Northern Railway Company*, 3 H. & C. 231; 33 L. J., Ex. 266; 10 Jur., N. S. 992; 10 L. T. 621; 12 W. R. 1081. See also *cases ante*, cols. 548 and 549.

**Breach of Statutory Obligation—Height of Bank.**—A dock company, which was empowered by act of parliament to make and maintain a dock and works according to the levels defined on the deposited sections, constructed its dock communicating with the Thames by an artificial channel, the height of the retaining bank of which and of the dock was shewn on the sections to be 4 ft. above Trinity high-water mark. The natural level of the land surrounding the dock was some 8 ft. below Trinity high-water mark, and the river was kept from overflowing it by means of a river wall 4 ft. 2 in. above Trinity high-water mark. The company allowed part of its retaining bank to be some inches below the height of 4 ft. above Trinity high-water mark. An extraordinarily high tide took place, the water rising to 4 ft. 5 in. above high-water mark, and the water in the dock overflowed the

bank and damaged the property of an adjoining landowner. In an action for damages by the latter:—Held, that the company was liable to damages, because it had broken its statutory obligation to maintain its retaining bank at the height of 4 ft. above high-water mark; that, independently of the act, the company was bound, as a riparian proprietor, to keep the bank up to the level of the rest of the river wall, and was liable to damages for negligence in not doing so; and that, although the extraordinarily high tide was an act of God, that fact did not free the company from its liability, though, if it could shew that some of the damage which actually happened was exclusively attributable to a cause beyond its control, it would be entitled to a proper deduction in that respect. *Nitro-Phosphate and Odam's Chemical Manure Company v. London and St. Katharine's Docks Company*, 9 Ch. D. 503; 39 L. T. 433; 27 W. R. 267—C. A.

**—Liability of Adjoining Owner.**—The defendants possessed a reservoir with sluices connected with a main drain or watercourse, from which the reservoir was supplied, and with sluices by which the surplus water was returned into the drain at a lower level. The combined effect of the emptying of a reservoir belonging to a third person above the defendants' premises, and of an obstruction in the drain below them, was to force water through the sluices into the defendants' reservoir and so cause an overflow thence on to the plaintiffs' land. In an action for damage caused thereby it was shewn that the defendants had no control over the main drain, or the other reservoir, or knowledge of the circumstances which caused the overflow, and that the sluices were maintained so as to prevent overflow under ordinary circumstances:—Held, that the defendants were not liable. *Boz v. Jubb*, 4 Ex. D. 76; 48 L. J., Ex. 417; 41 L. T. 97; 27 W. R. 415.

**Injuries caused by Precautions against Flood.**—An extraordinary flood arising from natural causes is a common enemy, against which a man has a right to protect his own property, although the damage inflicted by the flood upon his neighbour be thereby increased, provided he does not interfere with the natural outlet of a natural stream. *Nield v. London and North-Western Railway Company*, 10 L. R., Ex. 4; 44 L. J., Ex. 15; 23 W. R. 60.

Reasonable selfishness is permissible in a man who tries to protect himself from a common enemy, such as is a flood. *Id.*

A railway company owned a canal near a river, which did not communicate with it. Owing to heavy rains the river overflowed its banks, and the manager of the canal, fearing that the water from the river might enter the canal, and, by causing it to overflow, injure the warehouses of the railway company, inserted planks in grooves made in the banks of the canal with the object of preventing the water of the river from entering the canal. The water, however, found its way into the canal, which, owing to the insertion of the planks, rose to a higher level than it would otherwise have done, and ultimately overflowed its banks, doing substantial damage to a mill situated on the bank of the canal, which would not have been done to it if the planks had not been made use of by the manager:—Held

that the railway company was not liable to the owner of the mill for the damage so caused, as they had only sought to protect themselves from a common enemy. *Ib.*

**Flooding adjoining Mines — Working by Owner.**—A canal company was authorized to be formed under the provisions of several acts of parliament. They had also, by a provision of the same statutes, the option of purchasing adjoining coal mines on receiving notice from the owner that he was about to work them. An adjoining coal-owner, having given the statutory notice, and the company having refused to purchase, proceeded, as he had a right to do, to work his mines in the usual and proper manner, and thereby water from the canal flowed in and drowned his mine. The company was guilty of no actual carelessness in the management of the canal, unless it was carelessness to allow the water to remain in it while the mines were being worked:—Held, in an action by the adjoining coal-owner against the company for negligent management of the canal whereby damage resulted to his mine, that the action was not maintainable, inasmuch as the injury complained of resulted from the legitimate exercise by the company of statutory powers. *Dunn v. Birmingham Canal Navigation*, 8 L. R., Q. B. 42; 42 L. J., Q. B. 34; 27 L. T. 683; 21 W. R. 266 —Ex. Ch. Affirming 7 L. R., Q. B. 121; 41 L. J., Q. B. 121; 26 L. T. 241; 20 W. R. 573. Held, also, that the owner was entitled to compensation under the acts. *Ib.*

— **Injuries arising from Lawful Act.**—A mine-owner will not be liable to the owner of an adjacent mine for injury occasioned to such adjacent mine, where such injury proceeds from natural causes, in themselves beyond his control, though his own acts may have conduced to produce the injury, if his acts have only been those of the proper and ordinary working of his own mine, without default or negligence. *Fletcher or Musgrave v. Smith*, 2 App. Cas. 781; 47 L. J., Ex. 4; 37 L. T. 367; 26 W. R. 83. Affirming *S. C.*, 7 L. R., Ex. 306; 41 L. J., Ex. 193; 27 L. T. 164; 20 W. R. 987.

But when for his own convenience he does something, e.g., diverts the course of the stream, he must take care that the new course provided for it shall be sufficient to prevent mischief from an overflow, so that even if that overflow should be directly and mainly occasioned by an act of nature, his own conduct in not so forming the new and diverted course for the stream of form and of sufficient capacity to carry off an accidental overflow of water, even of an exceptional kind, will be matter for consideration in determining the question of his liability. *Ib.*

A's mine was flooded by water which had, after an unusual rainfall, accumulated in an excavation made by B. on his land, and had escaped thence through his mine into A's, which was situated at a lower level:—Held, that, although B., in making the excavation, had no intention of collecting water therein, and although he had provided an outlet for such an amount of water as might be looked for in ordinary seasons, he was liable for the damage sustained by A. *Ib.*

A. and B. occupied adjoining collieries. A predecessor of B., but with whom he had no

privity, committed a trespass, and made holes, called "thyrings," in a barrier (of coal belonging to A.) which separated the two collieries. B. in working his mine broke down a seam of coal of his own, and the consequence was that the water flowed from his mine into A's through the thyrings:—Held, that there was no duty on B. to prevent the water from flowing from his mine into A's mine. *Smith v. Kenrick*, 7 C. B. 515; 18 L. J., C. P. 172; 13 Jur. 362.

**Effect of Percolation.**—A man who places an artificial mound upon his property and thereby causes rain water, percolating naturally, to come on to the property of his neighbour, is liable to the latter in respect of damage so caused. *Hurdman v. North-Eastern Railway Company*, 3 C. P. D. 168; 47 L. J., C. P. 368; 38 L. T. 339; 26 W. R. 489.

A statement of claim alleged that the surface of the defendants' land had been artificially raised by earth placed thereon, and that in consequence rain water falling on their land made its way through their wall into the adjoining house of the plaintiff, and caused substantial damage:—Held, that the statement of claim disclosed a good cause of action. *Ib.*

**Water Undermining a Wall—Action by Successor in Title.**—The plaintiff, in 1822, had a remainder in fee in a wharf expectant on a tenancy for life of his father. The defendants, in that year, dug soil out of their dock, which was contiguous, and the water thereby undermined the wall of the wharf. In 1823, the plaintiff's father died; and, in 1824, the action of the water on the wall had undermined it so far that it fell:—Held, that the plaintiff had a right of action against the defendants, although they had done no act since the death of the plaintiff's father, by which the plaintiff came into possession of the freehold of the wharf. *Gillon v. Boddington*, 1 C. & P. 541; R. & M. 161.

**Escape of Water in Houses—Liability for.**—When the owner and occupier of a building lets the lower floor to a tenant, and remains himself in occupation of the upper floors and roof, he is under no liability to the tenant, to make compensation for damage done to this lower floor by an escape of water from the roof caused by an accident (such as a rat gnawing a hole in a water-pipe), which could not have been prevented by the exercise of reasonable care and vigilance. *Carstairs v. Taylor*, 6 L. R., Ex. 217; 40 L. J., Ex. 29; 19 W. R. 723.

A. occupied for business purposes the ground floor and B. the second floor of the same house, as tenants from year to year. There was a water-closet on B.'s premises to which he alone had access. After the respective premises had been closed on a Saturday evening, water percolated from the water-closet through the first floor to A.'s premises and caused damage to his stock in trade. The overflow of water was owing to the valve of the supply pipe to the pan having got out of order, and the waste pipe being choked with paper. The defects could not be detected without examination, and B. did not know of them, and was guilty of no negligence:—Held, that there was no obligation on him to keep in the water at his peril; and that he was not liable to A. for the damage. *Ross v. Fedden*, 7 L. R., Q. B. 661; 41 L. J., Q. B. 270; 26 L. T. 966.

**— Liability of Master for Act of Servant — Scope of Authority.**—The plaintiffs occupied premises beneath the offices of the defendants, who were solicitors. One of the defendants had a room of the offices, and in it was a lavatory for his own use exclusively, and his orders were that no clerk should come into his room after he had left. A clerk went into the room to wash his hands at the lavatory after his employer had left, turned the tap, and negligently left it so that water flowed from it into the plaintiffs' premises and damaged them. In an action for negligence:—Held, that the act of the clerk was not within the scope of his authority, or incident to the ordinary duties of his employment, and that there was no evidence of negligence for which the defendants were liable. *Stevens v. Woodward*, 6 Q. B. D. 318; 50 L. J., Q. B. 231; 44 L. T. 153; 29 W. R. 506; 45 J. P. 603.

**Frozen Water—Washing of Van in a Street.**—B. washed a van of his on part of the street opposite his coach-house, and the water so used ran along the gutter of the street for about seventy feet down to the corner of another street, where, meeting an obstruction, it accumulated and extended over part of the roadway, instead of going into the sewer, and there being a frost at the time it became frozen over. The cleaning a van in the street was an offence under the Metropolitan Police Act (2 & 3 Vict. c. 47), s. 54, sub-s. 1, but B. was not shewn to have known of the obstruction, and if he had cleaned the van in the coach-house the water would also have gone into the same gutter:—Held, that B. was not liable for damage caused to a horse by slipping whilst passing over the frozen water at the corner, as such damage was too remote, and was not the immediate and proximate cause of his act. *Sharp v. Powell*, 7 L. R., C. P. 253; 41 L. J., C. P. 95; 26 L. T. 436; 20 W. R. 584.

## WATERMEN AND LIGHT-ERMEN'S COMPANY.

See WATER.

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## I. HIGHWAYS.

## 1. NATURE AND CREATION OF.

## a. Generally.

**Through Private Property.**—Although a public way may pass through private property, it must have at each end a public terminus. *Young v. Cuthbertson*, 1 Macq. H. L. Cas. 455.

**Over Place not a Thoroughfare.**—A public highway may in law exist over a place which is not a thoroughfare; whether in fact it does exist or not is a question for the jury. *Bateman v. Black*, 18 Q. B. 870; 21 L. J., Q. B. 406; 17 Jur. 386.

**When Stopped at one End.**—Quære, if a road, long used as a thoroughfare by the public, is lawfully stopped at one end, whether the right of way over the remainder is gone. Per Patteson, J., it is not. *Rex v. Downshire (Marquis)*, 4 A. & E. 698; 6 N. & M. 92.

**When a Cul-de-Sac.**—A public footpath was rendered a cul-de-sac by buildings authorized by act of parliament; the defendant obstructed the path at a place between which and the end of the cul-de-sac there was no opening or thoroughfare. Upon an indictment for this obstruction, the jury found the defendant guilty; but also found that this part of the path, which the obstruction stopped, had ceased to be of any public utility.—Held, that a public path was still a highway, although it had become a cul-de-sac; and that the measure of public inconvenience caused by the obstruction of such a highway could be considered only with regard to the punishment of the person causing it. *Reg. v. Burney*, 31 L. T. 828.

In 1871 the plaintiff became the purchaser in fee-simple of hereditaments, described in the deed of conveyance as "all that piece of ground with the sixteen messuages thereon." The houses were divided into two blocks by a cul-de-sac or passage open at one end only, which had been dedicated to the use of the

public for twenty years, but the soil of which the plaintiff claimed as his private property by virtue of his conveyance. A railway company, being about to tunnel under this cul-de-sac, gave the plaintiff a notice to treat in respect of three houses on each side of it, but not in respect of that part of the cul-de-sac between them, the company contending it was a public way or street.—Held, that the cul-de-sac was a public way or street, and that the company was entitled to tunnel under it without paying the plaintiff any compensation. *Souch v. East London Railway Company*, 16 L. R., Eq. 108; 42 L. J., Ch. 477; 21 W. R. 590.

The terminus of a public way may be sufficient, although it has not in the ordinary sense an exit. It may be a cul-de-sac. *Young v. Cuthbertson*, *supra*.

But a mere private place, not admitting of a passage through or beyond it, cannot form the terminus of a public way. *Id.*

The terminus ad quem being laid to be a public highway, is proved by evidence of a public footway. *Allen v. Ormond*, 8 East, 4.

**When rendered Inaccessible.**—A way ceases to be a public highway where the access to it at either end has become impossible by reason of ways leading to it having been legally stopped up. *Bailey v. Jamieson*, 1 C. P. D. 329; 34 L. T. 62; 24 W. R. 456.

An ancient footpath led from one point to another in a high road, being a loop or short cut for pedestrians. The court of quarter sessions made an order diverting the part of the high road in connexion with the footpath, and substituting another road at some distance which did not communicate with the footpath. The order did not expressly refer to the footpath; but its effect was to stop both ends of it.—Held, that the footpath ceased to be a highway, and that the public right of way over it was by necessary implication extinguished by the order of quarter sessions. *Id.*

— **Extinguishment by Act of Parliament.**—

A provisional order made by the Board of Trade, under the general Pier and Harbour Act, 1861, sanctioned by a confirmation act, authorized the construction of a pier at the end of a street, and blocking it up.—Held, that any public right of way from the street to the beach was taken away. *Yarmouth (Mayor) v. Simmons*, 10 Ch. D. 518; 47 L. J., Ch. 792; 38 L. T. 881; 26 W. R. 802.

A public right of way is not saved as a right of the crown under the above sections of the general act. *Id.*

**Sufficiency of Way.**—A right of way for all the king's subjects to pass and repass with their carts and carriages, is not restrained because all carriages cannot pass and repass. *Rex v. Lyon*, 5 D. & R. 497.

**Extent of Public Rights.**—In an ordinary highway running between fences the right of passage *prima facie*, extends to the whole space between the fences, and the public are not confined to that part which is metalled and kept in repair for passengers. *Reg. v. United Kingdom Electric Telegraph Company*, 9 Cox, C. C. 174; 3 F. & F. 73; 31 L. J., M. C. 166; 8 Jur., N. S. 1153; 6 L. T. 378; 10 W. R. 538.

In 1811 a public road was set out across a common by inclosure commissioners of a width of fifty feet, and allotments of the land on either side were at the same time made. About twenty-five feet only of the fifty feet allotted had been used as the actual road, the sides having become covered with furze and heath; and fir trees had been allowed to come up through the furze. In 1868 the highway board advertised a sale of some of these fir trees growing within the fifty feet allotted by the commissioners in 1811 for the highway:—Held, that the right of the public was to have the whole width of the road, and not merely the *via trita*, preserved free from obstructions; and such right had not become extinguished by the fact that the trees had been allowed to grow up within the fifty feet for the period of twenty-five years. *Turner v. Ringwood Highway Board*, 9 L. R., Eq. 418; 21 L. T. 424; 18 W. R. 745.

— **Adverse User by Individual for Twenty Years.**—The adverse user by an individual of a public highway, or any part thereof, for more than twenty years, is no bar to the assertion by the public of their right over the highway, or the portion thereof, so adversely used. *Id.*

— **Encroachment by Adjoining Owners.**—The common notion that owners of land on the sides of a highway may encroach or enclose up to within fifteen feet of the centre is an error. *Reg. v. Johnson*, 1 F. & F. 687.

**Sufficiency of Description in Pleadings.**—It is sufficient in pleading a public highway to allege, that it is a common public highway, without shewing how it became so, or that it has been so time immemorial. *Aspidall v. Brown*, 3 T. R. 265.

It is not necessary to state any termini. *Rouse v. Bardin*, 1 H. Bl. 351.

**Jurisdiction to Determine.**—The Court of Chancery has no jurisdiction to decide the question of a public or private right of way upon a motion in a petition suit. *Pryor v. Pryor*, 27 L. T. 257—L. J.

#### b. Creation by Statute.

A highway may be created by an act of parliament. *Sutcliffe v. Greenwood*, 8 Price, 535.

**Strictness of Conditions.**—A highway cannot be created by statute unless the provisions of the statute creating it are strictly followed. *Cubitt v. Mawse*, 8 L. R., C. P. 704; 42 L. J., C. P. 278 29 L. T. 244; 21 W. R. 789.

#### — Road Formed and Completed, what is.]

—By the General Inclosure Act (41 Geo. 3, c. 109), ss. 8 and 9, the commissioner, before making the allotments of the land to be inclosed, was to set out such roads as he should judge necessary, and to appoint a surveyor to form and complete the same, and until so formed and completed the parish was not to be bound to repair such roads, but after that time they were to be for ever after kept in repair by the parish. An inclosure commissioner appointed to act under a local act, subject to the provisions of 41 Geo. 3, c. 109, duly set out a road which he described in his award made in 1808, but although such road was staked out

on the ground and fenced off, it was never formed and completed as required by 41 Geo. 3, c. 109, nor was it ever used by the public:—Held, that as the requirements of the statute had not been complied with, the road was not a highway created by statute, and as there had been no user by the public, it was not otherwise a highway. *Id.*

**When Completion a Condition Precedent.**—A local turnpike act recited, "that the making and maintaining a new road from Leeds to join the Wakefield and Halifax turnpike road, at a certain point, and several branch-roads (therein also described) from out of the main turnpike road, would be an advantage to the inhabitants of Leeds and Halifax, and to the public in general;" and it authorized the making of the said several roads, and enacted, "that the new roads should not be respectively open to the public, or become public roads until two justices should have certified that the roads respectively, and the works thereon respectively, were completely made, and fit to be travelled upon, throughout the whole length of such roads respectively." Semble, per Littledale and Taunton, J.J., that the making of all the branch roads was not a condition precedent to the main road becoming a public road. *Rev. v. Yorkshire, W. R. (Justices)*, 5 B. & A. 1003. See also *infra*, sub tit. REPAIRS.

**Rights Reserved by Owner.**—The provisions of the Highway and Metropolitan Local Management Acts, so far as they apply to roads and streets, are subordinate to the paramount rights reserved by the owner. *St. Mary, Newington (Vestry) v. Jacobs*, 7 L. R., Q. B. 47; 41 L. J., M. C. 72; 25 L. T. 800; 20 W. R. 249.

#### c. Dedication.

**By the Crown.**—The crown, if owner of the soil, may dedicate it to the public. *Reg. v. East Mark Tything*, 11 Q. B. 877; 3 Cox, C. C. 60; 17 L. J., Q. B. 877; 12 Jur. 332.

**Evidence of Intention—Generally.**—To constitute a dedication of a way to the public by an owner of the soil, there must be an intention so to dedicate, of which the user by the public is evidence, subject to be rebutted by contrary evidence. *Poole v. Huskinson*, 11 M. & W. 827.

If a road has been used by the public for a great number of years, a dedication by the owner of the soil may be presumed; and it is not material to inquire who the owner was, or whether he intended to dedicate the road to the public. *Reg. v. East Mark Tything*, 11 Q. B. 877; 3 Cox, C. C. 60; 17 L. J., Q. B. 877; 12 Jur. 332.

Public user of a road for some time is sufficient *prima facie* evidence of a dedication to the public, and it is not necessary to shew by whom the dedication was made. *Reg. v. Petrie*, 4 El. & Bl. 737; 24 L. J., Q. B. 167; 1 Jur., N. S. 752.

A user of a road for eighteen months, accompanied with a declaration of an intention to devote it to the public, may be sufficient evidence of a dedication. *North London Railway Company v. St. Mary (Vestry), Islington*, 27 L. T. 672; 21 W. R. 226.

A road led from a highway to the gates of a park; through the park was a bridleway, ter-

minating at another highway, but carriages could not go through the park without permission, the gates being occasionally locked. The parish had repaired the road from time immemorial, taking stones from the park for that purpose, but there had not been any user except for the purpose of seeking admission to the park:—Held, that the evidence did not shew a sufficient dedication to the public and user by them, and the road was not a public highway. *Reg. v. Hawkhurst*, 7 L. T. 268; 11 W. R. 9.

A public footway over crown land was extinguished by an inclosure act, but for twenty years after the inclosure the public continued to use the way:—Held, that this was not evidence of a dedication to the public, as it did not appear to have been with the knowledge of the crown. *Harper v. Charlesworth*, 4 B. & C. 574; 6 D. & R. 572.

#### — When Land in the Hands of Lessees.]

—If the land has been out on lease, the acquiescence of the tenant will not bind the landlord, without evidence of his knowledge sufficient to presume a grant from him. *Rugby Charity v. Merryweather*, 11 East, 376, n.

If a way has been used by the public for a great number of years over a close in the hands of a succession of tenants, the privity of the landlord and a dedication may be presumed, although he was never in the actual possession of the close himself, and he is proved not to have been near the spot. *Re v. Barr*, 4 Camp. 16.

Where a way has been used by the public for a great number of years over a close, leading only to the houses of lessees, there being no thoroughfare, the privity of the landlord, and a dedication by him to the public, are essential to constitute it a public highway; and evidence that the locus in quo has been paved and lighted for the like number of years, under an act of parliament, in which it is enumerated amongst the public streets, within the scope of the statute, not prejudice the rights of the owner of the fee. *Wood v. Veal*, 1 D. & R. 20; 5 B. & A. 454.

In order to prove that a way was public, evidence was given of user extending over nearly seventy years; but during the whole period the land had been on lease. The judge told the jury that they were at liberty, if they thought proper, to presume a dedication of the way to the public by the defendant or his ancestor, anterior to the land being leased:—Held, a proper direction. *Winterbottom v. Derby (Earl)*, 2 L. R., Ex. 316; 36 L. J., Ex. 194; 16 L. T. 771; 16 W. R. 15.

— Streets and Roads—Within 18 & 19 Vict. c. 120, s. 88.]—A vestry proposed to erect a public urinal in a mews, not a thoroughfare, the freehold of which was in the plaintiffs as trustees. The mews had for seventy years or more been open to the public at all times; no barrier had ever been put across the entrance. The mews had been lighted, cleansed, and paved by the vestry. The land adjoining the mews was in lease during the whole period. The lessees had applied to the vestry for leave to interfere with the soil of the mews, but such applications were made without the knowledge of the trustees:—Held, that the soil of the mews had been dedicated to the public, and it was "a street," being a highway within the meaning of 18 & 19 Vict. c. 120, s. 88. *Vernon v. St.*

*James's Vestry*, 49 L. J., Ch. 130; 42 L. T. 82. See also per Lush, L. J., 16 Ch. D. 449; 50 L. J., Ch. 81; 44 L. T. 229; 29 W. R. 222—C. A.

The actual site of the urinal had up to 1858 been occupied by a dung-pit, used by the tenant of stables adjoining the mews. About that year it was filled up:—Held, that the site of the dung-pit had been abandoned, and dedicated to the public with the rest of the mews. *Ib.*

— Setting out Proposed Road.]—H., a lessee for a term of seventy-five years of a plot of building land, laid out, in 1865, a proposed road across part of the land, and built six houses on one side of it, but subsequently abandoned her intention of making the road, and, in 1874, demised the remainder of the land, including the site of the abandoned road, for use as a timber-yard. The public had occasionally used the road from 1865 up to 1880, when the urban authority required H., as the owner of the houses, to sewer, flag, and pave the same, and on the lessee declining the urban authority executed the works:—Held, that the mere setting out of a road was not such an act that the person who did it, and allowed the public to traverse and use the road, was to be taken to have dedicated the same to the public; and that the urban authority had no right to cast upon the lessee the whole expense of sewerage and paving the road. *Hall v. Bootle (Corporation)*, 44 L. T. 873; 29 W. R. 862.

#### — Continuation by a Lessee—Jurisdiction.]

—Two owners of freehold property, by agreement in 1808, undertook, after a part should have been let on building leases, to demise the remainder to trustees for C. for sixty-one years, upon trust to lease upon the like plan as should have been adopted with respect to the other part, or as C. should think fit. In pursuance of the agreement, a lease was granted in 1813 to C.'s trustees, the lease reciting the agreement, and shewing by a plan the manner in which the other part of the property had been dealt with. Upon this plan there appeared a street, part of the land comprised in the lease adjoining one end of it. C. and his trustees leased this land for building purposes for the whole term, less ten days, to D., who erected houses to continue the street. The street was used by the public for upwards of twenty years:—Held, that there had been a direction by the freeholders to continue the street, and that it had become a public road. *Pryor v. Pryor*, 26 L. T. 758. Held, on appeal, without going into the merits, that the court had no jurisdiction. 27 L. T. 257.

— Agreement in Expired Lease.]—In 1850, the owner in fee of a plot of land near a town demised the coals under it for six years, to K., the owner of the adjoining land; and in the lease was an agreement that a street, to be called Union Street, should within five years be made across the land under which the coal lay and K.'s land; that a sewer should be made under such road; that the lessor and lessee should, at their own cost, construct and repair so much of the road and sewer as should extend along their respective lands; and that the road should be used as a public road for ever thereafter, and should be maintained by each of the parties, until it should be adopted by the surveyor of highways. The road and

sewer were never made, and there was no dedication of a highway to the public by notice under the Highway Act. A brickfield, and afterwards (in 1851) a colliery, were opened on K.'s land, and gaps were opened through which access was obtained to the premises for carts and foot-passengers. In 1869 posts and chains were placed across one of the openings, but after a few months the chains were removed. In 1870 K.'s land was sold, and in 1871 conveyed to the plaintiff in fee, and in 1872 the Local Board of Health called upon him to sewer and pave the alleged street under the Public Health Act, 1848:—Held, that the agreement in the expired lease had been abandoned and could not be enforced; and that it did not amount to a dedication of a way to the public. *Healey v. Batley (Corporation)*, 19 L. R., Eq. 375; 44 L. J., Ch. 642.

—**Rights of Reversioners.**—A dedication of a highway is not to be presumed against a reversioner. *Barter v. Taylor*, 1 N. & M. 13; 4 B. & Ad. 72.

No dedication to the public of a right of way will be presumed to have been made by a reversioner in fee of land during the existence of a term of years under a lease. *Bermondsey (Vestry) v. Brown*, 35 Beav. 226; 11 Jur., N. S. 1031; 13 L. T. 574; 14 W. R. 213.

**Occasional User—Effect of.**—The occasional user of a farm road by strangers, is evidence of a public rather than of a private way, and may be evidence of a dedication to the public, but must be well weighed with reference to all the circumstances, tending to shew whether the owner ever intended such a dedication, especially if it leads to a place of resort for mere purposes of pleasure. *Mildred v. Weaver*, 3 F. & F. 30; 6 L. T. 225.

**Over Copyholds.**—Where evidence of user is given in support of a presumed dedication of a public way over copyhold, it does not lie on the persons claiming such right to shew that the lord has had possession. *Powers v. Bathurst*, 49 L. J., Ch. 294; 42 L. T. 123; 28 W. R. 390.

**Of a Sea Wall.**—There is nothing inconsistent with the purposes of a sea or a river wall or an embankment, erected to protect neighbouring lands, in a right of way along the surface; and the same evidence of user will raise a presumption of dedication by the owner in the case of such an embankment as in any other case of uninterrupted user by the public. *Greenwich Board of Works v. Maudslay*, 5 L. R., Q. B. 397; 39 L. J., Q. B. 205; 23 L. T. 121; 18 W. R. 948.

**Of Road originally intended for Special Persons.**—By their act of incorporation, the proprietors of the Surrey Canal were to erect and maintain bridges over the canal where it intersected any public highway, bridleway, or footpath, and for the use of the owners and occupiers of lands adjoining the canal. In 1804, the company erected a swivel bridge (of sufficient dimensions for a carriage across the canal, at a spot where there had formerly been a public way, which at the most was only a bridleway. This bridge was originally intended for the exclusive accommodation (as a carriage-way) of the tenants

of an estate adjoining called the Rolls Estate, The neighbourhood having become populous, and a church having been built near the bridge, the public, from 1822 to 1832, used it as a carriage-way. In 1832, the company for the first time imposed a toll upon all carriages traversing the bridge, except those belonging to the tenants of the Rolls Estate; and in 1840 they removed the old swivel bridge, and erected a stone bridge in the place of it. In an action against the defendant for passing over the bridge without paying toll, the judge told the jury, that, supposing the bridge to have been originally erected for the exclusive accommodation of the tenants of the Rolls Estate, still if, by the acts of the company, an idea grew up in the minds of the public that the company had dedicated the way to the public use, they might find such dedication:—Held, that this was not a misdirection; and that the evidence warranted the jury in finding a dedication. *Surrey Canal Company v. Hall*, 1 Scott, N. R. 264; 1 M. & G. 392.

Held, also, that there was nothing in the constitution of the company, or in their property, to prevent them from dedicating the bridge to the public. *Id.*

Where a road was set out by commissioners under a local act, and certain persons only were entitled to use it, but in fact it had been used by the public for many years:—Held, that this was not sufficient evidence of a dedication to the public. *Rees v. St. Benedict*, 4 B. & A. 447.

**Of Vague Tracks.**—The mere use by people of tracks in a wood, where they were free to wander as they pleased, is not necessarily enough to shew a dedication of such tracks to the public as public footways. *Chapman v. Cripps*, 2 F. & F. 864.

Evidence that in a place of resort for pleasure, as a wood, or the like, people have gone wherever they pleased, there being no definite trackway in any particular direction, but merely transitory tracks, and varying every season, and never shewn to be repaired, is not evidence of either a public highway or a public right of resort for air and exercise, or a prescriptive right of way. *Schwinge v. Dowell*, 2 F. & F. 845.

**Limited Dedication—What Allowed.**—There may be a dedication of a way to the public for a limited purpose, as for a footway; but there cannot be a dedication to a limited part of the public, as to a parish; and such a partial dedication is simply void. *Poole v. Huskinson*, 11 M. & W. 827.

There can be no dedication of a way to the public for a limited time; if dedicated at all, it must be dedicated in perpetuity. Neither can the public by non-user release their rights. *Daves v. Hawkins*, 8 C. B., N. S. 848; 29 L. J., C. P. 343; 7 Jur., N. S. 262; 4 L. T. 288.

—**Evidence of Mere Licence.**—Where a landowner suffered the public to use for several years a road for all purposes, except that of carrying coals:—Held, that this was either a limited dedication to the public, or no dedication at all, but only a licence; and that a person carrying coals along the road after notice not to do so, was a trespasser. *Stafford (Marquis) v. Coyney*, 7 B. & C. 257.

A road had been used by the public for about thirty years, but it appeared that in 1814,

twenty-two years before the action, an agreement was made by the owner on one side, and a company and the surveyor of highways of the hamlet and others on the other side, by which the owner agreed to let them use the road on the company paying five shillings a year, and finding cinders, and the hamlet loading and spreading them:—Held, that although the evidence of user per se would shew a dedication by the owner of the soil, it was explained by the agreement which only amounted to a licence to use the road while the conditions in it should be observed. *Barraclough v. Johnson*, 3 N. & P. 233; 8 A. & E. 99; 1 W., W. & H. 162; 2 Jur. 839.

— **Dedication of Street.—Notice of.—Neglect of Duty by Surveyor.**—Under 5 & 6 Will. 4, c. 50, s. 23, when a person is about to dedicate a new road to the public, and seeks to make it repairable by the parish, and gives notice to the surveyor that at the end of three months it will be dedicated, it is the duty of the surveyor to call a vestry meeting of the inhabitants, and if such meeting decides that the road is not of sufficient utility to justify its being kept in repair, it is his further duty to summon the party proposing to dedicate before the justices at the next special sessions for highways, who are to decide on the question of the utility of the road; but if the surveyor omits to summon the party, at the next special sessions after such vestry meeting, the parish is not liable to repair the road, and a mandamus will not lie to the justices, after the three months mentioned in the notice have expired, to view and certify that the road has been substantially made. *Reg. v. Norfolk (Justices)*, 44 L. J., M. C. 45; 31 L. T. 585; 23 W. R. 165.

Held, also, that the neglect of the surveyor to call a meeting did not enable the landowner to dedicate the highway to the parish, and the acceptance by the vestry was a condition precedent to dedication. *Id.*

— **Effect of Public Health Act.**—In 1798, by a local act, trustees were appointed to repair, &c., the streets of a township, and to levy rates on the inhabitants, who on paying them were to be exempt from all other charges, for paving, &c. In 1816, A. laid out a street on his land, which in 1819 became dedicated to the public. In 1823, by another local act, the former act was repealed, and trustees were appointed for similar purposes, and it was provided that all persons should be exonerated from statute duty and compositions and all liability for highway repairs, that surveyors should be appointed to be in the position of surveyors of highways, all costs to be paid by the trustees out of rates, and when any new streets were properly paved, &c., on application by the owners of adjoining houses, to declare them public, they were to be public and repaired by the trustees, and where any streets set out on private property had been opened and used for three years, on application to cause them to be paved, &c., they should be deemed public. In 1851, the Public Health Act, 1848, was applied to the township, and the local acts repealed; and the local board having paved the street before mentioned, called on A. to contribute as an adjoining owner, under s. 69 of the last-mentioned act, which excepts highways defined by 15 & 16 Vict. c. 42, s. 13, to be repairable by the inhabitants at large. Rates had been paid in respect of the pre-

mises under the local acts, but the street had never been paved, &c., never been dedicated under 5 & 6 Will. 4, c. 50, and no steps taken by the trustees or the local board to make it public:—Held, that the first local act did not prevent a dedication to the public, that the second only applied to streets then in course of construction or afterwards constructed, and that therefore the street was a highway within the exception in s. 69 of the Public Health Act, 1848, and A. not liable. *Hirst v. Halifax Local Board*, 6 L. R., Q. B. 181; 40 L. J., M. C. 43; 25 L. T. 28; 19 W. R. 279.

— **Evidence of.**—If the owners of land suffer the public to have the free passage of a street in London, though not a thoroughfare, for eight years without any impediment, it is sufficient to presume a general dedication of it to the public. *Rugby Charity v. Merryweather*, 11 East, 376, n.

The plaintiff erected a street, leading out of a highway across his own close, and terminating at the edge of the defendant's adjoining close, which was separated from the end of the street by the defendant's fence for twenty-one years, during nineteen of which the houses were completed, and the street publicly watched, cleansed, and lighted:—Held, that this street was not so dedicated to the public, that the defendant pulling down his wall might enter it at the end adjoining to his land, and use it as a highway. *Woodyer v. Hadden*, 5 Taunt. 125.

Ely Place, part of the liberty of Saffron Hill, Hatton Garden, and Ely Rents, is private property; and, though it is generally open to the public during the day, has never been dedicated to the public. *Paul v. Jones*, 1 G. & D. 316; 1 Q. B. 832.

If a passage leading from one part to another of a public street (though by a very circuitous route), made originally for private convenience, has been open to all the world for a great number of years, without any bar or chain across it, and without any person meeting with interruption, it is to be considered as dedicated to the public, and it becomes a highway, to obstruct which is an indictable offence. *Rees v. Lloyd*, 1 Camp. 260.

— **Effect of Repairing.**—The defendant, to prove a public right of way over the plaintiff's land, shewed acts of repair done in a certain year by C., the township surveyor. The plaintiff offered to prove in answer an agreement made in that year, between C. and the steward of the plaintiff's predecessor, that C., in consideration of repayment by the steward, should repair a road which according to the plaintiff's case was the road now in question. The defendant's counsel objected, because it did not appear that the steward had authority to make such agreement. The judge received the evidence, and the plaintiff had a verdict. On motion for a new trial the former objection was renewed, and it was urged also that the evidence, when given, did not shew that the road to which the agreement related was the same as the one now in question:—Held, first, that (assuming the roads to be identified) the agreement, even if the steward had no sufficient authority, was evidence to explain the fact of repair, and was properly admitted. *Ferrand v. Millman*, 7 Q. B. 730.

Held, secondly, that if the evidence failed to

identify the roads, the objection should have been made when the defect appeared, and that the point could not now be raised. *Ib.*

**Acts to Prevent Dedication.]**—If a person opens his land so that the public pass over it continually, they would, after the user of a very few years, be entitled to pass over it and use it as a way; and if the person does not mean to dedicate it as a way, but only to give a licence, he should do some act to shew that he gives a licence only. The common course is to shut it up one day in the year. *British Museum (Trustees) v. Finnis*, 5 C. & P. 460.

The erection of a bar, although it may have been knocked down, rebuts the presumption of a dedication to the public. *Roberts v. Karr*, 1 Camp. 262.

A gate being kept across a way is not conclusive that it is not a public way, as the way may have been granted to the public, with a reservation of the right of keeping a gate across it, to prevent cattle straying. *Davies v. Stephens*, 7 C. & P. 570; *S. P., Rex v. Bliss*, 1 Jur. 960.

**Occupation Roads.]**—Occupation roads laid out through an estate for the use and convenience of the inhabitants are not thereby dedicated to the public. *Selby v. Crystal Palace District Gas Company*, 31 L. J., Ch. 595; 30 Beav. 606. -

There may be both an occupation-way and a public highway over the same road, for it does not, on becoming a highway, cease to be an occupation way. Per Lord Denman, C. J., at nisi prius. *Brownlow v. Tomlinson*, 1 M. & G. 484; 1 Scott, N. R. 428.

**Deviation from Ancient Path—Dedication of New Way—Evidence of.]**—The right of deviation is not an inseparable incident to the grant of a highway, and is not to be presumed in the absence of evidence, shewing that it has been either granted by the owner of the soil or enjoyed from time immemorial. *Arnold v. Holbrook*, 8 L. R., Q. B. 96; 42 L. J., Q. B. 80; 28 L. T. 23; 21 W. R. 330.

A passer-by is not entitled to remove hurdles standing on land immediately adjoining a highway, on the ground that they may be at night dangerous to the public. *Ib.*

The plaintiff was the occupier of an arable field, across which was a public footpath, but he and his predecessors had the right to plough up the footpath when ploughing the field. The public, when the way was muddy, having deviated on to the plaintiff's field, he, to prevent them from straying from the line of footpath, placed hurdles on the sides of it, some of which were thrown down by the defendant:—Held, that the footpath having been dedicated to the public, with a reservation of the right to plough it up, on its becoming impassable after being ploughed up the public had no right, in the absence of evidence of such a prescriptive right, to pass over the adjoining parts of the plaintiff's field; and that the defendant was liable in an action of trespass. *Ib.*

An ancient highway over a common or a down, was without authority or interference from the owner of the soil, diverted by an adjoining proprietor, who substituted for it a new road which was used by the public for more than twenty years. After the lapse of that period, the original road was re-opened to the public, and the owner

of the soil, over which the substituted road passed, built a wall and planted trees across it. In an action against a party for pulling down the wall and cutting down the trees:—Held, that these facts afforded no evidence of a dedication of the road to the public, the public user being referable to the right of the public to deviate on to the adjoining land, whenever the owner of the soil illegally stops a highway, or suffers it to become founderous. *Dawes v. Hawkins*, 8 C. B., N. S. 848; 29 L. J., C. P. 343; 7 Jur., N. S. 262; 4 L. T. 288.

If there is an old way near to a person's land, and, by the fences decaying, the public come on the land, that is no dedication of the land as a way. *British Museum (Trustees) v. Finnis*, 5 C. & P. 460.

In an action for an injury to the wife of the plaintiff through the negligence of the defendant, in leaving an open vault or cellar unfenced, whereby she fell in, and was injured, the evidence was that persons were in the habit of going across the spot where the vault was, for the purpose of making a short cut from a street to the main road, by avoiding an angle; but that the owner of the premises, as often as he saw them, turned them back:—Held, no evidence of a public way. *Stone v. Jackson*, 16 C. B. 199.

**Rights of Owner.]**—The owner who dedicates to public use as a highway a portion of his land, parts with no other right than a right of passage and may exercise all other rights of ownership consistent with such dedication; and the appropriation, made to and adopted by the public of a part of the street to one kind of passage and another part to another, does not deprive him of any rights as owner of the land which are not inconsistent with the right of passage by the public. *St. Mary, Newington (Vestry) v. Jacobs*, 7 L. R., Q. B. 47; 41 L. J., M. C. 72; 25 L. T. 800; 20 W. R. 249.

The provisions of the Highway and Metropolitan Local Management Acts, so far as they apply to roads and streets, are subordinate to the paramount rights reserved by the owner. *Ib.*

Therefore, when on a summons under 5 & 6 Will. 4, c. 50, s. 72, it appeared that the owner of premises adjoining a public street had caused heavily-laden waggons to be dragged to and from his premises across the footway, and had thereby injured it, the magistrate having found that such user was necessary to the reasonable enjoyment of the freehold premises, and was not inconsistent with the general welfare:—Held, that the summons was properly dismissed. *Ib.*

**— Right to Plough up a Path.]**—There may, in law, be a dedication to the public of a right of way, subject to the right of the owner of the soil to plough it up in due course of husbandry, and to destroy all trace of it for the time. *Mercer v. Woodgate*, 5 L. R., Q. B. 26; 39 L. J., M. C. 21; 21 L. T. 458; 18 W. R. 116.

As far as living memory went, the occupier for the time being of a field over which a footpath crossed, had been in the habit, in due course of farming, of ploughing up the whole field, and so destroying the footpath. There was no evidence of the existence of the footpath before living memory:—Held, that the inference to be drawn was, that the owner had originally dedicated the right of way to the public, subject to this right of periodically ploughing it up. *Ib.*

A footway across a field had from time immemorial at all times of the year been used by all persons, as of right, but the occupier of the field and his predecessors had also from time immemorial ploughed up the footway in such parts as they thought fit, and in other parts lifted the plough across it:—Held, that the surveyors of highways were not justified in repairing the way with hard materials so as to prevent it from being ploughed, or the plough from being lifted over it so easily as before, as it must be presumed to have been dedicated to the public subject to the inconvenience of being occasionally ploughed up. *Arnold v. Blaker*, 6 L. R., Q. B. 433; 40 L. J., Q. B. 185; 19 W. R. 1090—Ex. Ch.

— **Power of Magistrates to make Road over Land held for Public Recreation.**—Magistrates for a burgh held the links from time immemorial for the inhabitants, and, inter alia, subject to the obligation of preserving the same for the game of golf and for the recreation of the inhabitants. They had from time to time exercised powers of administration and management over the links. The magistrates proposed to make a macadamized road along the outside boundary of the links, where that boundary adjoined certain feus let off by them in 1820, which feus are no longer, in point of law, part of the links. P., an inhabitant of the burgh and member of the principal golfing club there, and others, the appellants, sought to restrain the magistrates either from making the road or from permitting any road to be used in that place for wheel traffic:—Held, substantially affirming the decision of the court below, but altering their interlocutor, that the proposed road would have no substantial interference with the obligation of golfing, &c., and that the road might be reconciled with its due observance; but that it was inconsistent with that obligation for the magistrates to alienate any part of the solum of the ground in question, or to abdicate their existing powers of administration, either by granting private easements to particular individuals, or, having made the road, to create a public easement by dedicating it to the public. *Paterson v. St. Andrew's (Provost)*, 6 App. Cas. 833—H. L. (Sc.).

**Subject to Existing Rights.**—A highway may be dedicated to the public, subject to a pre-existing right of user by the occupiers of adjoining land for the purpose of depositing goods thereon. *Morant v. Chamberlin*, 6 H. & N. 541; 30 L. J., Ex. 299.

— **Effect on Rent-Charge.**—A rent-charge issuing from lands adjoining certain roads, and granted at a time when the roads were private occupation-roads, in respect of the use of such roads, and the use of a sewer laid down in one of them, is not determined by the roads becoming highways repairable by the inhabitants at large, and the sewer becoming vested in and discontinued by the local authority; and it matters not that the grantor of the rent-charge had covenanted in the grant to keep the roads and sewers in repair. *Merrett v. Bridges*, 47 J. P. 775.

— **Allowable Reservations.**—There can be no dedication to the public of land as a highway, with the reservation of a right of making cuts through the land for the purposes of drainage. *Rex v. Leake*, 2 N. & M. 695; 5 B. & Ad. 469.

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Where drainage commissioners were directed by act of parliament to purchase lands, cut drains, and cleanse them when cut, by placing the mud upon the banks:—Held, that it was competent to them to dedicate such banks to the public as a highway. *Ib.*

— **Dangerous Obstructions.**—If a highway is dedicated to the public with a dangerous obstruction upon it, such as would have been a nuisance on an ancient way, as, a flight of steps, or a projecting flap, no action can be maintained against the person dedicating it for an injury caused thereby. *Robbins v. Jones*, 15 C. B., N. S. 221; 33 L. J., C. P. 1; 10 Jur., N. S. 239; 9 L. T. 523; 12 W. R. 248.

An action will not lie against the owner of a house having a covered area adjoining a public footway, which area was in existence before and at the time of the dedication of the highway, and before 5 & 6 Will. 4, c. 50, for an injury to an individual from the giving way of the covering of the area in consequence of the wear and tear by public user. *Ib.*

Where an erection or an excavation exists upon land which is dedicated to the public as a highway, the dedication must be taken to be made to the public and accepted by them, subject to the inconvenience or risk arising from the existing state of things. *Fisher v. Prowse*, 2 B. & S. 770; 31 L. J., Q. B. 212; 8 Jur., N. S. 1208; 6 L. T. 711.

A. occupied a house adjoining to a public street, with a cellar belonging to it. The mouth of this cellar opened into the footway of the street by a trapdoor. During the day this trapdoor was open, but at night it was closed by a flap, which slightly projected above the footway, and had so projected as long as living memory went back. B. coming along the footway at night, stumbled over this flap, fell, and sustained injury, for which he brought an action against A.:—Held, that the cellar flap had existed as long as the street, and that the dedication of the way to the public was with the cellar flap in it, and, therefore, that A. was not liable, as the maintenance of such an ancient cellar flap was not unlawful. *Ib.*

#### d. Adoption by Parish.

**Under 5 & 6 Will. 4, c. 50, s. 23.**—Section 23 of 5 & 6 Will. 4, c. 50 (Highway Act, 1835), is not retrospective in respect of roads completely public by dedication at the time of the passing of the act; it applies to roads then made, and in progress of dedication. *Reg. v. West Mark (Tithing)*, 2 M. & Rob. 305.

The formalities necessitated by the said statute before a road dedicated to the public can become such a highway, do not apply to a road made by trustees under a turnpike act. *Reg. v. Thomas*, 7 El. & Bl. 399; 3 Jur., N. S. 713.

— **Notice for Repairs.**—If a road has been dedicated to the public and used, but the necessary steps have not been taken by notice, under the above section, to make it repairable by the parish, it is still a highway in other respects, and an action is maintainable for obstructing it to the plaintiff's damage. *Roberts v. Hunt*, 15 Q. B. 17.

X

— **Satisfaction of Local Board.**—A landowner gave notice to the local board of his intention to dedicate a road as a highway; to which the board replied, that they would not adopt the road, as it had not been sewered, levelled, &c., to their satisfaction. The landowner, however, obtained and enrolled the certificate of two justices, and the public then used the road, which was kept in repair by the landowner for twelve months; after which, it being out of repair, an indictment was preferred against the inhabitants:—Held, that the inhabitants were not liable, inasmuch as the road had not become a highway; for that, assuming the above provision to apply to the case, the road had not been made to the satisfaction of the local board, who were the surveyors. *Reg. v. Dukinfield*, 4 B. & S. 158; 32 L. J., M. C. 230.

— **Magistrates' Certificate.**—Justices, after a parish had resolved that a road proposed to be dedicated to the public was of sufficient utility, were called upon to certify that it was made in conformity to 5 & 6 Will. 4, c. 50, s. 23. They refused to grant their certificate, being of opinion that it was but a part of a road, which in another part was not of the requisite width:—Held, that they were right in their decision. *Reg. v. Surrey (Justices)*, 3 L. T. 898.

— **Appeal against Order of Justices.**—Under 5 & 6 Will. 4, c. 50, s. 23, a special sessions was held after the vestry had deemed a highway not to be of sufficient utility to justify its being kept in repair at the expense of the parish. The justices made an order, in conformity with the determination of the vestry, that the highway was not of sufficient utility:—Held, that an appeal to the quarter sessions lay by the persons dedicating the highway against this order. *Reg. v. Derbyshire (Justices)*, El. Bl. & El. 69; 27 L. J., M. C. 189; 4 Jur., N. S. 755.

**At Common Law.**—Where a way has been recognized as public in an act of parliament, it is not necessary that it should be adopted by the parish to make it a public way. *Re v. Lyon*, 5 D. & R. 497.

A road dedicated to and used by the public becomes a highway, which the parish must repair, although neither such dedication nor such user has been adopted or acquiesced in by the parish. *Re v. Leake*, 2 N. & M. 583; 5 B. & Ad. 469.

Where a public road has been made such pursuant to an act, which was to continue in force for a limited period, and the inhabitants of a parish through which it passed were thereby bound to do statute duty:—Held, that the performance of such duty was not an adoption of the road by the parishioners; and that, at the expiration of the act, they were not bound by common law to repair such road. *Re v. Mellor*, 1 B. & Ad. 32.

By a local act for the better governing a parish, it was enacted, that no road which had not been repaired by the parish should be repaired out of the parochial funds, until such road should have been surveyed by two surveyors, and certified by them to have been properly made and drained, one of the surveyors to be appointed by the vestry and one by the freeholder or his lessee. A road had been set out by the proprietors, for the purpose of letting the

frontage, 5,660 feet, as building ground. Eight houses had been built and were inhabited, and twenty-six carcasses erected. The road had been formed and constructed, made and drained, and used by the public for six months, and the freeholder and his lessee had appointed a surveyor, and required the vestry to appoint one, which they refused. The court refused to grant a mandamus to the vestry to compel them to appoint a surveyor, as such appointment would have the effect of throwing on the parish the burden of repairing a road, which would not be so much for the benefit of the public as for the peculiar benefit of the freeholder during the time his buildings were erecting. *Re v. Paddington (Vestry)*, 9 B. & C. 456.

#### e. Property in the Soil.

**Rights of Adjoining Owners—General Principles.**—Ownership of land adjoining either side of a road is *prima facie* evidence of a right to the soil extending to the centre of the road. *Cooke v. Green*, 11 Price, 736.

And a recent right, founded on an inclosure under an act, does not make a distinction with regard to the general law. *Id.*

The soil of a public highway is presumably vested in the owner of the adjacent land *ad medium filum viae*. *Salisbury (Marquis) v. Great Northern Railway Company*, 5 C. B., N. S. 174; 28 L. J., C. P. 40; 5 Jur., N. S. 70.

There is nothing in 3 Geo. 4, c. 126, General Turnpike Act, to alter this presumption, or to vest the soil of that description of roads in the trustees. *Id.*

If the lord of the manor being owner of close A., adjacent to one side of a highway, and also of close B., adjacent to the opposite side, conveys both in one deed to one vendee, the soil of the road passes to the vendee, although the acreage of each of the closes is stated in the conveyances, unless there is enough in the deed to shew that the soil of the road was intended to remain in the vendor. *Id.*

The presumption that the soil of a road, *usque ad medium filum viae*, belongs to the owners of the adjoining lands applies equally to a private as to a public road. *Holmes v. Bellingham*, 7 C. B., N. S. 329; 29 L. J., M. C. 132; 6 Jur., N. S. 534.

If the strip of land communicates with open commons or other larger portions of land, the presumption is either done away or considerably narrowed; for the evidence of ownership which applies to the larger portions applies also to the narrow strip which communicates with them. *Grose v. West*, 7 Taunt. 39.

Where the boundary of property is described as abutting upon a highway, such boundary must be taken (in the absence of evidence the other way) to extend to the middle of such highway. *Reg. v. Strand Board of Works*, 9 L. T. 374; 12 W. R. 46. Affirmed, 4 B. & S. 526; 33 L. J., M. C. 33; 12 W. R. 828—Ex. Ch.

— **Evidence.**—The right of the owner of land abutting on a highway to the soil of the highway *ad medium filum viae* is founded on a presumption of law which exists only in the absence of evidence of ownership. *Beckett v. Leeds Corporation*, 7 L. R., Ch. 421; 26 L. T. 375; 20 W. R. 454.

Though the right of the soil in a public high-

way belongs to the owner of the adjoining closes (when no other proprietor appears), usque ad medium flum viæ, this is only a presumption of law in his favour, when the original dedication of the road cannot be shewn by positive evidence. *Headlam v. Hedley*, Holt, 463.

In opposition to a claim of the owners of houses abutting upon an ancient street in a town that they were entitled to the soil of the street ad medium flum viæ, evidence was adduced, that the lords of the manor used formerly to receive tolls in respect of markets held in the street, which tolls they subsequently sold to the corporation of the town; that in 1694 they had, in consideration of a yearly rent of 3*l.*, granted a licence to persons to dig up any streets of the town in order to lay pipes for the purpose of supplying the town with water, which rent was paid to them down to 1858, when it was bought up by the corporation for 75*l.*; and that payments had on several occasions been made to the lords of the manor by owners of houses abutting on the street in respect of encroachments made upon the soil of the street:—Held, that the evidence of ownership in the lords of the manor was sufficient to rebut the presumption of law, that the owners of the lands abutting upon the street were entitled to the soil of the street ad medium flum viæ, and that consequently the lords of the manor had shewn a good title to the soil in question. *Id.*

The plaintiff granted to the defendant two pieces of land separated by, and each described as abutting on, a strip of land called a street, which the plaintiff intended to dedicate as a highway, but which was in fact never so dedicated. For more than twenty years before action the defendant used this piece of land for the purposes of his business in such a way as to make it impassable, save for foot passengers. Within twenty years both the plaintiff and the defendant had repaired some railings which separated this intended street from an adjoining highway; and within the same period the defendant had first enclosed a small portion of the street, and then fenced it in at each end, where it abutted on two highways. In an action to recover possession of the land,—Held, that the presumption that the soil to the middle of a highway belongs to the owner of the adjoining enclosed land, does not apply where such land abuts on an intended highway which has not at the time of the conveyance been dedicated to the public. *Leigh v. Jack*, 5 Ex. D. 246; 49 L. J., Ex. 220; 42 L. T. 463; 28 W. R. 452; 44 J. P. 488—C. A.

— **By Conveyance.**—Where a piece of land which adjoins a highway is conveyed by general words, the presumption of law is, that the soil of the highway, usque ad medium flum, passes by the conveyance, even though reference is made to a plan annexed, the measurement and colouring of which would exclude it. *Berridge v. Ward*, 10 C. B., N. S. 400; 30 L. J., C. P. 218; 7 Jur., N. S. 876; *S. C.*, at Nisi Prius, 2 F. & F. 208.

Strips of land lying along a highway, even though indirectly connected with parts of a waste, may well pass under a conveyance of the adjacent inclosure, though the deed purports to state the quantity of acres within the fences that were therein conveyed, if the words "more or less" were added. *Dendy v. Simpson*, 7 Jur., N. S. 1058; 9 W. R. 743—Ex. Ch.

**Waste Lands.**—The presumption is, that waste land which adjoins to a road belongs to the owner of the adjoining inclosed land, and not to the lord of the manor. *Steel v. Prickett*, 2 Stark. 463.

And that, whether he is a freeholder, a leaseholder, or a copyholder. *Doe d. Pring v. Pearsey*, 7 B. & C. 304; 9 D. & R. 908.

But evidence of acts of ownership in the lord of the manor is admissible to repel such presumption. *Anon.*, Lofft, 358.

When strips of land lie between the highway and the adjoining inclosure, the legal presumption is, that the soil belongs to the owner of the adjoining old inclosure. *Scovones v. Morrell*, 1 Beav. 251.

The ordinary presumption is, that strips of land lying along a highway, even though indirectly connected with parts of the waste, belong to the owner of the adjacent inclosed land between which and the actual beaten road they lie, and not to the lord of the manor, especially if the adjacent owner has done acts of ownership without interruption upon the land. *Simpson v. Dendy*, 8 C. B., N. S. 433; 6 Jur., N. S. 1197.

Upon a question whether waste land on the side of a road belonged to the owner of the adjoining inclosure, or to the lord of the manor, grants made by the lord of the waste lands lying on both sides of the road at a considerable distance from the spot in dispute, but in continuity with it, are admissible in evidence; acts of ownership having been proved to have been exercised by the lord, on the waste in the immediate vicinity of the wastes adjoining to the plaintiff's inclosure. *Doe d. Barrett v. Kemp*, 2 Scott, 9; 2 Bing. N. C. 102; 1 Hodges, 231.

But grants made by the lord, of waste lands in other parts of the manor, which were not in continuity with the spot in dispute, are not admissible in evidence. *Id.*

— **Evidence.**—Where the question was, whether a slip of land, between some old inclosures and the highway, belonged to the lord of the manor or the owner of the adjoining freehold:—Held, that evidence might be received of acts of ownership by the lord of the manor on similar slips of land not adjoining his own freehold in various parts of the manor. *Doe d. Barrett v. Kemp*, 7 Bing. 332; 5 M. & P. 173.

**Rights of Owners—Encroachments.**—The common notion that owners of land on the sides of a highway may encroach or enclose up to within fifteen feet of the centre is an error, and the question will always be as to the extent of the highway by user. *Reg. v. Johnson*, 1 F. & F. 657.

When an ordinary highway runs between two fences, one on each side, the right of passage which the public has along it extends *prima facie*, and unless there is evidence to the contrary, over the whole space between the fences. The public is entitled to the use of the entire space. *Reg. v. United Kingdom Electric Telegraph Company*, 2 B. & S. 647, n.; 31 L. J., M. C. 166.

— **Injunction to Prevent Laying Down of Pipes.**—The owner of the soil in a public way is entitled to an injunction to prevent a stranger from laying down pipes therein, and from keeping there any already laid. *Goodson v. Richardson*, 9 L. R., Ch. 221; 43 L. J., Ch. 790; 30 L. T. 142; 22 W. R. 337.

— **Removal of Obstructions.**—The owner of the soil of a highway may remove anything thereon not justified by the easement, though not a nuisance to the way. *Reg. v. Mathias*, 2 F. & F. 570.

One of the public has no right to remove an incumbrance to the soil of a highway unless a nuisance to the way. *Ib.*

**Liability for Injuries.**—See ACTION FOR INJURIES, *infra*.

## 2. STOPPAGE AND DIVERSION OF.

### a. By Order of Justices.

#### i. Generally.

**Under 13 Geo. 3, c. 78.**—The 13 Geo. 3, c. 84, s. 63, only referred to diversions under writs of ad quod damnum, and under 13 Geo. 3, c. 78, s. 19. *Reg. v. Netherthong*, 2 B. & A. 179.

— **Widening of Roads.**—The power of two justices, under 13 Geo. 3, c. 78, s. 16, to order any highway to be widened, extended to roads repairable *ratione tenuræ*. *Reg. v. Balme*, Cowp. 648. Sects. 6 and 63 of 13 Geo. 3, c. 78, did not authorize the surveyor to widen a road to thirty feet by removing a fence, unless the fence supposed to be an encroachment was actually upon the highway. *Lowen v. Kaye*, 6 D. & R. 20; 4 B. & C. 3.

— **Rendering Footpath a Cul de sac.**—By 13 Geo. 3, c. 78, justices were empowered to divert and stop up certain highways, and to sell the part stopped up; but by s. 17, if they found it necessary, the old highway was to be sold, subject to the right of way and passage to any lands, house, or place, according to the ancient usage in that respect. In 1827 orders for diverting, stopping, and selling a portion of a highway were confirmed at quarter sessions, containing the reservation of a free passage for persons on foot only over and along the land and soil of the highway to and from a certain public footpath communicating therewith at the letter E., as delineated on an annexed plan, according to the ancient usage thereof:—Held, that the effect of these orders was to render another public footpath which communicated with the old highway at another point, and was not marked in the annexed plan, a cul de sac; and that a landowner was justified in closing a door at the point of communication. *Reg. v. Waller*, 31 L. T. 777.

— **Setting out of New Highway—Necessity of.**—Under 13 Geo. 3, c. 78, s. 19, a new highway must have been set out before an old one could be stopped up; and it was not sufficient that another old highway was widened in parts to answer the purpose of a new road. *Welch v. Nash*, 8 East, 394. But see *Reg. v. Phillips*, *post*, col. 650.

Where a road was stopped up by order of justices, and a new one was substituted, partly over the ground of a stranger, and partly over an accustomed road, that was a sufficient compliance with the act, provided the new road conveyed the public to the same place as the old one did. *De Ponthieu v. Pennyfeather*, 1 Marsh. 261; 5 Taunt. 634.

— **Sufficiency of Certificate.**—Where an

order of justices for the diversion and turning of a road recited that they had viewed the new road and found it to be in good condition and repair:—Held, to be a sufficient certificate under 13 Geo. 3, c. 78, s. 19. *Ib.*

#### ii. Prior to Highway Act, 1835.

**Contents of Order.**—An order of sessions for stopping up footpaths must distinctly describe the parish they are in, their length and breadth, and order them to be sold. *Reg. v. Kenyon*, 6 B. & C. 640; 9 D. & R. 694.

In an order of justices for stopping up an unnecessary highway under 55 Geo. 3, c. 68, it must be stated that it appeared to the justices on view that the way was unnecessary. *Reg. v. Worcestershire (Justices)*, 8 B. & C. 254; 2 M. & R. 289.

Justices could not make an order for stopping up part of a highway as unnecessary, under 55 Geo. 3, c. 68, s. 2, unless they had viewed the highway together; nor unless the finding that it was unnecessary was the result of that view. *Reg. v. Cambridgeshire (Justices)*, 5 N. & M. 440; 4 A. & E. 111; 1 H. & W. 600.

By an order of justices, it was stated, that three justices having particularly viewed the public roads within a parish thereafter described, and being satisfied that they were unnecessary to be continued, did order that such roads should be stopped up and extinguished:—Held, that this order was invalid, inasmuch as it did not appear upon the face of it that the justices were, upon the view, satisfied that the roads were unnecessary. *Reg. v. Downshire (Marquis)*, 6 N. & M. 92; 4 A. & E. 698; 1 H. & W. 673.

An order of justices under 55 Geo. 3, c. 68, s. 2, for stopping a highway, began with this recital, "we," &c., "having viewed a certain public highway," &c., "and it appearing to us that such highway is unnecessary," we do order, &c.:—Held, a bad order, the words not necessarily implying that it was made upon the view "of the said justices" according to the act. *Reg. v. Jones*, 12 A. & E. 684; 4 P. & D. 520; 1 Arn. & H. 113.

**Validity of Order.**—An order of justices, under 55 Geo. 3, c. 68, stopping up more than the highway, was void. *Reg. v. Milcorton*, 1 N. & P. 179; 5 A. & E. 841; 2 H. & W. 435.

Such an order, stopping up part only of a highway, was void. *Ib.*

Justices had no authority to narrow a highway. *Ib.*

An order of justices under 55 Geo. 3, c. 68, for diverting a public footway and substituting a new one, which contained also an order for the stopping up the old footway, was void. There should have been two separate orders; the one for diverting, the other for stopping up. *Reg. v. Middlesex (Justices)*, 1 N. & P. 92; 2 H. & W. 407; 5 A. & E. 626.

An order of justices for diverting a public highway and substituting a new one for it, containing also an order for stopping up the old highway, is bad, inasmuch as they have no power to stop up the old road until the new one has been made. An order for diverting an old highway and substituting a new one, must shew, on the face of it, that the justices viewed the line of the proposed new road. *Reg. v. Kent (Justices)*, 10 B. & C. 477.

An order for diverting and stopping up a highway and substituting for it a new road is bad, unless it appears that the public acquire as permanent a right in the latter as they had in the former. *Reg. v. Winter*, 3 M. & R. 433; 8 B. & C. 785.

Justices by 55 Geo. 3, c. 68, s. 2, might make an order for stopping a footway as unnecessary, without ordering it to be sold. *Reg. v. Glover*, 1 B. & Ad. 482.

— **By what Justices.**—By 2 & 3 Will. 4, c. 64, s. 36, Sched. (O.) 30, Clifton is made a part of the parliamentary borough of Bristol, which is a county of itself. Except so far as that act operated, it was in the county of Gloucester:—Held, that after the passing of the Corporations Act, 5 & 6 Will. 4, c. 76, ss. 7, 8, the Gloucestershire justices could not make an order for diverting a footway in Clifton, their jurisdiction, in such cases, being transferred to the justices of Bristol. *Reg. v. Gloucester (Justices)*, 4 A. & E. 689.

Justices in petty session having made an order for stopping a highway under a local act, giving an appeal, and the time for appeal having elapsed, it cannot be contended, on a prosecution for obstructing such way, that the order was bad, because the justices were not properly summoned to the petty session. *Reg. v. Downshire (Marquis)*, 4 A. & E. 698; 6 N. & M. 92; 1 H. & W. 673.

— **Consent of Parties.**—An order made by justices of peace, under 55 Geo. 3, c. 68, s. 2, for stopping up an old highway, and setting out a new one, must shew that it was made with the consent in writing, under the hand and seal of the owner of the land through which the new highway was proposed to be made. *Reg. v. Denbighshire (Justices)*, 2 D. & R. 52; *S. C.*, nom. *Reg. v. Kirk*, 1 B. & C. 21.

So, where an order of justices for turning a footpath was founded upon a consent, signed and sealed by the attorney of the parties in and through whose ground the new road was to pass, there being nothing to bind the principal:—Held, ill, and quashed by the court, after confirmation by sessions. *Reg. v. Crewe*, 3 D. & R. 6; *S. C.*, nom. *Reg. v. Kent (Justices)*, 1 B. & C. 622.

— **Description of Order—Plan Annexed—Notice without Plan.**—An order of justices for diverting a highway, and stopping up a part of it, described the highway by termini, and by reference to a plan; the part to be stopped up was described as so many yards of the said highway, lying between certain letters on the plan, and coloured blue. Notice was published (pursuant to 55 Geo. 3, c. 68) of the order having been made; but the notice had no plan annexed, and merely described the road by termini and the part to be stopped up as so many yards of such road:—Held, that the order explained by a plan annexed was good, but that the notice was insufficient. *Reg. v. Horner*, 2 B. & Ad. 150.

“On Notice being given.”—By 59 Geo. 3, c. 134, s. 39, an order of the church building commissioners for stopping paths through a churchyard is to be made with consent of two justices, and on notice being given in the manner and form prescribed by 55 Geo. 3, c. 68; and no appeal lies against the order. By 55 Geo. 3, c. 68, s. 2, the stopping up was to be by

an order of two justices, provided that were given in the form annexed, which form stated that the order had been signed; but there was an appeal to the sessions, and if no one appealed, or the order was confirmed on appeal, the way was to be stopped, and the proceedings conclusive:—Held, that an order of the commissioners being final when made, must be preceded by notice, and that the words “on notice being given,” in 59 Geo. 3, c. 134, s. 39, must, with reference to such an order, be read “after notice given.” *Reg. v. Arkwright*, 12 Q. B. 960; 18 L. J., Q. B. 26; 13 Jur. 300.

— **Proof of Highway—Evidence of Order.**—An award, made in 1830, under an inclosure act, which empowered the commissioners to stop up highways, subject, nevertheless, to the order and concurrence of two justices, directed a public highway for carriages to be stopped up. Ever since the award (i. e. for twenty-eight years) the road had been stopped up by a gate, and had never been used by the public with carriages or horses. There had been, however, some user by foot passengers. No proof was given that the requisite order of justices had ever been made:—Held, that from the non-user of the road for so long a period, the jury might presume that there was such an order. *Williams v. Byton*, 4 H. & N. 357; 28 L. J., Ex. 146; 5 Jur., N. S. 770—Ex. Ch.

### iii. Since the Highway Act, 1835.

— **Power to Order on a Contingency.**—Justices of the peace have no power under 5 & 6 Will. 4, c. 50, s. 85, to order a highway to be stopped up because, in consequence of matters to arise at some future time, another road not yet made will be nearer or more commodious to the public. *Reg. v. Midgley Local Board*, 5 B. & S. 621; 33 L. J., M. C. 188; 10 Jur., N. S. 1125; 12 W. R. 951.

— **Validity of Certificate—Authority to make Application.**—When a highway, which was situate locally within the boundaries of a parish, was also within the limits of a local improvement act, and the commissioners appointed by that act were liable to repair, and entitled to the control and management of the highway, but no provision was made by the local act for its diversion, the inhabitants of the parish in which the road was situate, in vestry assembled, have no authority under 5 & 6 Will. 4, c. 50, s. 82, to direct their surveyors to make an application to the justices to view the same in order to its being stopped up or diverted, and a certificate of two justices grounded on such an application is void. *Wright v. Frant*, 4 B. & S. 118; 32 L. J., M. C. 204; 10 Jur., N. S. 39; 8 L. T. 455; 11 W. R. 883.

— **Sufficiency of Statements in.**—A certificate of a justice for the diversion of a highway, need not state that the proposed new highway is nearer and more commodious; it is sufficient if the statement is in the alternative. *Reg. v. Phillips*, 1 L. R., Q. B. 648; 35 L. J., M. C. 217; 12 Jur., N. S. 920; 14 W. R. 791.

It is not necessary that the new highway should be over entirely new land; it is a sufficient substitution if an old narrow highway is widened so as to form a more commodious road. *Id.*

firmed, as were the two others, nothing being said of the appeals against these, to which the same objections would have applied. On motion for a mandamus to enter continuances and hear the appeals, it appearing that the preliminary objection taken was unfounded, and that the appellant had in reality intended to enter his appeal against all the orders, the court made the rule absolute as to all three. *Id.*

#### Defects in Certificate—Jurisdiction of Court.]—

Upon appeal against an enrolment of a certificate by two justices for the diversion of a highway, and the stopping up of an old road under 5 & 6 Will. 4, c. 50, the sessions have jurisdiction to inquire into defects upon the face of it, and are not limited to the trying by a jury the three questions of fact stated in s. 89. *Reg. v. Worcestershire (Justices)*, 3 El. & Bl. 447; 2 C. L. R. 1393; 23 L. J., M. C. 113; 18 Jur. 424.

**Distinct Orders in Certificate.]—**On appeal to the quarter sessions against a certificate of justices ordering certain roads to be diverted and others to be stopped up, the court may confirm the order as to the stopping up and quash it as to the diverting. *Reg. v. Midgley Local Board*, 5 B. & S. 621; 33 L. J., M. C. 188; 10 Jur., N. S. 1125; 12 W. R. 951.

**Costs—Discretion.]—**The 5 & 6 Will. 4, c. 50, s. 90, by which "the court of quarter sessions is required to award costs to the party giving or receiving notice of appeal (against a certificate of justices for stopping up a highway) whether the same shall be tried or not," is imperative, and the court of quarter sessions has no discretion to disallow such costs in any particular case. *Pouncey, Ex parte*, 2 C. L. R. 1593.

Notice of appeal having been given against a certificate of justices for the diversion of a highway, the party at whose instance such certificate had been given gave notice to the appellant that he had abandoned further proceedings, and should make no application to the quarter sessions. The appeal was nevertheless entered at the quarter sessions, and placed on the list, and being called on in its turn, and no one appearing, it was struck out. Afterwards, on the same day, an application was made by the counsel for the appellant to reinstate the appeal, and make an order for the costs of the appellant:—Held, that, inasmuch as by 5 & 6 Will. 4, c. 50, s. 90, the court is required to give costs, whether the appeal is heard or not, they were bound to enter continuances and make such order for costs as by law required. *Reg. v. Yorkshire, W. R. (Justices)*, 2 B. & S. 811; 31 L. J., M. C. 271; 9 Jur., N. S. 118; 6 L. T. 494; 10 W. R. 757.

Two justices, by an order at special sessions, directed a footway to be diverted, under the authority of 55 Geo. 3, c. 68, s. 2, against which a party aggrieved gave notice of appeal to the next quarter sessions. In the interval, the justices gave notice to the appellant that they had abandoned the order, which had been filed with the clerk of the peace pursuant to the statute:—Held, that the sessions had no jurisdiction to award the appellant his costs of preparing to try the appeal, either under the appeal clause of the 55 Geo. 3, c. 68, s. 2, or under 13 Geo. 3, c. 78, s. 80. *Reg. v. Wing*, 6 D. & R. 323; 4 B. & C. 184.

**—Effect of Non-Payment.]—**The non-payment of costs awarded by an order of quarter sessions, on the trial of an appeal against the stoppage of a highway, under 5 & 6 Will. 4, c. 50, s. 90, is not an offence forming a subject for a conviction under ss. 101 and 103; but the non-payment of them may be enforced by a distress warrant, issued by two justices under s. 103, grounded directly upon the order of sessions. *Selwood v. Mount*, 1 G. & D. 358; 1 Q. B. 726.

Such a distress warrant is bad, if it does not shew on the face of it an order of sessions for the payment of a specific sum as costs. *Id.*

#### b. By Individuals.

**Indictment for—Evidence of Motive.]—**Upon an indictment for stopping up a highway, it appeared that the road ran through a meadow; that a party was the occupier of the meadow; that he was dead; that he had planted a willow in the meadow; that, at the time of planting, he said he did it because that spot was the boundary of the road, and that he did it to mark the boundary:—Held, that the declaration of his motive for planting the willow was not evidence of reputation, although the act itself might be. *Reg. v. Bliss*, 9 Jur. 959.

Where, upon an indictment for stopping up a highway which ran through a meadow, there was a general verdict for the crown, the jury finding specially that a gate at the entrance of the road was contemporaneous with the road, the court granted a new trial, as the gate might have been only to prevent cattle from straying, and not to exclude the public. *Id.*

**—Party Grieved.]—**The prosecutor of an indictment for stopping a common footway, who had used it for some years before it was stopped up, is a party grieved within 5 & 6 Will. & M. c. 11, s. 3. *Reg. v. Williamson*, 7 T. R. 32.

**—Practice.]—**In an indictment for stopping up a highway removed by a certiorari, and tried at the assizes, the counsel for the defendant may sum up his evidence at the close of his case, as in a civil action. *Reg. v. Broke*, 1 F. & F. 514.

### 3. USER OF.

#### a. Obstruction.

##### i. What Amounts to.

**Encroachments Generally.]—**The erection of a building within fifteen feet of the centre of a carriage-way, which has been repaired by the surveyor for the six months preceding, but not on any part of the highway which has been lately used for passage, is not an encroachment of which justices can take summary cognizance under 5 & 6 Will. 4, c. 50, s. 69. *Chapman v. Robinson*, 1 El. & El. 25; 28 L. J., M. C. 30; 5 Jur., N. S. 434.

By 27 & 28 Vict. c. 101 (the Highway Act, 1864), s. 51, if any person shall encroach by making any hedge or other fence on the side of any carriage-way, or within fifteen feet of the centre thereof, he shall be subject on conviction for every such offence to a penalty, notwithstanding that the whole space of fifteen feet from the centre of

such carriage-way has not been maintained with stones or other materials used in forming highways. A person erected a fence upon the site of an open and uninclosed ditch, which was his property, which, however, was within fifteen feet of the centre of a carriage-way :—Held, that this was not an encroachment within the meaning of the section. *Field v. Thorne*, 20 L. T. 563.

By 27 & 28 Vict. c. 101 (the Highway Act, 1864), s. 51, if any person shall encroach by making or causing to be made any building or pit, or hedge, ditch, or other fence, on the side or sides of any carriage-way or cart-way within fifteen feet of the centre thereof, he shall be subject, on conviction for any such offence, to any sum not exceeding 40s., notwithstanding that the whole space of fifteen feet from the centre of such carriage-way or cart-way has not been maintained with stones or other materials used in forming highways :—Held, that this enactment only applies to persons who have committed the encroachment upon the carriage-way or cart-way, or upon that part of the side which has been dedicated to the public. *Easton v. Richmond Highway District Board*, 7 L. R., Q. B. 69; 41 L. J., M. C. 25; 25 L. T. 586; 20 W. R. 203.

**Right to remove Wall.**—To an action for entering a close and pulling down a wall there, the defendant pleaded that the close was a paved public place, within the Metropolitan Paving Act (57 Geo. 3, c. xxix.), and that the plaintiff had unlawfully, and contrary to the act, erected thereon the wall; and because the wall remained incumbering the pavement, and because the plaintiff, upon the request of the defendant, refused to remove the same, the defendant entered upon the close and pulled down the wall :—Held, that the plea was bad, as it did not shew any necessity for the defendant's using a portion of the pavement obstructed by the wall, or that it interfered with the exercise of his right of passage. *Bateman v. Black*, 18 Q. B. 870; 21 L. J., Q. B. 406; 17 Jur. 386.

Seem, that a wall inclosing part of a street is an obstruction to the safe and convenient passage along the street, within the Towns Improvement Clauses Act of 1847, whatever be the width of the uninclosed portion of the street. *Bagshaw v. Buxton Local Board*, 1 Ch. D. 220; 45 L. J., Ch. 200; 34 L. T. 112; 24 W. R. 231.

**Making Road a Cul de sac.**—A public foot-path was rendered a cul de sac by buildings authorized by act of parliament; the defendant obstructed the path at a place between which and the end of the cul de sac there was no opening or thoroughfare. Upon an indictment for this obstruction, the jury found the defendant guilty; but also found that this part of the path, which the obstruction stopped, had ceased to be of any public utility :—Held, that a public path was still a highway, although it had become a cul de sac; and that the measure of public inconvenience caused by the obstruction of such a highway could be considered only with regard to the punishment of the person causing it. *Reg. v. Burney*, 31 L. T. 828.

**Depositing Rubbish.**—Upon hearing an information and a complaint, under 5 & 6 Will. 4, c. 50, s. 73, for a nuisance, by depositing rubbish on a highway, the defendant claimed to be owner

of the land, subject to a private right of road only, and denied the existence of a highway :—Held, that it was competent to the justices, as a necessary preliminary to the exercise of their functions, to determine the question of highway or no highway, and that title to the land was not involved in such question. *Williams v. Adams*, 2 B. & S. 312; 31 L. J., M. C. 109; 8 Jur., N. S. 816; 5 L. T. 790.

**Depositing Stones for Repairs—Liability of Surveyor.**—A local surveyor of highways, in repairing a road, placed stones thereon, and allowed them to remain at night insufficiently fenced, and without sufficient light to warn the public against the obstruction :—Held, that he was properly convicted under s. 72 of the Highway Act (5 & 6 Will. 4, c. 50), notwithstanding that he might also have been guilty of an offence under s. 56. *Fearnley v. Ormsby*, 4 C. P. D. 136; 27 W. R. 823.

**Laying Timber.**—Under 5 & 6 Will. 4, c. 50, s. 73, which enacts, that if any timber is laid upon any highway, so as to be a nuisance, and shall not after notice be removed, it shall be lawful for the surveyor, by order in writing from a justice, to remove the timber, an order of a justice, reciting that the plaintiff's timber was laid on a highway, and directing its removal, is conclusive to shew that the locus in quo was a highway, so that the plaintiff, in an action against the justice who made the order, cannot dispute his jurisdiction on the ground that the locus in quo was not a highway. *Mould v. Williams*, D. & M. 631; 5 Q. B. 469.

**Standing of Vehicles.**—The mere fact that a piece of ground, part of a public highway, has for twenty years been used by an innkeeper for the standing of the vehicles belonging to his guests, is no answer to a complaint for the obstruction under 5 & 6 Will. 4, c. 50, s. 72. *Gerring v. Barfield*, 16 C. B., N. S. 597; 11 L. T. 270.

**Roller left on Highway.**—The defendant left an agricultural roller between the hedge and the metalled part of the road, having removed it from a field on the opposite side of the road for his own convenience. A pony, drawing a carriage in which the plaintiff's wife was riding, shied at the roller and upset the carriage, whereby the plaintiff's wife was killed :—Held, that the roller was an obstruction to the highway, and that it was an unreasonable user of the highway by the defendant. *Wilkins v. Day*, 12 Q. B. D. 110; 49 L. T. 399; 32 W. R. 123; 48 J. P. 6.

**Hackney Carriage Stand—Paving Acts.**—Where the commissioners of pavement within a certain district were authorized by act of parliament to direct and regulate the stands of hackney-coaches within the district :—Held, that this gave them power to remove a stand from a street where it occasioned obstruction in the carriage-way. *Re v. Hawlinson*, 6 B. & C. 23; 9 D. & R. 7.

**Putting up Stalls—Jurisdiction.**—Under 5 Eliz. c. 4, s. 48, it is lawful to hold petty sessions, otherwise called statute sessions, in all shires wherein such sessions have been used to be kept, but there cannot be a legal custom to

put up stalls for refreshments at such sessions, on the public highway. And if such stalls are put up so as to obstruct the free passage of a highway, the persons putting them up are liable to be convicted under 5 & 6 Will. 4, c. 50, s. 72. *Simpson v. Wells*, 7 L. R., Q. B. 214; 41 L. J., M. C. 105; 26 L. T. 163.

The jurisdiction of justices is not ousted by a claim of right to put up such stalls. *Ib.*

**Allowing Rain-water to Fall from Eaves of Building.**—C. was occupier of a stable, and also owner, but not occupier, of some cottages, and the dripping of the rain-water from the eaves of the stables and cottages obstructed the free passage of the adjacent public footways by flowing upon and over them, and caused public inconvenience to the passengers. C. had frequent notice of the obstruction, but did nothing to remove it:—Held, that he was not guilty of wilfully obstructing the free passage of the highway within 5 & 6 Will. 4, c. 50, s. 72. *Croasdale v. Hatcliffe*, 5 L. T. 834.

**Making Fires.**—The lighting of a fire within fifty feet of the centre of the highway is not an offence within 5 & 6 Will. 4, c. 50, s. 72, unless done "to the injury of such highway, or to the injury, interruption, or personal danger of any person travelling thereon." *Stinson v. Brown*, 1 L. R., C. P. 321; 35 L. J., M. C. 152; 12 Jur., N. S. 262; 13 L. T. 799; 14 W. R. 395; 1 H. & R. 263.

**Use of Perambulators.**—The use of a public footway includes that of a perambulator as a usual accompaniment of a large class of foot passengers, if of a size and weight not to inconvenience other passengers, and not to injure the soil. *Reg. v. Mathias*, 2 F. & F. 570.

Whether, under the circumstances, the use of such a vehicle is justifiable, is a question of fact. *Ib.*

**Riding on Footpaths.**—The 5 & 6 Will. 4, c. 50, s. 72, imposes a penalty on any person "who shall wilfully ride upon any footpath or causeway by the side of any road made or set apart for the use or accommodation of foot passengers, or shall wilfully drive any horse, &c., cattle or carriage, upon any such footpath or causeway:—Held, that the enactment applies only to footpaths (as well as causeways) by the side of roads, and not to footways in general. *Reg. v. Pratt*, 3 L. R., Q. B. 64; 37 L. J., M. C. 23; 16 W. R. 146.

**Racing on Highway—Liability.**—A right of highway does not include a right to race; and a person who had been party to a hurdle-race is jointly liable for the putting the hurdles on the ground, although he did not take part in that particular act. *Sowerby v. Wadsworth*, 3 F. & F. 734.

**Cattle Lying about Highways.**—Under 27 & 28 Vict. c. 101, s. 25, the owner is liable to a penalty if cattle, sheep, &c., are found lying about any highway, notwithstanding they are under the control of a keeper at the time. *Lawrence v. King*, 3 L. R., Q. B. 345; 37 L. J., M. C. 8; 18 L. T. 356; 16 W. R. 966; 9 B. & S. 325.

**Cattle Straying.**—By 27 & 28 Vict. c. 101, s. 25, if any horse, ox, &c., is found straying on or lying about any highway, or across any part, or by the sides thereof, the owner shall be liable to a penalty not exceeding 5s. for each animal, provided that nothing in the act shall be deemed to extend to take away any right of pasturage which may exist on the sides of any highway:—Held, that the owner of cattle found straying on the metalled part of a highway was liable to the penalty, notwithstanding he had a right of pasturage on the sides of it. *Golding v. Stocking*, 4 L. R., Q. B. 516; 38 L. J., M. C. 122; 20 L. T. 479; 17 W. R. 722; 10 B. & S. 348.

By a local act, a barrier bank, made for drainage purposes in Lincolnshire, together with a road thereon, was vested in trustees, who were directed and required from time to time to let the herbage of the bank to be grazed with sheep only, at such yearly rent as could be reasonably had for the same. The road ran along the top of the bank, and was an open public highway. Sheep owned by a renter of the herbage, and depastured on the sides of the barrier bank, were found upon the metalled part of the highway, and the owner was convicted and fined under the Highway Act, 1864 (27 & 28 Vict. c. 101), s. 25:—Held, that the conviction was right. *Bothamley v. Danby*, 24 L. T. 656.

By the Public Health Act, 1875, highways (not being turnpike roads) are, in urban districts, vested in and put under the control of the urban authority for the district, which in some places is the local board. In 1771 the commissioners under an inclosure act set out E. and C. as private roads. In 1818 E. became a public road, and as such has since been repaired by the parish. C. has always continued to be a private way. Until 1863 the surveyor of highways, and subsequently the local board (to whom the office of surveyor of highways was then transferred, and who in 1875 became the urban authority for the district under the Public Health Act), were accustomed, year by year, to let the right of pasturage on the sides of E. and C., though several persons in the neighbourhood had insisted on the right to put cattle in both places without making any payment. In February, 1876, the local board let to the plaintiff the right of herbage on the sides of both E. and C. for a term, notwithstanding which the defendant insisted, during the continuance of the term, on turning out his cattle to graze on the side of both roads. The plaintiff thereupon brought an action for trespass against the defendant:—Held, that the action was maintainable so far as related to the sides of E., which by virtue of s. 149 of the Public Health Act, 1875, had become vested in the local board in such a way as to confer the right of pasture; but that the plaintiff's claim failed as regarded C., the local board having no title, and there being no such actual or conclusive possession on the part of the plaintiff as would enable him to maintain an action for trespass against the defendant. *Coverdale v. Charlton*, 3 Q. B. D. 376; 47 L. J., Q. B. 446; 38 L. T. 687; 26 W. R. 687. Affirmed, 4 Q. B. D. 104; 48 L. J., Q. B. 128; 40 L. T. 88; 27 W. R. 257—C. A.

**Turning Cattle Loose.**—By the 2 & 3 Vict. c. 47 (Metropolitan Police Act), s. 54, a penalty is imposed on all persons who, to the annoyance of passengers, shall turn loose any horse or cattle

in a thoroughfare:—Held, that the expression "turned loose" means leaving the cattle without any control. *Sherborn v. Wells*, 3 B. & S. 784; 32 L. J., M. C. 179; 8 L. T. 274.

Where, therefore, a person sent his cattle without any halter, but under the care of a boy, to graze on a highway:—Held, that this was not an offence within the act. *Id.*

**Overhanging Trees.**—By the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 72, if any person shall wilfully obstruct the passage of any footway, he is made liable to a penalty of 40s. A person was summoned under this section for obstructing a way. Evidence was given that trees and underwood on his land had grown over and across the way, so as to be an obstruction to the free passage along it:—Held, that the person, in merely suffering the trees to grow so as to be an obstruction, did not wilfully obstruct the way within s. 72. *Walker v. Horner*, 1 Q. B. D. 4; 45 L. J., M. C. 34; 33 L. T. 601; 24 W. R. 95.

**Order of Justices on Occupier.**—The word "owner" in s. 65 of the Highways Act (5 & 6 Will. 4, c. 50), means the person in actual occupation. An order of justices under s. 65 for lopping trees overhanging a highway, made on a summons served only on the occupying tenant of the land abutting on the highway:—Held, to be valid, and in form sufficient. *Woodard v. Billericay Highway Board*, 11 Ch. D. 214; 48 L. J., Ch. 535; 27 W. R. 593.

**Lopping done by Surveyor on Default.**—At a special session for the highways, an order of justices under 5 & 6 Will. 4, c. 50, s. 65, was made, reciting a complaint by the surveyors that the owner had refused and neglected to cut, prune, or plash certain hedges, and to prune or lop certain trees upon his farm, on the side of a carriage-way or cart-way, "whereby the sun and wind were excluded from the carriage-way or cart-way, to the damage thereof, and whereby also obstructions were caused in the carriage-way or cart-way;" that the owner had appeared, and the offence was proved; and the justices did thereby order the owner "to cause the hedges to be cut, pruned or plashed, and the trees to be pruned or lopped, and the obstructions complained of, to the injury or damage of the highway, removed within ten days from the service hereof." Upon default of the owner to comply with this order, the surveyor cut one of the hedges, and removed the obstruction caused thereby, and, in so doing, cut down the thorn trees or thorns in question:—Held, that the order, if not valid, afforded no justification to the surveyor. *Jenny v. Brook (in error)*, 1 New Sess. Cas. 323; 6 Q. B. 323; 13 L. J., Q. B. 376; 8 Jur. 782—Ex. Ch.

Held, also, that the order, so far as the direction contained in it to cut, prune or plash the hedges, without any description of the extent to which it was to be done, was bad, but was good as to the residue, and justified the surveyor in removing any actual obstruction to the highways by hedges or trees, though, as to the trees, it was defective, in omitting to state that they were not planted for ornament, &c. *Id.*

Held, lastly, that a statement, that the hedges and trees were growing on the plaintiff's farm, and on the side of the highway, was equivalent to a statement that he was the owner of the land

next adjoining the road; so that the order was not bad altogether for omitting to shew that fact. *Id.*

**— Recovery of Expenses — Mandamus to issue Warrant.**—The court will not grant a rule nisi for a mandamus to compel justices to issue their warrant to levy the expenses of cutting a hedge, pursuant to 5 & 6 Will. 4, c. 50, s. 65, unless it appears that a demand has been made of the expenses from the person sought to be charged, and that the justices were informed of that demand. *Whitemarsh, Ex parte*, 8 D. P. C. 431; 4 Jur. 823.

#### ii. Action for Injuries caused by.

**Particular Injury, Necessity of.**—To entitle anyone to bring an action for an obstruction to a highway he must shew that he has sustained a "particular, direct and substantial" injury beyond that which is done to the public. *Benjamin v. Storr*, 9 L. R., C. P. 400; 43 L. J., C. P. 162; 30 L. T. 362; 22 W. R. 631.

In order to maintain an action for obstructing a public way, a person must suffer some substantial damage peculiar to himself, beyond that suffered by the rest of the public who use the way. *Winterbottom v. Derby (Earl)*, 2 L. R., Ex. 316; 36 L. J., Ex. 194; 16 L. T. 771; 16 W. R. 15.

In an action for obstructing a public way, the plaintiff proved no damage peculiar to himself beyond being delayed on several occasions in passing along it, and being obliged, in common with everyone else who attempted to use it, either to pursue his journey by a less direct road, or to remove the obstruction:—Held, that he was not entitled to maintain the action. *Id.*

An action will lie at the suit of a private individual who actually sustains an injury by reason of a public nuisance, which may possibly affect the public, and for which the person committing the nuisance would be indictable. *Rose v. Groves*, 5 M. & G. 613; 6 Scott, N. R. 645; 1 D. & L. 61; 12 L. J., C. P. 251; 7 Jur. 951. See *Hurbert v. Groves*, 1 Esp. 148.

Where A. was delayed by an obstruction in a highway, and thereby prevented from performing the same journey as many times in a day as he otherwise would if the obstruction had not existed:—Held, that he might maintain an action against the person who raised the obstruction, as he had sustained an individual injury or inconvenience. *Greasley v. Codling*, 2 Bing. 263; 9 Moore, 489.

**Proximity of Damage.**—A declaration alleged that there was a public footway from a field of the plaintiff to another field of the plaintiff, and that the defendant obstructed the way, whereby the plaintiff and his servants, employed in the management of his lands and in tending his cattle, were compelled to go by a longer route, and thereby the work and labour of the plaintiff and his servants were necessarily consumed to a greater extent, and the plaintiff was prevented from employing his servants during such excess as he otherwise would have done:—Held, a sufficient allegation of peculiar damage to enable the plaintiff to maintain the action. *Blagrove v. Bristol Waterworks Company*, 1 H. & N. 369; 26 L. J., Ex. 57.

**— Causing Trespass.**—It is no ground of

action that a person, by stopping up on his own land the continuation of a public footway over his neighbour's land, causes the public to trespass on other parts of his neighbour's land, to his damage. *Ib.*

**Under Lord Campbell's Act—Roller left in Highway.]**—The defendant left an agricultural roller between the hedge and the metalled part of the road, having removed it from a field on the opposite side of the road for his own convenience. A pony, drawing a carriage in which the plaintiff's wife was riding, shied at the roller, upset the carriage, and the plaintiff's wife was killed. —Held, that the roller was an obstruction to the highway; that it was an unreasonable user of the highway by the defendant, and that the plaintiff was entitled to recover damages for the death of his wife under Lord Campbell's Act. *Wilkins v. Day*, 12 Q. B. D. 110; 49 L. T. 399; 32 W. R. 123; 48 J. P. 6.

**Effect of Contributory Negligence.]**—H. was driving a mare along a highway. The mare took fright at a house-van belonging to the defendant, which was standing on the grassy side of the highway; she kicked and fell, and H. was thrown out of his vehicle and injured so severely that he died. The mare was a kicker, but H. did not know of her vice. The jury found that the van was a dangerous object; that the defendant had acted unreasonably in leaving it where it stood; and that the injury to H. was occasioned by two causes combined—(1) the van standing where it stood, and (2) the vice of the mare. They also found that H. was guilty of no contributory negligence. —Held, that on these findings his executors were entitled to recover against the defendant under Lord Campbell's Act. *Harris v. Mobbs*, 3 Ex. D. 268; 39 L. T. 164; 27 W. R. 154.

Unreasonable and unnecessary user of part of a highway is equivalent to the obstruction of the highway. *Ib.*

One who is injured by an obstruction in a highway, against which he fell, cannot maintain an action, if it appears that he was riding with great violence and want of ordinary care, but for which he might have seen and avoided the obstruction. *Butterfield v. Forrester*, 11 East, 60.

In an action to recover compensation for an injury occasioned by an obstruction in a highway, it was left to the jury to say whether or not the plaintiff was himself in any degree the cause of the injury—whether he had acted with such a want of reasonable and ordinary care as to disentitle him to recover. —Held, that the direction was proper. *Marrriott v. Stanley*, 1 Scott, N. R. 392; 4 Jur. 320.

In an action for killing an ass, which the declaration alleged to have been lawfully upon a highway when it met its death, it appeared, that the animal, fettered by the fore feet, had been placed on the highway by the plaintiff, and was killed by being unable to get away from the defendant's waggon, which, without its driver, was coming at a smartish pace along the road. —Held, that the jury was properly directed that, although it was an illegal act on the part of the plaintiff to put the animal on the highway, still, unless its being there was the immediate cause of the accident, the plaintiff was entitled to recover against the defendant for the loss of the animal.

*Davies v. Mann*, 10 M. & W. 546; 12 L. J., Ex. 10; 6 Jur. 954.

**Necessity of Precautions against Danger.]**

—A person placing a dangerous obstruction in a highway or in a private road over which persons have a right of way, is bound to take all necessary precautions to protect persons exercising their right of way; and if he neglects to do so is liable for the consequences. *Clark v. Chambers*, 3 Q. B. D. 327; 47 L. J., Q. B. 427; 38 L. T. 454; 26 W. R. 613.

The defendant had placed in a private road adjoining his ground a hurdle with a chevaux-de-frise on the top in order to prevent the public from looking over the barrier at athletic sports in his grounds. Some one, not known, removed the hurdle to another spot without his authority, and the plaintiff, passing of right along the road, soon afterwards, in the dark, and knowing the original position of the hurdle, but not that it was moved, ran his eye against the chevaux-de-frise and lost his sight. The jury, in an action for negligence, held that the original erection of this hurdle was unauthorized and wrongful, that the chevaux-de-frise was dangerous to the safety of persons using the road, and that there was no contributory negligence. They gave the plaintiff a substantial verdict. —Held, that the injury was not an improbable consequence of the defendant's act; that it was his duty to take all necessary precautions under the circumstances to protect persons exercising their right of way; and that the action was maintainable. *Ib.*

If a highway is dedicated to the public with a dangerous obstruction upon it, such as would have been a nuisance if placed upon an ancient way, as a flight of steps, or a projecting flap, no action can be maintained against the person dedicating it for an injury caused thereby. *Robbins v. Jones*, 15 C. B., N. S. 221; 23 L. J., C. P. 1; 11 Jur., N. S. 239; 9 L. T. 523; 12 W. R. 248.

An action will not lie against the owner of a house having a covered area adjoining a public footway, which area was in existence before and at the time of the dedication of the highway, and was dedicated to the public before 5 & 6 Will. 4, c. 50, for an injury to an individual from the giving way of the covering of the area in consequence of the wear and tear occasioned by public user. *Ib.*

**Obstructing Access to a House.]**—When the private right of the owner of a house adjoining a highway to access from his house to the highway is interfered with by an unreasonable user of the highway, he is entitled to recover damages from the wrongdoer in respect of loss of custom in the business which he carries on in his house. He is entitled also to recover damages on the ground that he has suffered a particular injury from a public nuisance. *Fritz v. Hobson*, 14 Ch. D. 242; 49 L. J., Ch. 321; 42 L. T. 225; 28 W. R. 459.

*Rose v. Groves* (5 Man. & G. 613) and *Lyon v. Fishmongers' Company* (1 App. Cas. 662) followed. *Ricket v. Metropolitan Railway Company* (2 L. R., H. L. 175) distinguished. *Ib.*

The right of a landowner to use a public highway, e.g. for the purpose of bringing materials for the building of a house on his land, must be exercised reasonably. *Ib.*

If there are several ways of access to the land there is no absolute right to use the most convenient way exclusively, without regard to the convenience of neighbouring landowners. *Ib.*

For any obstruction to a public highway, which is a nuisance, though such should obstruct the party's business, an action cannot be maintained by the party so obstructed; the only remedy is by an indictment. *Hubert v. Groves*, 1 Esp. 148.

A railway company, in the construction of its line of railway, and under the powers of its statute, temporarily obstructed a highway, adjoining which was a house occupied by a licensed victualler, whereby the number of passengers passing along the highway was diminished, and he sustained damage by the falling off of his business:—Held, that such damage was not the subject of compensation. *Ricket v. Metropolitan Railway Company*, 5 B. & S. 149; 34 L. J., Q. B. 257; 11 Jur., N. S. 260; 12 L. T. 75; 13 W. R. 455—Ex. Ch. And in Dom. Proc., 2 L. R., H. L. 175; 38 L. J., Q. B. 205; 16 L. T. 542; 15 W. R. 937.

**Duty of Owners—Fencing of Excavations—Liability of Owners.**—Where an excavation is made near to, but not substantially adjoining, a public highway, at common law no action lies against the owner of the land by a person who has strayed off the highway, and fallen into such excavation. *Harcastle v. South Yorkshire Railway and River Dun Company*, 4 H. & N. 67; 28 L. J., Ex. 139; 5 Jur., N. S. 150.

A person while passing along a recently used way over the defendant's land instead of an ancient way close by, sustained injury by falling into a sand pit excavated by the defendant on his own land. Held, that as there was no evidence of dedication of the new way by the defendant to the public, he was not responsible. *Neill v. Byrne*, 2 L. R., Ir. 287.

In an action for an injury to the wife of the plaintiff through the negligence of the defendant in leaving an open vault or cellar on his own premises unfenced, whereby she fell in and was injured, the evidence was that persons were in the habit of going across the spot where the vault was for the purpose of making a short cut from a street to the main road, by avoiding an angle, but that the owner of the premises as often as he saw them turned them back:—Held, that he was not liable. *Stone v. Jackson*, 16 C. B. 199.

Where owners of some waste land, which was bounded by two highways, and in which there was a quarry, worked it by their licensees, and the plaintiff, not knowing of the quarry, passed over the waste in the dark to get from one road to the other, and fell into the quarry:—Held, that no duty was cast upon the owners to fence, as the digging the quarry did not amount to a public nuisance. *Hounsell v. Smith*, 7 C. B., N. S. 731; 29 L. J., C. P. 303; 6 Jur., N. S. 897; 8 W. R. 277.

**Parties Liable—Proximate Cause.**—If the proximate cause of damage is the plaintiff's unskilfulness, although the primary cause is the misfeasance of the defendant, he cannot recover; at least, if the mischief is in part occasioned by the misfeasance of a third person not sued. *Flower v. Adam*, 2 Taunt. 314.

A. placed lime rubbish in a highway; the dust blown from it frightened the horse of B., and nearly carried him into contact with a passing waggon, in avoiding which, he unskilfully drove over other rubbish placed in the road by C., and was overthrown and hurt:—Held, that B. could not recover against A. *Ib.*

**— Negligence of Person Employed.**—A employed B. to construct a drain in a public highway, B. employed C. to fill in the earth over the brick-work and to carry away the surplus: C., in performing his work, left the earth raised so much above the level of the road, that D., driving in the dark, was thereby upset and sustained injury:—Held, that A. was not responsible for the negligence of C. *Peachey v. Rowland*, 13 C. B. 182; 22 L. J., C. P. 81; 17 Jur. 764.

**— Local Boards.**—A heap of stones was left by the side of a road without light, and the plaintiff on a dark night drove his cart against it, and was upset and injured. The road was in the district of which the corporation was the local board of health, and the heap was left there by the negligence of persons employed by the corporation to repair the roads:—Held, that the corporation was liable, as the local board, to an action for the negligence of their servants; and was not exempt from liability by reason of 11 & 12 Vict. c. 63, s. 117, which imposes on them the same duties and liabilities as a surveyor of highways. *Foreman v. Canterbury (Mayor)*, 6 L. R., Q. B. 214; 40 L. J., Q. B. 138; 24 L. T. 385; 19 W. R. 719.

**— Negligence of Contractor.**—A company contracted with A. for the laying down of their main gas-pipes in the streets of a town, having no special legislative powers for such purpose. A.'s servants left a heap of earth and stones which had been thrown out of the trenches dug for receiving the pipe in one of the streets, and B., in passing along the street, tumbled over it and was injured:—Held, that the company was liable for the injury occasioned to B. *Ellis v. Sheffield Gas Consumers' Company*, 2 El. & Bl. 767; 23 L. J., Q. B. 42; 18 Jur. 146..

A workman in a government dockyard, which he was not allowed to leave during the day, returning to his place of work from a necessary in the dockyard, which he habitually used, by one of several practicable routes which he was permitted to take, accidentally fell, and had his arm injured by a revolving shaft insufficiently fenced, which had been placed in the road by a government contractor, who placed his works on the spot by permission of the government:—Held, that the contractor was not responsible. *Bolch v. Smith*, 7 H. & N. 736; 31 L. J., Ex. 201; 8 Jur., N. S. 197; 10 W. R. 387.

### iii. Other Proceedings.

**Injunction—Rights of Owner.**—The owner of the soil of a public way is entitled to an injunction to prevent a stranger from laying down pipes therein, and from keeping there any already laid. *Goodson v. Richardson*, 9 L. R., Ch. 221; 43 L. J., Ch. 790; 30 L. T. 142; 22 W. R. 337.

**— To Restrain Removal by Surveyor.**—In a suit to restrain surveyors of highways from removing a wall inclosing a piece of ground alleged

to form part of a highway, the High Court of Justice has jurisdiction to decide whether the land does or does not form part of the highway; and if the court comes to the conclusion that it does not form part of the highway, an injunction to prevent the removal of the inclosure cannot be granted. *Bagshaw v. Buxton Local Board*, 1 Ch. D. 220; 45 L. J., Ch. 260; 34 L. T. 112; 24 W. R. 231.

Semble, that a wall inclosing part of a street is an obstruction to the "safe and convenient passage along" the street within the meaning of the Towns Improvement Clauses Act, 1847, whatever may be the width of the uninclosed portion of the street. *Id.*

Semble, that after it has been judicially determined that a particular object is an obstruction to a public highway, the surveyors of highways may remove the obstruction. *Id.*

**Suing for Penalty—Time for.]**—Under 27 & 28 Vict. c. 101, s. 51, which enacts that if any person shall encroach by making or causing to be made any building or fence on the side of any carriage-way within fifteen feet from the centre thereof, he shall be subject to a penalty not exceeding 40s., the encroachment is not a continuing offence, and the six months' limitation created by 11 & 12 Vict. c. 43, s. 11, commences from the completion of such building or fence. *Cuggins v. Bennett*, 2 C. P. D. 568.

#### b. User of Locomotives.

##### **Locomotives, what are—Threshing-Machine.]**

—A portable steam-engine, upon wheels and drawn by horse-power, used to drive a threshing-machine within a barn, but not fixed thereto or to the soil, is within 5 & 6 Will. 4, c. 50, s. 70. *Smith v. Stokes*, 4 B. & S. 84; 32 L. J., M. C. 199; 8 L. T. 425; 11 W. R. 753.

An owner of a steam threshing-machine lent it to hire to a farmer, and sent his man with it, who superintended it. The machine was erected within a distance of twenty-five yards from the highway, but there was no evidence to shew that the owner directed it to be so erected, and he was himself not present at the time. Being convicted under 5 & 6 Will. 4, c. 50, s. 70:—Held, that the conviction was bad. *Harrison v. Leaper*, 5 L. T. 640.

—**Tricycle capable of being Propelled by Steam.]**—A tricycle was capable of being propelled by the feet of the rider, or by steam as an auxiliary, or by steam alone. There was no smoke, nor escape of steam into the air, nor anything to indicate that it was being worked by steam, nor anything which could frighten horses, or cause danger to the public using the highway beyond any ordinary tricycle. The weight was about two hundredweight, and the tires of the wheels about one and a half inch in width. The tires being of india-rubber, no injury would be done to the surface of the road by working the machine on it:—Held, that the tricycle was a "locomotive" within the definition in s. 38 of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), and was therefore subject to the rules and regulations for the use of locomotives on highways prescribed by ss. 28 and 29 of that act, by the Locomotives Act, 1861 (24 & 25 Vict. c. 70), s. 12, and the Locomotives Act, 1865 (28 & 29

Vict. c. 83), ss. 3, 4, 7. *Parkyn v. Priest*, 7 Q. B. D. 313; 50 L. J., M. C. 148; 50 L. J., Q. B. 648; 30 W. R. 13; 45 J. P. 751.

##### **Regulation of Railways—Rate of Speed.]**

The S. railway company obtained the leave of parties interested in the soil of a highway and in streets of a town adjoining their terminus, and laid rails thereon, and ran their railway engines and carriages over such street to a place beyond their terminus. No express power so to use the highway was given by any statute:—Held, that the Locomotives Act (28 & 29 Vict. c. 83), s. 4, applied, and that the company could not go at a greater speed than two miles an hour, this being a case of driving a locomotive along a public highway within the meaning of that act. *London and South-Western Railway Company v. Myers*, 45 J. P. 731.

##### **Gates for Level Crossings.]**

The provisions of the Highways Act (5 & 6 Will. 4, c. 50), s. 71, as amended by 2 & 3 Vict. c. 45, s. 1, and 5 & 6 Vict. c. 55 (for the better regulation of railways), s. 9, by which the proprietors of a railroad which crosses a highway at a level crossing are compelled to put up gates at such crossing, do not apply to a private line of railway, on private property, used by the proprietors exclusively for their private purposes. *Matson v. Baird*, 3 App. Cas. 1082; 39 L. T. 304; 26 W. R. 835.

A declaration stated that the railway of a railway company crossed a public highway on a level, yet the company, in contravention of the statutes in that behalf, did not keep the gates across the highway at the crossing point constantly closed, whereby two horses of the plaintiff, which were lawfully upon the highway, escaped from the highway into and upon the railway, and were by a locomotive engine and train run over and killed. Plea, that the horses were not lawfully upon the highway when the injury was done. The horses had leaped a hedge into a turnpike road, and had strayed thence into a new road formed by the company, leading across the railway into an old highway, and one of the gates at the crossing being open, had got upon the line:—Held, that the company being required by their act, and by 5 & 6 Vict. c. 55, s. 9, to keep the gates constantly closed, the horses were as against them lawfully on the highway, and the plaintiff might recover. *Fawcett v. York and North Midland Railway Company*, 16 Q. B. 610; 20 L. J., Q. B. 222; 15 Jur. 173.

See also sub tit. RAILWAYS.

##### **Regulation of Locomotives—Shoes on Wheels.]**

—By the Locomotives Act, 1861 (24 & 25 Vict. c. 70), s. 3 (repealed by 41 & 42 Vict. c. 77, s. 28), every locomotive used on a highway and drawing any waggon shall have the tires of the wheels thereof not less than 9 inches in width, and the wheels shall be cylindrical and smooth-soled, or used with shoes or other bearing surface of a width not less than 9 inches. A locomotive was used on a highway, having the tires of the two driving-wheels 18 inches wide. Upon the tires were strips or shoes 9½ inches in width, measured across the tire parallel to the axis of the wheel, and 3 inches broad and 1 inch thick. The shoes were placed alternately on each edge

of the tire, and in the centre they touched and overlapped one another by about  $1\frac{1}{2}$  inch. There was thus always a bearing surface of at least 9 inches in width on the road:—Held, that no shoes or bearing surface would comply with the statute unless they were similar to the tires of the wheels prescribed, viz., uniform smooth-surfaced bands of the width of 9 inches at least round the whole circumference of the wheels; that these bands must be continuous and unbroken (save in so far as the joints of the material used might render perfect continuity impossible); and that the engine in question did not comply with the statute. *Boddy v. Jeffery*, 3 Ex. D. 95; 47 L. J., M. C. 69; 38 L. T. 68; 26 W. R. 356.

The question of what are "shoes" within the meaning of s. 3 (repealed) of the Locomotives Act, 1861, is a question of fact to be determined by the justices. *Edmunds v. Savin*, 26 W. R. 755.

By the Locomotives Act (24 & 25 Vict. c. 70), s. 3 (repealed), every locomotive used on a highway and drawing any waggon shall have the wheels cylindrical and smooth-soled, or used with shoes or other bearing surface of a width not less than 9 inches. An engine was so used, which had its wheels fitted with shoes  $4\frac{1}{2}$  inches broad, placed parallel to one another, and 3 inches apart, and bolted obliquely across the whole breadth of the wheel, so that when a length of less than 9 inches of one shoe was in contact with the ground the deficiency was made up by the length of contact of the next shoe with the ground:—Held, that the bearing surface not being continuous, the engine was not in conformity with the act. *Stringer v. Sykes*, 2 Ex. D. 240; 46 L. J., M. C. 139; 36 L. T. 152; 25 W. R. 273.

— **Person preceding Locomotive on Foot.**—The 3rd section of 28 & 29 Vict. c. 83, which, as amended by 41 & 42 Vict. c. 77, s. 29, requires one of the three persons employed to conduct a steam locomotive on a public highway to precede such locomotive on foot by 20 yards, and in case of need to assist horses, or carriages drawn by horses, in passing the same, is not the less complied with because such person, whilst preceding the locomotive on foot, leads a horse and cart of his own. *Davis v. Browne*, 48 L. J., M. C. 92; 40 L. T. 557.

— **Liability for Injuries caused by.**—An action is maintainable by a person who had sustained an injury through his horses being frightened by a traction steam-engine used on a highway, under 24 & 25 Vict. c. 70, the jury finding that the engine was likely to frighten horses, and that the defendant knew it. *Watkins v. Reddin*, 2 F. & F. 629.

— **When no Negligence.**—The defendant was possessed of a traction engine, which was propelled by steam power. Whilst it was being driven by the defendant's servants along a highway, some sparks escaping from it set fire to a stack of hay of the plaintiffs standing on a neighbouring farm. The engine was constructed in conformity with the Locomotive Acts, 1861, 1865; at the time of the accident it was being driven at a proper pace, and the defendant's servants were guilty of no negligence in the management of it:—Held,

that the defendant was liable to compensate the plaintiffs for the injury done to the stack, upon the ground that the engine, being a dangerous machine, an action was maintainable at common law, and the Locomotive Acts did not restrict the liability of the defendant. *Powell v. Fall*, 5 Q. B. D. 597; 49 L. J., Q. B. 428; 43 L. T. 562—C. A.

### c. Extraordinary Traffic.

— **Liability for—"Excessive Weight" and "Extraordinary Traffic," what is.**—The appellant employed on a highway a traction engine drawing two waggons for the carriage of materials and goods used for ordinary purposes on his estate (the engine being of less weight than was allowed by s. 28 of the Highways and Locomotives (Amendment) Act, 1878, and having its wheels constructed in accordance with the provisions of that section), and thereby did damage to the highway beyond that caused by the ordinary wear and tear:—Held, that this was "excessive weight" and "extraordinary traffic," the damage caused by which was properly chargeable upon the appellant under s. 23 of the act. *Aveland (Lord) v. Lucas*, 5 C. P. D. 351; 49 L. J., C. P. 643; 42 L. T. 788; 28 W. R. 571; 44 J. P. 360—C. A. Affirming 5 C. P. D. 211; 28 W. R. 446.

— **Haulage of Timber in Timber District.**—In a group of twenty parishes there were large woods which came to maturity after ten or seventeen years' growth, and one or other wood was cut every year, and the timber hauled over one or other highway each winter. Before the haulage the roads were in fair repair, and the other traffic was chiefly caused by donkey carts or passengers. The haulage over one and a half mile caused extra expense of 12l. 10s., for which the respondents were summoned under 41 & 42 Vict. c. 77, s. 23. The justices found that the weights were not excessive, and held that there was not extraordinary traffic, this being the ordinary trade of the district:—Held, that the justices were justified by the evidence in coming to their decision. *Raglan Highway Board v. Monmouth Steam Company*, 46 J. P. 598.

— **Road not Constructed for Heavy Weights.**—Savin was adjudged to pay 500l. for damage done by the excessive weight of his locomotives and carriages along a highway near Oswestry. The highway had not been originally constructed for heavy weights and was not well formed, but owing to the damage done it was reconstructed and properly formed, and the expense of reconstruction could not be separated from the cost of repairs. The quarter sessions affirmed the order, but stated a case:—Held, that the order was right, it being immaterial that his engines were made and used in accordance with the statute. *Savin v. Oswestry Highway Board*, 44 J. P. 766.

— **Traffic caused in Building a House.**—Materials for building a house were carried by the respondent over a highway, and he was summoned under s. 23 of the Highways and Locomotives (Amendment) Act, 1878, by the appellants, to recover the amount of expenses incurred by them by reason of the damage to the highway. The justices dismissed the summons, subject to

a special case in which they found that the traffic conducted by the respondent was, in aggregate weight and quantity, excessive and extraordinary as compared with the ordinary traffic along the highway, which was light agricultural traffic, that the highway had been damaged thereby, that the amount expended on the highway by reason thereof was in excess of the average expense of repairing highways in the neighbourhood, and was an extraordinary expense incurred by reason of such damage, but that the traffic did not materially differ in character from that to be expected on the highway:—Held, that the respondent was not liable for the damage to the highway. *Pickering Lythe East Highway Board v. Barry*, 8 Q. B. D. 59; 51 L. J., M. C. 17; 45 L. T. 655; 30 W. R. 246; 46 J. P. 215.

— **Branch Road—Conveyance of Manure to Farm—Traction Engines.**—Justices having made an order charging the expenses of repairing a highway upon the appellants as being extraordinary expenses within 41 & 42 Vict. c. 77, s. 23, it appeared that the highway communicated at either end with main roads, and was principally used by farmers and occupiers of land adjoining it for ordinary farm traffic. The appellants having been employed to convey a quantity of manure to a farm adjoining the road, carried it there by means of a traction engine and trucks, the engine weighing eight and the truck five tons. The road, which had not been prepared for, and was not adapted to, the weight of traction engines, was, in consequence of such traffic, rendered unfit for use. The carriage of farm material and produce by traction engines was usual in the neighbourhood, though not upon this particular road:—Held, that the order was right, the passage of traction engines and trucks being "extraordinary traffic" upon the particular road. *Reg. v. Ellis or Ellis v. Maidstone Sanitary Authority*, 8 Q. B. D. 466; 30 W. R. 613; 46 J. P. 295.

— **Traffic from recognized Business in Neighbourhood.**—Upon the hearing of a complaint made by a highway board under the Highways and Locomotives Amendment Act, 1878 (41 & 42 Vict. c. 77), s. 23, for the purpose of recovering from the appellant extraordinary expenses incurred by the board by reason of traffic conducted by him, it appeared that he was owner or occupier of stone quarries in the district, and that the stone was conveyed in heavy loads over the highways, so as to make the cost of repairing them much larger than if they had been subject to ordinary agricultural traffic; but that the stone traffic was a recognized business in the neighbourhood, and the wagon loads of the usual weight in such traffic. The justices having upon these facts found, first, that the traffic was not extraordinary; secondly, that the weights were excessive; and thirdly, that the expenses were extraordinary:—Held, that the first finding, which was warranted by the evidence, shewed that the expenses were not "extraordinary" within the meaning of the section, and that they could not be recovered from the appellant. *Wallington v. Hoskins or Hookins*, 6 Q. B. D. 206; 50 L. J., M. C. 19; 43 L. T. 597; 29 W. R. 152; 45 J. P. 173.

— **According to Number of Carts.**—W.,

owner of ironstone mines, sent his traffic to the railway station along a highway, in carts of the ordinary size and weight, but they made about 70 journeys per day. The other traffic was agricultural, and very small, and W.'s carts caused the chief traffic here. Other owners of mines sent their traffic by a private railway, and not over the highway in carts:—Held, the justices were wrong in holding that W. caused extraordinary traffic merely because he had many carts to send. *Reg. v. Williamson*, 45 J. P. 505.

— **Mode of Estimating Traffic.**—Semble, the surveyor was wrong in merely comparing the traffic of W. with the traffic on part of the highway he was bound to repair. *Id.*

— **Liability for Acts of Contractor.**—W. bought timber near a railway station and contracted with a person to convey part of it, he himself sending the rest. The timber was conveyed in broad-wheeled waggons in sixty-seven loads, each load from three to five tons weight. The surveyor estimated that this caused 21l. extra expenses in repairs, and summoned W. under s. 23 of the Highways Amendment Act, 1878. The justices held that it was extraordinary traffic, and that whether W. or the contractors conveyed it was of no consequence, and made an order on W. for 21l.:—Held, by the court, that the justices were right. *Williams v. Davies*, 44 J. P. 347.

The owner of quarries had been ordered to pay a sum for damage caused by excessive weight and extraordinary traffic. Counsel admitted that the principle of the preceding case was conclusive against him. He, however, asked for leave to appeal, as that case was also under appeal. The court gave judgment for the respondents, and gave leave to appeal. *Northumberland Whinstone Company v. Alwicks Highway Board*, 44 J. P. 360.

— **Act of Person Employed by Contractor.**—B. was employed by a contractor, C., to build a bridge over the H. railway for the railway company, and in doing so used a traction-engine of nine tons to draw two trucks loaded with bricks, each truck being eight tons, and caused damage for several days which amounted to 137l. On a proceeding under 42 & 43 Vict. c. 77, s. 23, for causing extraordinary traffic:—Held, that B. was liable though employed by C., and that the remedy was applicable, though under the Railway Clauses Act, 1845, s. 58, the company might be proceeded against to make good all such damage. *Barnett v. Hoo Highway Board*, 46 J. P. 805.

— **Recovery of Expenses—Surveyor's Certificate—Time within which Summary Proceedings may be Taken.**—A complaint was preferred against G. on the 7th December, 1881, by a highway board, to recover 322l. 6s. 3d. for extraordinary expenses under the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 23. The damage was done before the 25th March, 1879, the surveyor made his certificate on the 19th May, 1879, and payment was demanded on the 15th September, 1881. By s. 36 of the Highways and Locomotives (Amendment) Act, 1878, all expenses under the act may be recovered before a court of summary jurisdiction in manner provided by 11 & 12 Vict. c. 43, and by the 11th

section of that Act, "Where no time is already or shall hereafter be specially limited for making any such complaint, or laying any such information in the act or acts of parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose:"—Held, that the six months' period of limitation within which a complaint may be preferred to recover extraordinary expenses under the 23rd section of the Highways and Locomotives Amendment Act, 1878, must be reckoned from the date of the surveyor's certificate and not from the time payment is demanded. *Pool and Forden Highway Board v. Gunning*, 51 L. J., M. C. 49; 46 L. T. 163; 31 W. R. 30; 46 J. P. 708.

Certain extraordinary traffic took place in the year ending March, 1880. The expense of 21l. thereby incurred was demanded from C. in November, 1880, and in March, 1881; the surveyor's certificate being signed in February, 1881. The summons for non-payment was in April, 1881:—Held, that the six months' limitation dated from the certificate and demand of payment, and not from the time when the repairs were made, and therefore that the summons was in time. *White v. Colson*, 46 J. P. 565.

#### d. Other Offences on.

**Riding Furiously.**—The Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 78, enumerates various acts and omissions by persons on highways having charge of carriages and animals, and also by persons interrupting others; amongst them, if any person, riding any horse or beast, or driving any sort of carriage, shall ride or drive the same furiously, so as to endanger the life or limb of any passenger, then follow the words: "Every person so offending in any of the cases aforesaid, and being convicted of any such offence," shall "for every such offence forfeit any sum not exceeding 5l., in case such driver shall not be the owner of such waggon, cart, or other carriage; and in case the offender be the owner of such waggon, cart, or other carriage, then any sum not exceeding 10l." W. was convicted by justices of riding furiously on horseback along a highway, and fined a sum less than 5l.:—Held, that the penalty under 5l. was applicable to all offences mentioned in the section, whether the offenders were drivers of carriages or not; and that the conviction was right. *Williams v. Evans*, 1 Ex. D. 277; 35 L. T. 864.

**Bicycle is a Carriage.**—A person, riding a bicycle on a highway at such a pace as to be dangerous to the passers-by, may be convicted of furiously driving a carriage, under 5 & 6 Will. 4, c. 50, s. 78. *Taylor v. Goodwin*, 4 Q. B. D. 228; 48 L. J., M. C. 104; 40 L. T. 458; 27 W. R. 489.

**Racing.**—A right of highway does not include a right to race; and a person who had been a party to a hurdle race is jointly liable for putting the hurdles on the ground, although he took no actual part in the race. *Sowerby v. Wadsworth*, 3 F. & F. 734.

**Waggon, Cart, or other such Carriage without Owner's Name on it.**—An information was laid against the respondent for using a cart on the

highway without having his name painted thereon, as required by 5 & 6 Will. 4, c. 50, s. 76. The cart was a light spring cart with two wheels, used by the respondent in his business as an agricultural implement maker, in which he frequently carried agricultural implements to market, and drove his family about from place to place, and for which he paid duty under 82 & 33 Vict. c. 14, s. 18. The magistrates dismissed the information:—Held, that the "cart or carriage" contemplated by the 76th section of 5 & 6 Will. 4, c. 50, was "ejusdem generis" with a waggon, and that this was not such a cart, and that the magistrates were therefore right. *Danby v. Hunter*, 5 Q. B. D. 20; 49 L. J., M. C. 15; 41 L. T. 622; 28 W. R. 228; 44 J. P. 283.

**Right to Remove Driver.**—Where the driver of a waggon committed an offence within 13 Geo. 3, c. 78, s. 60, in the view of a justice, and placed himself before the board on which his master's name was painted, so as to prevent the discovery of the owner, and the justice stopped the horses and laid hands on the driver, and removed him from his position before the board, and thereby informed himself of the ownership:—Held, that this was a trespass, and gave the driver a right of action. *Jones v. Owen*, 2 D. & R. 600. See 5 & 6 Will. 4, c. 50, s. 78.

**Destroying Surface of Way—Footpaths.**—By 5 & 6 Will. 4, c. 50, s. 72, a penalty is imposed upon anyone who shall "wilfully destroy or injure the surface of any highway:"—Held, that a footway across a field is a highway within the meaning of this section. *Brackenborough v. Thorsby*, 19 L. T. 692.

**Sufficiency of Fence within Highways Act.**—A contractor for the construction of a railway made an excavation within five yards of, and fenced it off from, a highway. A horse attached to a cart containing a load of a ton weight, came in contact with the fence, which gave way, and the horse was killed by the fall into the excavation:—Held, that the fence was sufficient within s. 70 of the General Highways Act, 1835 (5 & 6 Will. 4, c. 50), and that there was no legal duty imposed upon the contractor to construct a fence of such strength as to withstand such a shock as that described. *Blakeley v. Baker*, 39 L. T. 369.

**Removal of Dust and Cinders—Under Paving Acts.**—Ashes falling from a furnace of a brass-founder, and containing particles of metal, were subjected to a process whereby a portion of the metal was extracted. The residue, having been given to the apprentices as a perquisite, was by them sold to a brass-refiner, for the purpose of extracting a further quantity of metal. The plaintiff, who was employed by the brass-refiner, whilst conveying the ashes from the brass-founder's premises for this purpose, was apprehended by the defendant under 57 Geo. 3, c. xxix., which gives a power of apprehending all persons who, not being employed by or contracting with the commissioners under the act, shall carry away any dust, cinders or ashes within the district:—Held, that the ashes in question were not dust, cinders or ashes within the meaning of the act. *Law v. Dodd*, 1 Ex. 845; 17 L. J., M. C. 65.

**Offences of Obstruction.]—***See ante*, OBSTRUCTION.

#### e. Proceedings.

**When One Conviction a Bar.]—**W. was summarily convicted under 5 & 6 Will. 4, c. 50, s. 78, for that he, being driver of a carriage on a highway, by negligence and wilful misconduct, to wit, by striking a horse ridden by H., caused hurt and damage to H.; he was afterwards convicted, on the same facts, under 24 & 25 Vict. c. 100, s. 42, for unlawfully assaulting H.:—Held, that the first conviction was a bar to the second. *Wemyss v. Hopkins*, 10 L. R., Q. B. 378; 44 L. J., M. C. 101; 32 L. T. 9; 23 W. R. 691.

**Appeal against Conviction.]—**In appealing against a conviction under 5 & 6 Will. 4, c. 50, s. 72, on information by the surveyor, it is not necessary that the notice of appeal provided by s. 108 should be personally served upon the convicting justices. *Reg. v. Yorkshire, N. R. (Justices)*, 1 New Sess. Cas. 574; 7 Q. B. 154; 14 L. J., M. C. 91; 9 Jur. 425.

Leaving the notice at the dwelling-house is sufficient. *Ib.*

A party appealing against a conviction by two justices upon complaint of the surveyors, for an offence under 5 & 6 Will. 4, c. 50, s. 47, must serve notice of appeal, under s. 105, on both the justices. A notice addressed to both the justices and surveyors, and served on the latter, and on one justice only, is not sufficient. *Reg. v. Bedfordshire (Justices)*, 3 P. & D. 21; 11 A. & E. 184; 4 Jur. 85.

#### 4. AUTHORITIES.

##### a. Highway Boards.

**Constitution—Time for Proceedings.]—**By 54 Geo. 3, c. 91, s. 1, overseers of the poor are to be appointed on the 25th March, or within fourteen days next after. By 5 & 6 Will. 4, c. 50, s. 6, surveyors of highways are to be appointed at the same time. By 25 & 26 Vict. c. 61, s. 10, waywardens shall be elected in every parish forming part of a highway district at the meeting and time and in the manner at and in which surveyors of highways would have been chosen if the act had not passed. By 27 & 28 Vict. c. 101, s. 10, the first meeting of the highway board shall be held at such time as may be appointed by the provisional or final order of the justices, so that the time appointed be not more than seven days after the expiration of the time limited by law for the election of waywardens. A provisional order constituting a highway district ordered that waywardens should be elected for each of the parishes, and the final order made on the 7th April, 1865, confirming it, ordered that the first meeting of the highway board should be held on the first Thursday after the 25th March:—Held, that the quarter sessions were not bound to appoint on a day after the expiration of the time limited by law for the election of waywardens, and therefore the order was valid. *Reg. v. Lindsey (Justices)*, 1 L. R., Q. B. 68; 35 L. J., M. C. 90; 12 Jur., N. S. 314; 14 W. R. 179; 6 B. & S. 892.

By 25 & 26 Vict. c. 61, s. 8, and 27 & 28 Vict. c. 101, s. 12, no objection shall be made at any trial or in any legal proceeding to the validity of

any order after the expiration of three calendar months from the making of the order:—Held, that an objection to the validity of an order was made within three calendar months, if made on moving for a rule nisi for a certiorari within that time, though the rule was not returnable, and cause not shewn till after the three months. *Ib.*

**—Appointment of Districts.]—**An ancient borough, having liberties and franchises, with charters containing non-intromittent clauses, was not a borough within the exception in 25 & 26 Vict. c. 61, s. 2. It was wholly surrounded by a county, and maintained its own poor and highways:—Held, that the justices of the county might take the proper proceedings in quarter sessions for making it a part of a highway district, under 25 & 26 Vict. c. 61, s. 5; and that they had jurisdiction to hear a complaint by the waywarden against the overseers of the poor of the borough, for not paying over to the treasurer of the highway board the sum ordered by the precept of the board to be levied in the borough. *Giles v. Glubb*, 12 Jur., N. S. 389; 13 L. T. 526.

The following description of the borough, "The several parishes, townships, tithings, hamlets, or places of Liskeard parish, &c., E. &c., shall be united, &c.," in the order constituting the highway district, was not such an imperfect description as to vitiate it. *Ib.*

A provisional order for forming a highway district constituted the township of E. and certain other parishes and places a highway district, and directed that one waywarden should be elected for each of the parishes, townships and places. E. was divided into three hamlets, each of which maintained its own highways. The separate hamlets were not named in the order:—Held, that the provisional order and the final order based on it were bad, as the provisional order did not state whether any or what waywardens were to be elected for the three hamlets. *Reg. v. Yorkshire, W. R. (Justices)*, 34 L. J., M. C. 227; 12 L. T. 580; 13 W. R. 966.

**Existing after Dissolution of Highway District.]—**By the dissolution of a highway district, in respect of which a highway board had been constituted under the Highway Act, 1862, the highway board, though it ceases to have any control over the highways in its district, does not cease to exist as a corporate body for the performance of its other duties, such as those of suing or being sued, and of acting generally for the purpose of winding up its affairs. *Reg. v. Essex (Justices)*, 11 Q. B. D. 704; 49 L. T. 394; 32 W. R. 220—C. A. Affirming 52 L. J., M. C. 124; 49 L. T. 177; 31 W. R. 813; 47 J. P. 725.

**—Right to Notice of Action.]—**The members of a board for the repair of the highways in a parish having resolved that the surveyor should be directed to open the locus in quo to the public, on the suggestion that there was an ancient right of footway over it, the surveyor did in pursuance of such resolution remove a gate obstructing such supposed right of footway; and an action being brought against the members of the board and the surveyor:—Held, that they were entitled to notice of action, it being admitted that the act was done *bonâ fide*.

*Smith v. Hopper*, 9 Q. B. 1005; 16 L. J., Q. B. 93; 11 Jur. 302.

**Election of Members—Waywardens.]**—At a vestry meeting for the election of a waywarden, according to 25 & 26 Vict. c. 61, s. 10, A. and B. were duly proposed and seconded as candidates for election. A vote of those present at the meeting was then taken, when A. had a majority of votes, and a poll was demanded on behalf of B. It was then observed that no account had been taken of the plurality of votes, and a second vote was accordingly taken, when B. had a majority. A poll was demanded on behalf of A., and fixed for a later day. On the day appointed for the poll the vestry was closed, in consequence of a notice having been affixed to the vestry door without the authority of B., that he declined to stand as waywarden, and no poll was taken. B. then received a certificate of his having been duly elected waywarden, signed by the chairman of the meeting at which the votes were taken, according to 27 & 28 Vict. c. 101, s. 19, and proceeded to take his seat at the highway board:—Held, that there had been no valid election, since it appeared that the ratepayers had not wilfully abstained from voting, but were misled by the notice. *Reg. v. Cooper*, 5 L. R., Q. B. 457; 39 L. J., Q. B. 273.

**Refusal of Poll—Effect of.]**—A parish claimed to be exempt from being included in a highway district, under 25 & 26 Vict. c. 61, s. 5, by reason of its highways being under the superintendence of a board established under 5 & 6 Will. 4, c. 50, s. 18. The 25 & 26 Vict. c. 61, passed in July, 1862, and the highway board was constituted at a vestry meeting in November, 1862, by a majority of two-thirds of the vestrymen present, the chairman having refused to grant a poll which was demanded at the meeting:—Held, that a poll ought to have been granted, and that therefore the highway board, under 5 & 6 Will. 4, c. 50, was not properly created, and so the parish was not exempt from being included in the highway district under 25 & 26 Vict. c. 61, s. 5. *Reg. v. How*, 33 L. J., M. C. 53; 9 L. T. 385.

**Demand of Poll.]**—At a vestry meeting held to elect waywardens for eleven townships, different candidates were successively and separately nominated, proposed, and seconded, and, after shew of hands, declared by the chairman to be duly elected waywardens for each township. After waywardens had been thus elected for all the townships, an elector demanded a poll in respect of the sixth and seventh townships in order of election. The chairman ruled that the demand was too late, and refused a poll. On a rule for a mandamus to the defendants to re-assemble the meeting, and proceed to an election of waywardens for the two townships:—Held, that the proceedings in respect of each township were a separate election, and that the demand for a poll was too late, as it should, in each case, have been made upon the declaration of the shew of hands. *Reg. v. Thomas*, or *St. Asaph (Vicar)*, 11 Q. B. D. 282; 52 L. J., Q. B. 671; 47 J. P. 792.

**Jurisdiction—Removal of Obstructions.]**—A highway board under 25 & 26 Vict. c. 61, has no authority to determine whether a disputed high-

way is or is not a highway, or to order the removal of an obstruction from a disputed highway. *Mill v. Hawker*, 9 L. R., Ex. 309; 43 L. J., Ex. 129; 30 L. T. 894; 22 W. R. 26. Affirmed, 10 L. R., Ex. 92; 44 L. J., Ex. 49; 33 L. T. 177; 24 W. R. 348—Ex. Ch.

**Personal Liability of Members.]**—The 25 & 26 Vict. c. 61, by s. 9, sub-s. 6, protects the members of the board from liability by reason of any "lawful act done by them in execution of any of the powers of the board;" but if the board, acting as a corporation, orders the surveyor to commit a trespass on private property for the purpose of removing an obstruction from a disputed highway, such an order is ultra vires, and the members of the board who concur in giving the order are personally liable, and may be sued for the trespass, though they have acted bona fide. *Id.*

**Recovery of Expenses—Bill in Parliament.]**—A board of waywardens of a highway who have incurred expenses in opposing a bill in parliament has no power under 27 & 28 Vict. c. 101, s. 32, to charge the parishes in the district or any of them with such expenses, even though the opposition was successful and the result beneficial to the district, the board having no legal authority to incur such expenses. *Reg. v. Kingsbridge Highway Board*, *Cornish*, *Ex parte*, 18 L. T. 554; 16 W. R. 1115.

**Allowance of Law Expenses.]**—Law expenses incurred in resisting a rule for a certiorari to remove the allowance, by a justice, of the accounts of the preceding waywardens, were expenses which a waywarden might insert in his account, and which the justices might allow, if they thought proper. *Rea v. Fowler*, 3 N. & M. 826; 1 A. & E. 836.

All expenses bona fide incurred by a waywarden, in the execution of the duty imposed upon him, might be inserted in his account, and might be allowed or disallowed by the justices in their discretion. *Id.*

**Costs of Indictments.]**—A township was included in a highway district formed under 25 & 26 Vict. c. 61. The highway board indicted B. for an obstruction caused by him in a street in the township. B., having removed the indictment by certiorari, was upon the trial found guilty, and paid the taxed costs. There were extra costs, which the highway board charged on the township:—Held, that the costs of the indictment, including the extra costs, were expenses of repairing and keeping in repair the highway, which the surveyor of the highways would have been justified in incurring under 5 & 6 Will. 4, c. 50, ss. 6, 27, and which, therefore, the highway board, who is placed in the same position as the surveyor by 25 & 26 Vict. c. 61, s. 17, had properly charged on the township; and, per Cockburn, C. J., and Crompton, J., if not, they were expenses in relation to such highways, within 25 & 26 Vict. c. 61, s. 20. *Reg. v. Heath*, 6 B. & S. 571; 12 L. T. 492; 13 W. R. 805, sub nom. *Heath v. West Eddisbury Highway Board*.

#### b. Surveyors.

##### i. Election and Appointment.

**For two Townships in one Parish.]**—A ses-

sions found that the parish of M. consisted of two townships, M. and K. N.; that, from the earliest period within living memory to 1799, surveyors were appointed for these townships, one for each; that from that time, to save expense, there had been one appointment of two surveyors for the parish at large, one of them always being an inhabitant of M., and the other of K. N.; and that each acted as surveyor in his own township; that distinct rates had been made for each township, and applied distinctly to the repairs of each; that the surveyors kept distinct accounts, but that these, as well as the rates (before they were taken to the magistrates), were examined and allowed at a general parish vestry; and that the occupiers of land had been rated, in respect of their occupation, to the repair of the highways of that township in which the houses they resided in were situate:—Held, sufficient evidence that each township was immemorably bound to repair the roads in it, and consequently, that the appointment of surveyors for each township was proper. *Rez v. King's Newton*, 1 B. & Ad. 826.

**By Parish Divided into several Tithings.**—Where a parish was divided into eight tithings, each of which before 5 & 6 Will. 4, c. 50, maintained its own highways separately, and after the passing of that act each of the tithings elected one or more persons as surveyors, who formed a board for the parish, but rated the tithings separately as before the act:—Held, that the parish at large had no power to form a board under s. 18, and that a rate made by them was bad. *Reg. v. Bush*, 1 P. & D. 586; 9 A. & E. 820.

**By Magistrates on Refusal or Neglect of Parish.**—The appointment of a surveyor of highways by justices at a special sessions, upon neglect or refusal on the part of a parish to nominate and elect a surveyor, under 5 & 6 Will. 4, c. 50, s. 11, is invalid, if made at the same sessions at which the neglect or refusal appears. *Reg. v. Best*, 5 D. & L. 40; 2 B. C. Rep. 90; 2 New Sess. Cas. 655; *S. C.*, nom. *Surrey (Justices)*, 16 L. J., M. C. 102; 11 Jur. 489.

The 5 & 6 Will. 4, c. 50, s. 6, which enacts, that the inhabitants of a parish maintaining its own highways shall proceed to an election of surveyors of highways at their first meeting in vestry for the nomination of overseers of the poor in every year, requires the vestry to be one of which due notice has been given, in pursuance of 58 Geo. 3, c. 69, s. 1. *Id.*

**Who may Vote.**—In the election of a surveyor of highways, an inhabitant occupying property liable to be assessed to the highway rate is entitled to vote, though he has never been actually rated to the highway rate. *Reg. v. Kershaw*, 6 El. & Bl. 999; 26 L. J., M. C. 19; 2 Jur., N. S. 1139.

**Demand of a Poll.**—At a vestry held under 58 Geo. 3, c. 69, for the purpose of electing surveyors of highways, of which public notice had been given, it was agreed that the vote should be taken by a shew of hands, leaving it open to any one to propose that the votes should be taken according to the statute. A. and B. were respectively proposed and seconded for the office of surveyor, and on a shew of hands, A. had a

majority. It was then proposed and seconded, on behalf of B., that the votes should be taken according to the statute. No objection was made; and on the votes being so taken, B. had a majority, and was declared duly elected. A. then demanded a poll of the whole parish:—Held, that the meeting having agreed to a poll being taken according to the statute, no one was entitled afterwards to demand a poll of the whole parish; that the election of B. was valid, and that a mandamus for another meeting to elect would not lie. *Reg. v. Hillingdon (Vicar)*, 18 Q. B. 718.

## ii. Powers and Duties.

### a. Personal Liability generally.

**Injury to a Bank on the Roadside.**—A surveyor of highways is liable to a reversioner for subtraction of a portion of his bank by the roadside, although the property was the better for what the surveyor had done. *Alston v. Scales*, 9 Bing. 3; 2 M. & Scott, 5.

**Lowering of Soil—Under Local Police Act.**—Action against the commissioners for executing the Oldham Police Act, for entering the plaintiff's close and lowering the soil. Plea, justifying the acts as done in lowering a street under powers given by that act substantially the same as the 10 & 11 Vict. c. 34 (the Towns Improvement Act), s. 51. On the trial, it appeared that the close was part of a new street; that the commissioners had caused it to be paved and lowered in a manner that would have been justified if it had been an old street, or had been previously brought under their management:—Held, that the powers given to the commissioners were not applicable to such a new street, and that the plaintiff was entitled to recover. *Brown v. Clegg*, 16 Q. B. 681.

**Removal of a Fence—Under 5 & 6 Will. 4, c. 50.**—To justify a surveyor of highways in taking down a fence, under 5 & 6 Will. 4, c. 50, s. 69, two things must concur: first, the fence must be within fifteen feet of the centre of the road; and, second, it must be on the road. *Erans v. Oakley*, 1 C. & K. 125.

A road was nine feet wide; and there being a piece of uninclosed land at the side of it, also nine feet wide, which land was so rough and uneven, that no carriage ever did or could go over it, the owner of the adjoining field took this land into his field, and put a fence round it. The surveyor of highways took down the fence:—Held, that he was not justified in so doing under 5 & 6 Will. 4, c. 50, s. 69, as the fence was not on the road. *Id.*

Sections 6 and 63 of 13 Geo. 3, c. 78, did not authorize the surveyor to widen a road to thirty feet by removing a fence, unless the fence supposed to be an encroachment was actually upon the highway. *Lowen v. Kaye*, 6 D. & R. 21; 4 B. & C. 3.

**Pulling down Cottage.**—In an action for pulling down a cottage, it appeared that the plaintiff had been convicted, under 5 & 6 Will. 4, c. 50, s. 69, of building the cottage so as to encroach on the highway, but which was not in fact an encroachment within the meaning of the act; and the defendant justified as surveyor of the highways:—Held, that s. 69 required

the surveyor, after a conviction, to remove the encroachment without a warrant; and therefore the conviction, though erroneous, was a defence. *Keane v. Reynolds*, 2 El. & Bl. 748; 2 C. L. R. 245; 18 Jur. 242.

#### Removal of Obstruction—Malicious Damage.]

—T. was the occupier of a residence which communicated with an adjoining highway by means of a gateway; an inclosed drain and brickwork were put down at the gateway for the purpose of convenient access to his residence, and also for the purpose of allowing the free passage of water running by the side of the highway. The drain and brickwork, with the earth covering the same, formed a nuisance and an obstruction to the highway. The surveyor of highways for the parish within which T.'s residence was situate, took up and removed the drain and the brickwork, and in so doing damaged them. The surveyor having been charged upon an information before justices with committing damage, injury, and spoil upon T.'s property, against the provisions of 24 & 25 Vict. c. 97, s. 52, they found that the surveyor had acted bona fide, but that he did not do the act complained of under a fair and reasonable supposition that he had a right to do it, and they convicted him of the offence charged:—Held, that the conviction was wrong, and that the information ought to have been dismissed; for he was not a private individual, but the surveyor of highways having a control over, and an interest in, the drains laid for carrying off the water, and that in dealing bona fide with the drains he was not guilty of wilful or malicious damage. *Denny v. Thwaites*, 2 Ex. D. 21; 46 L. J., M. C. 141; 35 L. T. 628.

Seemingly, that as he, according to the finding of the justices, acted bona fide, they ought, upon the facts stated, also to have found that he acted under a fair and reasonable supposition that he had a right to do what was complained of in the information. *Id.*

**Trespass—Compensation for Injury.]**—Under 5 & 6 Will. 4, c. 50, s. 54, a surveyor of highways may enter on adjoining lands, and cut drains therein, without tendering amends for the damage caused thereby; and an action will not lie against him for so doing, the tendering of amends not being a condition precedent or concurrent: and the surveyor is not bound to have the amount of damages and compensation ascertained within twenty-one days after the injury is committed. *Peters v. Clarkson*, 1 New Sess. Cas. 519; 8 Scott, N. R. 384; 7 M. & G. 548; 13 L. J., M. C. 153; 8 Jur. 648.

The amount of compensation to be paid can be settled only by the justices at a special session for the highways. *Id.*

— **In obtaining Materials for Repairs.]**—*See post*, col. 701.

— **Wrongful Distress for Rate.]**—Where a highway rate was made, payment of which was refused by a person, and application thereupon made for a distress warrant to justices, who declined to act until a rule of the court was made absolute, calling upon them to do so:—Held, that although no action would lie against the justices, it might well lie against the surveyor who levied the distress. *Freeman v. Read*,

4 B. & S. 174; 32 L. J., M. C. 226; 10 Jur., N. S. 149.

**Replevin by A. against B. for taking the goods of A.** Plea, that after the passing of the 5 & 6 Will. 4, c. 50, two justices made their warrant in writing directed to the surveyors of the highways (waywardens) of a parish, and to the constable of that parish, reciting, that by a rate A., occupier of lands in the parish, was duly assessed to the repair of the highways of the parish in a sum which had been demanded; but that A. had refused to pay, and that he had been summoned and had not appeared, whereupon the waywardens were commanded to levy the amount by distress and sale of his goods. The plea then stated, that B. was constable, and that C. and D. were surveyors (waywardens), and that the warrant being delivered to C. and D. and to B., the latter, in aid of C. and D., seized the goods of A.:—Held, that the plea was neither in form nor in substance a plea under the statute; and that it was not a good plea at common law, inasmuch as it did not allege that the justices had jurisdiction over the subject-matter in respect of which the warrant was granted. *Morrell v. Martin*, 3 M. & G. 581; 4 Scott, N. R. 300.

— **Obedience to Orders.]**—At a meeting of the members of a highway board it was resolved that a path running through land in the occupation of the plaintiff was a highway, and that the plaintiff be directed to remove a lock from a gate placed across it. The surveyor of the board was afterwards ordered by them to remove the lock, and did so. On the trial of an action of trespass brought by the plaintiff against the members of the board in their personal capacity and the surveyor, in which they justified, Kelly, C. B., nonsuited the plaintiff on the ground that neither the members of the board nor the surveyor were liable individually. No evidence was, therefore, given in support of the plea of justification. The Court of Exchequer having set aside the nonsuit and ordered a new trial on the ground, first, that assuming that the resolution was illegal the members of the board who concurred in it were personally responsible; secondly, that the fact that the surveyor was, by 25 & 26 Vict. c. 61, s. 16, bound to obey the orders of the board, did not excuse him if in obeying their orders he did an unlawful act:—Held, on appeal (the court expressing no opinion as to the liability of the members of the board), that the surveyor was liable, and that the judgment setting aside the nonsuit must therefore be affirmed. *Mill v. Hawker*, 10 L. R., Ex. 92; 44 L. J., Ex. 49; 33 L. T. 177; 23 W. R. 348—Ex. Ch. Affirming (as to surveyor) 9 L. R., Ex. 309; 43 L. J., Ex. 129; 30 L. T. 894; 23 W. R. 26.

**Non-Repair.]**—An action for a personal and pecuniary damage resulting from the non-repair of a county bridge, will not lie against the county surveyor, either at common law, or under 43 Geo. 3, c. 59. *McKinnon v. Penson*, 9 Ex. 609; 23 L. J., M. C. 97; 18 Jur. 513—Ex. Ch.

No action lies against a surveyor for damage resulting from an accident caused by his neglect to repair the highway. *Young v. Davis*, 7 H. & N. 760; 31 L. J., Ex. 250; 8 Jur., N. S. 286; 6 L. T. 363; 10 W. R. 524. Affirmed, 2 H. & C. 177; 8 Jur., N. S. 79; 9 L. T. 145; 11 W. R. 735—Ex. Ch.

**Negligence — Third Party contracting to supply Labour—No Interference.]**—When a surveyor of highways has been ordered by a vestry to do certain works on a highway, and during the performance of those works an accident occurs in consequence of the road being left in a dangerous condition, the surveyor is guilty of neglect of a statutory duty under 5 & 6 Will. 4, c. 50, s. 56, and will be liable in an action for damage notwithstanding that he has contracted with a third party for supplying the necessary labour, and has not personally interfered with the work. *Taylor v. Greenhalgh*, 24 W. R. 311—C. A. Reversing 9 L. R., Q. B. 487; 43 L. J., Q. B. 168; 31 L. T. 184; 23 W. R. 4.

A vestry resolved that part of a highway should be raised, and ordered the surveyor of highways to employ men to do it. He contracted with G. to do the work. G. employed and paid his own men, and proceeded with the work. The surveyor employed men to cart materials to the ground, and determined the levels; but beyond exercising a general superintendence on behalf of the vestry did not personally interfere with the work. G. left the road in such a state that the plaintiff in driving along the road by night was overturned and injured. The surveyor did not give any direction that the road should be left in such a state:—Held, that he was liable. *Pendlebury v. Greenhalgh*, 1 Q. B. D. 36; 45 L. J., Q. B. 3; 33 L. T. 472; 34 W. R. 98—C. A.

**Hire of Labourers.]**—A surveyor of turnpike roads is not personally liable to answer the labourers; but they must look to the commissioners, or their treasurer. *Pechin v. Pawley*, 1 W. Bl. 670.

**Right to Notice of Action—In what Cases.]**—Where surveyors had been appointed, but in an informal manner, and bona fide believing themselves to be such surveyors, and to have been duly appointed, cut down a tree which overhung the highway and was a nuisance to it:—Held, that they were entitled to notice of action, as for a thing done in pursuance of the act. *Huggins v. Wayday*, 15 M. & W. 357; 16 L. J., Ex. 136.

The members of a board for the repair of the highways in a parish, having resolved that the surveyor should be directed to open the locus in quo to the public, on the suggestion that there was an ancient right of footway over it, the surveyor did, in pursuance of such resolution, remove a gate obstructing such supposed right of footway; and an action being brought against the members of the board and the surveyor:—Held, that they were entitled to notice of action, it being admitted that the act was done bona fide. *Smith v. Hopper*, 9 Q. B. 1005; 16 L. J., Q. B. 93; 11 Jur. 502.

An action was brought against a surveyor for allowing and causing a heap of gravel, which had being placed for the purposes of repair of the highway, to remain upon it, without taking any care or precaution to guard against damage to persons passing along it, contrary to his duty in that behalf:—Held, that the action was brought for a "thing done in pursuance of, or under the authority of," the statute, and, therefore, that he was entitled to notice of action. *Davis v. Curling*, 8 Q. B. 287; 15 L. J., Q. B. 56; 10 Jur. 69.

In pursuance of a resolution at a parish vestry, that it would be advantageous if a weighing machine was erected to check the weight of materials purchased for the highways, the surveyors caused a machine to be placed on the highway:—Held, that although the 5 & 6 Will. 4, c. 50, gave no express power to erect weighing machines, the surveyors were acting in pursuance of the act, so as to entitle them to notice of an action brought for injuries sustained by a person in driving over a heap of earth excavated for the weighing machine. *Hardwick v. Moss*, 7 H. & N. 136; 31 L. J., Ex. 205; 7 Jur., N. S. 804; 4 L. T. 802.

**— Action to Recover Money paid for Rate.]**

—The surveyors of highways of a parish made a rate, which was entered in the rate book as a composition of 1s. in the pound, agreed to be taken by the surveyors, &c., in lieu of statute work to be performed and done by several inhabitants and occupiers of land, hereditaments, &c. The rate was not signed by the surveyors, nor allowed by justices of the peace, nor published as required by 5 & 6 Will. 4, c. 50. An inhabitant paid the amount at which he was assessed, and afterwards, discovering that the rate was bad, commenced an action to recover the money paid:—Held, that although the rate was bad, the surveyors were entitled to the protection afforded by 5 & 6 Will. 4, c. 50, s. 109, and that the action was not maintainable, inasmuch as the plaintiff had not given to them any notice of action. *Judge v. Selmes*, 6 L. R., Q. B. 724; 40 L. J., Q. B. 287; 24 L. T. 905; 19 W. R. 1110.

**Period of Limitation.]**—A reversioner of land declared against a surveyor for digging his close, separating a portion of it from the residue, and keeping it so separated, and adding such portion to the public road. The separation was by a wall which was begun more than three calendar months before the action. It was at that time very low, but formed a complete division between the parcels of land. After the commencement of the three months the wall was raised and finished:—Held, that, as there was a complete separation before that period, the raising of the wall was not such an act of severance as would take the case out of the limitation in 13 Geo. 3, c. 78, s. 81, which required all actions for things done in pursuance of that statute to be commenced within three calendar months after the fact committed. *Wordsworth v. Harley*, 1 B. & Ad. 391.

By s. 109 of the Highway Act (5 & 6 Will. 4, c. 50) no action is to be brought against any person for anything done under that act after three months after the fact committed for which such action was brought. The Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 117, constitutes the local board of health surveyor of highways, and by s. 139 of that act every action against any inspector or any person acting under the general board of health, or the officer of health, clerk, surveyor of nuisances, or officer acting under a local board for anything done under the provisions of the act, is to be commenced within six months after the accrual of the cause of action:—Held, that an action of trespass against a local board of health for an act done as surveyor of highways which was commenced less than six months though more

than three months after the alleged trespass, was not too late. *Taylor v. Meltham Local Board*, 47 L. J., C. P. 12.

By a local act passed in 1862, the corporation of Salford were constituted surveyors of highways within the borough, having and being subject to all such powers and liabilities as any surveyors of highways had or were subject to by virtue of the law for the time being in force. Sect. 109 of 5 & 6 Will. 4, c. 50 (the Highway Act of 1835), limits the period within which any action may be brought for anything done under the authority of that act to three months after the fact committed for which the action is brought. Sect. 5 of 5 & 6 Vict. c. 97, limits the period within which any action may be brought for anything done under the authority of local acts to two years after the cause of action. By the Public Health Act, 1875, s. 144, urban authorities (including by s. 6 corporations of boroughs) are constituted surveyors of highways within their district, having and being subject to all the powers, duties, and liabilities (so far as the same are not inconsistent with the provisions of that act) of surveyors of highways under the law for the time being in force. Sect. 264 limits the period within which actions may be brought for anything done under that act to six months after the cause of action accrued; and by a 341, all powers given by that act shall be deemed to be in addition to and not in derogation of any other powers conferred by statute, and such other powers may be exercised in the same manner as if that act had not passed. In an action against the corporation for negligence, as surveyors of highways, commenced more than three, but less than six months after the cause of action accrued:—Held, that the defendants were entitled to rely on the limitation of three months provided by 5 & 6 Will. 4, c. 50, and therefore that the action could not be maintained. *Taylor v. Meltham Local Board* (*supra*) distinguished. *Burton v. Salford (Corporation)*, 11 Q. B. D. 286; 52 L. J., Q. B. 668; 49 L. T. 43; 31 W. R. 815; 47 J. P. 614.

#### *B. Penalty for Neglect of Duties.*

**Non-Repair.**—By the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 20, if a surveyor shall neglect his duty in anything required of him by that act, for which no particular penalty is imposed, he shall forfeit for every such offence any sum not exceeding 5*l.* By s. 94, if any highway is out of repair, justices may order a view, and if satisfied thereof upon the view, may convict the surveyor who is liable for the repair in any penalty not exceeding 5*l.*, and shall make an order appointing a time for the necessary repair. Justices convicted a surveyor, under s. 20, upon evidence in the ordinary way, of neglecting his duty by neglecting to repair a footpath for which he was liable:—Held, that the justices could convict for non-repair only upon adopting the course provided by s. 94; and that this conviction was therefore bad. *Robinson v. Steveniti*, 38 L. T. 611.

**Denial of Obligation, Effect of.**—Where, on the hearing of a summons against the district surveyor for the non-repair of a highway in South Wales, he denies on behalf of the inhabitants of the parish, the obligation to repair, justices may direct an indictment to be pre-

ferred against the parish. *Reg. v. James*, 3 B. & S. 901; 32 L. J., M. C. 211; 9 Jur., N. S. 1126.

**Securing Causeways with Posts.**—The 5 & 6 Will. 4, c. 50, s. 24, requiring parish surveyors to secure horse causeways and foot causeways by posts, from being passed over by waggons, applies to the protection of causeways lying side by side with public roads, and being parts of such roads, from the wheels of carriages passing along those roads; therefore surveyors are not bound to secure the ends of those causeways with posts. *Ellis v. Woodbridge*, 29 L. J., M. C. 183; 6 Jur., N. S. 1017; 8 W. R. 437.

**Neglect of Specific Orders.**—Where magistrates directed a surveyor of highways to remove a nuisance from the highway, and to fence a pit that was dangerous, and on his neglecting to do so, convicted him in a penalty for having "willfully neglected his duty in not removing, or causing to be removed, nuisances in and upon a highway in the parish, &c., and not duly guarding a dangerous pit lying on the highway."—Held, that the conviction was not warranted by 5 & 6 Will. 4, c. 50, s. 20, or s. 73, and that it could not be supported. *Morgan v. Leach*, 10 M. & W. 558; 12 L. J., M. C. 4.

**Proceedings—Viewer's Report.**—Where an information is laid under 5 & 6 Will. 4, c. 50, s. 94, that a highway is out of repair, and the magistrates, pursuant to that section, appoint a viewer, who reports it out of repair, the magistrates, at the special sessions, are not bound by that report, but may exercise their discretion, whether they will convict the surveyor or not. *Reg. v. Wills (Justices)*, 8 D. P. C. 717.

#### *γ. Collection of Rates.*

It is the duty of outgoing surveyors of a parish to collect an outstanding highway rate, when, during their term of office, the parish is incorporated into a new highway district under 25 & 26 Vict. c. 61, and a highway board and district surveyor are appointed. *Reg. v. Bluffield*, 11 L. T. 337.

The words "and then remaining unpaid," in s. 43, mean remaining unpaid at the end of seven days from the appointment of the district surveyor. *Id.*

#### *δ. Accounts.*

**Time for—Mandamus.**—Where a surveyor of the highway has improperly allowed the time for producing and passing his accounts to elapse, the court will compel him to produce them by mandamus. *Re v. Lewis*, 1 D. P. C. 530.

**Action against Predecessors.**—A surveyor of highways could not maintain an action against the late surveyor for the balance remaining in his hands, until his accounts had been settled and allowed, or disallowed, in the manner pointed out by 13 Geo. 3, c. 78, s. 48. *Heudebourch v. Langton*, 10 B. & C. 546; 3 C. & P. 566.

**Action against Co-Surveyor.**—A. and B. being co-surveyors of the highways of a parish, it was agreed between them that A. should deliver up the rate-book to B., and that B. should pay A. out of the moneys he should

collect under the rate, 15*l.* which A. had advanced beyond the amount collected by the previous rate. The book was accordingly delivered to B., who collected more than 15*l.*, but expended the whole in the repair of the roads, and did not pay A. the 15*l.* :—Held, that A. might maintain an action to recover it. *Luddard or Liddard v. Holmes*, 2 C., M. & R. 586; 1 Tyr. & G. 9.

**Right to Recover Account Books.**—Churchwardens and overseers had not such a property in the account-books of a late surveyor of the highways as to enable them to maintain trover for them; and their remedy was under 13 Geo. 3, c. 78, s. 48. *Addison v. Round*, 7 C. & P. 285.

**Allowance of Expenses.**—Under 5 & 6 Will. 4, c. 50, s. 111, it is not necessary for a surveyor of highways, at the expiration of his year of office, to obtain the sanction of the inhabitants in vestry to expenses reasonably incurred in defending indictments, or prosecuting appeals, and the allowance thereof by two justices, previously to laying his accounts before justices at a special sessions for the highways. It is sufficient that such expenses have either been agreed to at a vestry or allowed by two justices. *Townsend v. Read*, 10 C. B., N. S. 317; 30 L. J., M. C. 245; 8 Jur., N. S. 39; 5 L. T. 180; 9 W. R. 940.

**Power of Justices.**—Justices, sitting at a special sessions for highways, have no power, under 5 & 6 Will. 4, c. 50, s. 44, to allow charges in the surveyor's accounts which are illegal by reason of the provisions of s. 46. *Barton v. Piggott*, 10 L. R., Q. B. 86; 44 L. J., M. C. 5; 31 L. T. 404; 23 W. R. 233.

A surveyor of highways having charged in his accounts certain items for work and materials and team hire, which were illegal under s. 46, the justices in special sessions, on complaint made to them, after examining the surveyor on oath, made an order, under s. 44, allowing the accounts :—Held, that the charges were made illegal by s. 46; and the justices had therefore no discretion under s. 44, and the order allowing the accounts was bad. *Ib.*

**Rights of Outgoing Surveyor.**—A's year of office as surveyor of highways in a township expired on the 25th of March, 1863, when B. was appointed his successor, pursuant to 5 & 6 Will. 4, c. 50, and at the next special sessions (on the 1st of April), A. verified and passed his accounts, which shewed a balance of 24*l.* 6*s.* 5*d.* in his hands due to the township. At this time there were debts owing by A. as such surveyor. On the 10th of April, a highway board was formed under 25 & 26 Vict. c. 61, for a district, which included the township; and on the 4th of May the board appointed a district surveyor. B. never acted as surveyor at all :—Held, that A. was an outgoing surveyor, and as such liable to account to the board; but that he was entitled to the same allowances for disbursements from the board as he would have been entitled to if he had paid over the balance to his immediate successor in office, B. *Wrexham Highway Board v. Hardcastle*, 19 C. B., N. S. 177.

**Recovery of Disbursements.**—A surveyor of trustees of a turnpike trust having for several years suppressed, in his accounts, liabilities in-

curred by him on their behalf, which he actually paid, the trustees passed and settled each account successively, except the last :—Held, that he could not recover the sums so paid for any year but the last. *Cave v. Mills*, 7 H. & N. 913; 31 L. J., Ex. 265; 8 Jur., N. S. 363; 10 W. R. 471.

Surveyors of highways' accounts for 1856 shewed a balance due to them of 211*l.* 14*s.* 10½*d.*, and their accounts for 1857 shewed a balance due to them of 205*l.* 5*s.* 1½*d.* For the next three years, ending March, 1860, new surveyors were appointed, and the balance of 205*l.* 5*s.* 1½*d.* was omitted in the accounts for those three years, and undischarged. The surveyors for the year commencing March, 1860, paid the balance out of moneys received by them, and entered such payment in their accounts :—Held, that they were not justified in doing so, and that the justices were right in disallowing that payment in their accounts. *Taylor v. Stansfield*, 6 L. T. 26.

**Method of Recovering Balance.**—The defendant, as surveyor of highways, had incurred legal expenses in defending appeals against orders for stopping up highways without the previous sanction of the parish. At a meeting of the vestry, where his accounts were gone into, the items for these expenses were objected to, and opposition was threatened to be made to his accounts before the justices. The defendant ultimately offered to pay 50*l.* in discharge of the attorney's bill for costs, if no opposition were offered to the passing of his accounts before the justices; the vestry accepted the offer, and the plaintiff and other vestrymen signed a minute to this effect. They also entered and signed a minute at the foot of the defendant's account, that the 50*l.* was to be paid to his successor in office, who happened to be the plaintiff. The accounts were passed without opposition; but the defendant did not pay the 50*l.* The plaintiff consequently sued him for it in a county court :—Held, that there was no evidence of any contract with the plaintiff alone to entitle him to maintain an action alone for the 50*l.*; and that, if the 50*l.* was to be treated as part of the balance of the public money in the hands of the outgoing surveyor, the method of recovering it was not by action, but by summary application under 5 & 6 Will. 4, c. 50, s. 103. *Kilham v. Collier*, 21 L. J., Q. B. 65; 15 Jur. 1175.

**Penalty for Neglect—Assistant Surveyor.**—An assistant surveyor to a highway board, appointed in pursuance of 5 & 6 Will. 4, c. 50, s. 18, is not liable to a penalty for not making out his accounts and laying them before the justices at the special highway sessions; s. 44 applying only to an ordinary surveyor of highways, where no board and assistant surveyor to the board have been appointed. *Adams v. Lakeman*, El., Bl. & El. 615; 27 L. J., M. C. 307; 4 Jur., N. S. 854.

**Proceedings—Appeal against Order of Justices.**—Under 5 & 6 Will. 4, c. 50, ss. 44 and 105, no appeal lies, on the part of the surveyor of the highways, against an order of justices, a highway sessions allowing part of his accounts, and disallowing the rest, and ordering him to pay over to his successor the amount disallowed. *Reg. v. Leicestershire (Justices)*, 8 El. & Bl. 557; 4 Jur., N. S. 280.

An inhabitant of a parish gave notice of appeal to the quarter sessions against the allowance of the surveyor's accounts. At the sessions the court dismissed the appeal for want of jurisdiction, under 5 & 6 Will. 4, c. 50, and ordered the appellant to pay the costs:—Held, that the sessions had, under 12 & 13 Vict. c. 45, s. 5, jurisdiction to order the payment of costs. *Reg. v. Padwick*, 8 El. & Bl. 704; 27 L. J., M. C. 113; 4 Jur., N. S. 360.

A complaint made by an inhabitant of a parish against the accounts of the surveyor of highways at the special sessions for highways, is the subject of an appeal to one of the superior courts under 20 & 21 Vict. c. 43, even though the sessions make no order on such complaint otherwise than by allowing the surveyor's accounts. *Townsend v. Read*, 10 C. B., N. S. 308; 30 L. J., M. C. 223; 9 W. R. 659.

There is no appeal to the quarter sessions, under 5 & 6 Will. 4, c. 50, s. 44, against the allowance at special sessions of the accounts of a surveyor of highways. *Reg. v. Yorkshire, W. R. (Justices)*, 1 G. & D. 198; 1 Q. B. 624; 5 Jur. 824.

## 5. REPAIR OF.

### a. Obligation to Repair.

#### i. Inhabitants of Parish or District.

**Generally.**—The inhabitants of a parish are *prima facie* bound to repair a highway of common right. *Rea v. Great Broughton*, 5 Burr. 2700.

Unless by prescription they can throw the onus on particular persons by reason of their tenure. *Rea v. Sheffield*, 2 T. R. 106.

**When Repairs Undertaken by Mistake.**—The inhabitants of a parish are not bound to repair a way used by the public, and repaired by the parish for more than twenty years, if there is no owner who could dedicate the way to the public, and the repairs by the parish are shewn to have been begun and continued under a mistaken notion of the liability of the inhabitants to repair. *Rea v. Edmonton*, 1 M. & Rob. 24.

The inhabitants are bound by such repairs, if made with a full knowledge of the facts, and with the intention of taking upon themselves the public duty. *Id.*

**Road not Adopted by Parish.**—A road dedicated to and used by the public becomes a highway which the parish must repair, although neither such dedication nor such user has been adopted or acquiesced in by the parish. *Rea v. Leake*, 2 N. & M. 583; 5 B. & Ad. 469. See also *Reg. v. Dukinfield*, 4 B. & S. 158, *ante*, col. 644.

**Extent of Repairs.**—A parish bound to repair a road, must make it reasonably passable at all times of the year. *Reg. v. High Malden*, 1 F. & F. 678.

**—Highway across a River.**—Where a public way crosses the bed of a river which washes over it at every high tide, and leaves a deposit of mud, *semble*, that the parish is not bound to make it good. *Rea v. Landulph*, 1 M. & Rob. 393.

**Destruction of Road—Effect of.**—An indict-

ment charged that a part of a highway was out of repair. Part of the road had, at the time when the indictment was preferred, been destroyed by the encroachments of the sea, and the surface of the existing road was in good repair up to where the same had been so destroyed, at which part the road was terminated by a perpendicular cliff, caused by successive encroachments:—Held, that there was no obligation on the parish to provide an available carriage-road down to the beach, the encroachments of the sea having destroyed the road, so that the subject of repair was not in existence. *Reg. v. Hornsea*, Dears. C. C. 291; 2 C. L. R. 596; 23 L. J., M. C. 59; 18 Jur. 315.

A highway ran along the slope of a hill, beneath which was a valley, the slope being at right angles to the valley, and very precipitous. A landslip of considerable magnitude occurred on the slope, and about 252 yards of the highway was carried off into the valley below, and its place being filled up with stones and other debris, no trace of the old metalled road remained, but the line of it was known and admitted. An engineer, who had inspected the locus in quo, reported that it was practicable to form a permanent and passable road along the whole tract, and of a similar character, at a moderate outlay:—Held, that there was no such total destruction of the road as would relieve the parish from liability to repair. *Reg. v. Greenhow*, 1 Q. B. D. 703; 45 L. J., M. C. 141; 35 L. T. 363.

**Road situate in different Counties.**—If a parish is situate, part in one county and the rest in another, and a highway lying in one part is out of repair, an indictment against the inhabitants of that part only is bad; the indictment must be against the whole parish. *Rea v. Clifton*, 5 T. R. 498.

If a parish lies in two distinct counties, an indictment for not repairing the highway may be brought against that part of the parish in which the ruinous road lies. *Rea v. Weston*, 4 Burr. 2507. *And see* 5 Burr. 2700.

**Main Roads—Expense of Removing Snow—Liability of County Authority.**—The main roads within the district of a highway authority became impassable from snow, which the highway authority removed, and they claimed one half the expense of doing so from the county authority under the Highways and Locomotives Amendment Act, 1878, s. 13:—Held, that this was an "expense incurred in the maintenance" of such roads within that section, and that the county authority were liable. *Amesbury (Guardians) v. Wilts (Justices)*, 10 Q. B. D. 480; 52 L. J., M. C. 64; 31 W. R. 521; 47 J. P. 184.

**Liability of one Parish for Another—Prescription.**—*Semble*, there is no sufficient authority for holding that one parish can be liable by prescription to repair a highway in another parish. But at all events there must be shewn to have been a sufficient consideration, which existed contemporaneously with such liability. *Reg. v. Ashby Folville*, 1 L. R., Q. B. 213; 35 L. J., M. C. 154; 12 Jur., N. S. 520.

**Extra-Parochial Places or Hamlets.**—The 25 & 26 Vict. c. 61, s. 2, does not subject places

formerly extra-parochial parishes to the common-law liability to indictment for non-repair of highways. It only subjects them to the operation of that act as highway parishes liable to be put into a highway district. *Reg. v. Central Wingland*, 2 Q. B. D. 349; 46 L. J., M. C. 282; 36 L. T. 798; 25 W. R. 876.

Though the inhabitants of a parish are liable, as of common right, to repair all highways therein, yet, where an indictment stated, that a way was an ancient common highway, and that a certain part, situate in an extra-parochial hamlet, was out of repair, and that the inhabitants of such hamlet ought to repair it:—Held, that such indictment was bad, as it did not allege that the inhabitants of the hamlet were immemorably bound to repair, nor that the hamlet did not form part of a larger district, the inhabitants of which were bound to repair; and it is doubtful whether the inhabitants of the hamlet would be liable to repair at common law, even if the indictment had contained the latter allegation. *Rees v. Kingsmore*, 3 D. & R. 398; 2 B. & C. 190.

A parish contained four townships, each of which had been accustomed from time immemorial to maintain its own highways. There was, from time immemorial, in one of the townships a hamlet, the owners and occupiers in which had never in the memory of man paid highway rates, nor done team work, nor paid any composition in lieu thereof. There were now no public roads in the hamlet which could be repaired by it:—Held, that these circumstances were insufficient by themselves to establish a custom exempting the occupiers in the hamlet from contribution to the repair of highways without its limits. *Reg. v. Rollett*, 10 L. R., Q. B. 469; 44 L. J., M. C. 190; 24 W. R. 26; *S. C.*, nom. *Rollett v. Corringham (Overseers)*, 32 L. T. 769.

**Townships and other Districts.**—[The *prima facie* liability to repair roads attaches to a parish only, and not to any township, or other district, although it is no part of any parish. *Reg. v. Midville*, 3 G. & D. 522; 4 Q. B. 240.]

— **Exemption by Statute—New Roads.**—[If the inhabitants of a township bound by prescription to repair are expressly exempted by an act of parliament from repairing new roads to be made within the township, the duty falls on the rest of the parish. *Rees v. Sheffield*, 2 T. R. 106.]

— **When other Persons specially Liable.**—[By a navigation act the proprietors of the navigation were required to keep a road in repair, and were declared to be liable to indictment if it was out of repair:—Held, that this enactment did not relieve the township from their common-law liability to repair the road. *Reg. v. Brightside Bierlow*, 13 Q. B. 933; 4 New Sess. Cas. 47; 19 L. J., M. C. 50; 14 Jur. 174.]

**Highways Created by Statute—Turnpike Roads becoming Main Roads.**—[The Highways and Locomotives Amendment Act, 1878 (41 & 42 Vict. c. 77), by s. 13 enacts that any road which has "between the 31st of December, 1870, and the date of this act ceased to be a turnpike road, and any road which, being at the time of the passing of this act a turnpike road, may after-

wards cease to be such, shall be deemed to be a main road; and one-half of the expenses incurred from and after the 29th of September, 1878, by the highway authority in the maintenance of such road shall as to every part thereof which is within the limits of any highway area, be paid to the highway authority of such area by the county authority of the county in which such road is situate out of the county rate." The corporation of the borough of Rochdale was the highway authority of the Rochdale highway area. Under ss. 47–50 of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), the obligation to repair all public highways within the area of the "town" was imposed upon the corporation, and the turnpike trustees were forbidden to collect any toll or lay out any money on any road within that area. By a local act in 1872 the boundaries of the borough were enlarged and all the provisions of the acts relating to the "town" were made applicable to the enlarged area of the borough. The effect was that further portions of turnpike roads were for the first time brought within the area of the borough and within the operation of the Towns Improvement Clauses Act, 1847:—Held, that these further portions being only parts of turnpike roads, had not ceased to be "turnpike roads" and were not to be deemed to be "main roads," within s. 13 of the Highways and Locomotives Amendment Act, 1878; and that the county authority were not liable to pay half the expenses of their maintenance. *Lancaster (Justices) v. Rochdale (Mayor)*, 8 App. Cas. 494; 53 L. J., M. C. 5; 49 L. T. 368; 32 W. R. 65; 48 J. P. 20—H. L. Reversing 8 Q. B. D. 12; 51 L. J., M. C. 1; 45 L. T. 425; 30 W. R. 130; 46 J. P. 485—C. A.]

The Highways and Locomotives Amendment Act, 1878, s. 13, provides for the maintenance of roads which have since the 31st of December, 1870, ceased to be turnpike roads. A provision in turnpike acts coming into operation before the 31st of December, 1870, that turnpike trustees shall not spend money or levy toll upon certain portions of turnpike roads does not prevent such portions of the roads from being still turnpike roads on the 31st of December, 1870, within the meaning of s. 13 of the Highways and Locomotives Amendment Act, 1878. An agreement under the Local Government Act, 1858 (21 & 22 Vict. c. 98), s. 41, made before the 31st of December, 1870, between turnpike trustees and a corporation, under which the turnpikes upon certain portions of turnpike roads were removed, and the repair of such portions was undertaken by the corporation, does not operate to make such portions cease to be part of a turnpike road, and therefore these portions also come under the operation of the Highways and Locomotives Amendment Act, 1878, s. 13. *West Riding Justices v. Reg.*, 8 App. Cas. 781; 53 L. J., M. C. 41; 32 W. R. 259—H. L.]

— **Highways within a Town.**—[The 1 & 2 Vict. c. ii., for better paving the town of M., by s. 23 required the commissioners to repair all or any streets which had hitherto been dealt with under the act. The limits of the act were not defined. In pursuance of 25 & 26 Vict. c. 61, s. 7. the county was divided into highway districts, one of which included that part of the parish of M. "not within the town of M." Since 1862, certain highways in the parish of M. had been

lighted by the commissioners; before they were so lighted they were not within the town. Upon complaint against the highway district board:—Held, that the highway was within the town if there was a continuous row of houses so as to form a congregation of human habitations, and that the fact of lighting the highways was not conclusive as to their being in the town. *Milton-next-Sittingbourne (Commissioners) v. Faversham Highway Board*, 10 B. & S. 548.

— **Street not a Highway—Wrong Decision of Commissioners—Lapse of Time.**—The commissioners appointed in pursuance of the South Wales Turnpike Act, 1844 (by which act, also, the roads of the county of Glamorganshire were vested in the defendant board), directed that a certain road, situated within the borough of S., should be continued as a turnpike road, and in 1845 a toll-gate was erected on it, at which tolls have been collected up to the present time. In the year 1850 a provisional order was made, by which the Public Health Act, 1848, was applied to the borough of S., and a local board of health for the borough was appointed. By the 68th section of that act it is provided that all present and future streets, being highways without any district, shall vest in and be under the management of the local board of health, and that board is directed to repair these roads. By 15 & 16 Vict. c. 42, s. 13, it is declared that the word "highway" in the above section shall mean "any highway repairable by the inhabitants at large."—Held, that though the road in question was in fact a street, it was not a "highway repairable by the inhabitants at large," and therefore had not become vested in the local board of health, but had remained vested in and subject to the powers of the defendant board. *Nutter v. Acreington Local Board* (4 Q. B. D. 375) distinguished. The commissioners having done certain acts more than thirty years before, which had ever since been acted on, the court refused to review their decision, though it appeared wrong. *Swansea Improvement Company v. County Roads Board (Glamorganshire)*, 41 L. T. 583.

— **Non-Compliance with Regulations—Effect of.**—By a local act, passed in 1823, which was to be in force for twenty-one years, and the preamble of which stated that making and maintaining a turnpike road would be of advantage to the public, trustees were appointed, who were enabled to make the turnpike road, and required to erect sufficient fences where it passed through private lands. The act did not expressly declare that the road should be a highway, but it enabled all persons to use it on payment of toll. Part of the turnpike road was formed upon an existing road, which had been made under an inclosure act, but which had never been declared to be completed, as provided by 41 Geo. 3, c. 109, s. 9. The turnpike road was completed and opened to the public in 1833, and had for fourteen or fifteen years since that time been used by the public. A coach had at one time travelled over it. Part of the road passed through a parish, and was out of repair; no repairs had ever been done upon it by the parish. While the turnpike act continued in force, an indictment was preferred and found against the parish for non-repair:—Held, that at all events, during that time, the road was a common Queen's high-

way; and that the want of compliance with the provisions of 41 Geo. 3, c. 109, s. 9, did not prevent it from having all the incidents of a common highway, when adopted and used as such by the turnpike trustees. *Reg. v. Lordsmere*, 15 Q. B. 689; 4 New Sess. Cas. 208; 19 L. J., M. C. 215; 15 Jur. 82.

— **Expiration of Local Act.**—Under a local act, passed in 1827, and which was to be in force for twenty-one years, enabling commissioners to make and maintain a public highway from W. to N., the road was made only from N. to L., where it joined a private road. The local act was repealed in 1844. During the existence of the act, the part so made was treated as a highway repairable by the parish; and after the repeal of the act, the public continued to use it as before; and although portions of it were not kept in sufficient repair, rates for the repair of it had been made by the parish:—Held, that there was evidence from which the sessions might find, that after the expiration of the local act the road became a highway compulsorily repairable by the parish. *Reg. v. Thomas*, 7 El. & Bl. 399; 3 Jur., N. S. 713.

— **Contribution to Repair out of Highway Rate.**—An act of parliament authorized trustees to establish a ferry and make certain highways in connexion therewith. The trustees were also empowered to take tolls, out of the proceeds of which the ferry and roads were to be maintained. No limit of time was specified by the act for the expiration of the trust. The act also provided that, in case the works thereby authorized should not be executed within the space of ten years all the powers and authorities thereby given should cease and determine, save only as to so much of the work as should have been completed within that time. The trustees established the ferry and made all the roads specified in the act but one. The funds arising from the tolls becoming insufficient for the repair and maintenance of the roads so made, an application was made by the trustees to justices for an order for contribution to the repair of one of the roads so made, out of the highway rate under 4 & 5 Vict. c. 59, s. 1:—Held, that the trust created by the act was a turnpike trust within the meaning of 4 & 5 Vict. c. 59; and, secondly, that, inasmuch as the act merely authorized and did not compel the making of the roads thereby specified, and contemplated that all the works might not be executed, the construction of the whole system of roads authorized to be made was not a condition precedent to the roads that were made becoming highways, and consequently that an order of contribution to the repair of the road in question might be made under 4 & 5 Vict. c. 59, s. 1. *Rea v. Cumberworth (infra)* overruled. *Reg. v. French*, 4 Q. B. D. 507; 48 L. J., M. C. 175; 41 L. T. 63—C. A.

— **Necessity of Completing whole Road.**—Where, by an act, trustees were authorized to make a road from one point to another, the making of the entire road is a condition precedent to any part becoming a highway repairable by the public; trustees empowered by act to make a road from A. to B. (being in length twelve miles) had completed eleven miles and a half of such road to a point where it intersected a public

highway :—Held, that the district in which the part so completed lay was not bound to repair it. *Reg. v. Cumberworth*, 3 B. & A. 108.

So, where trustees under a turnpike act are empowered to make a road from A. to B., and a branch from that road to C., the public are not compellable to repair the main road, though complete in its whole extent, till the branch is finished. *Reg. v. Cumberworth*, 4 A. & E. 731; 1 N. & P. 197; 2 H. & W. 439.

Where, by an act, trustees are authorized to make a main line of road from one point to another, and a portion only of the road is completed, the district through which the part completed is situate is not bound to repair it, although made by the trustees, and used by the public and repaired by the district for upwards of thirty years, and although it is of great utility to the public. *Reg. v. Edge Lane*, 6 N. & M. 81; 4 A. & E. 723; 1 H. & W. 737.

A new road had been made by virtue of an act of parliament, and traversed the highway; by the act it was enacted, that the new road should be completed, and that the lands constituting the former road (unless leading over some moor or waste ground, or to some village, town, or place to which the new road did not lead) should be vested in trustees and sold :—Held, that the trustees could not make a partial destruction of the road, and that, if the old road led to a single house, the same remained subject to the public right. *Wilkinson v. Bagshaw*, Peake's Add. Cas. 165.

— **Private Ways.**—A power in an act to continue private ways does not alter the liability of parties to repair them. *Anon.*, Loft, 465.

## ii. On Inclosure.

**Owners Adjoining New Road.**—Where the commissioners of a turnpike road directed a public road across open common fields, inclosed and divided by a private act, to be made, and then allotted the land :—Held, that one, whose lot adjoined to this open road, and who had inclosed it, was not bound to repair it. *Reg. v. Flecknow*, 1 Burr. 461; 2 Ld. Ken. 261.

**Liability of Occupier—Ratione Clausuræ.**—The liability to repair a highway ratione clausuræ is in the occupier of the lands inclosed, not in the owner as owner. *Reg. v. Ramsden*, El., Bl. & El. 949; 27 L. J., M. C. 296; 5 Jur., N. S. 169.

Such liability, however, does not accrue where either the highway is not immemorial, or where the adjoining land inclosed has not, before the inclosure, been used for passage. *Id.*

**Private Road.**—If the commissioners, under an inclosure act, set out a private road for the use of the inhabitants of nine parishes, directing the inhabitants of six of those parishes to keep it in repair, no indictment can be supported against the latter for not repairing, it not concerning the public. *Reg. v. Richards*, 8 T. R. 634.

A private road, set out under an inclosure award, may upon proof of sufficient user by the public before the passing of the Highway Act (5 & 6 Will. 4, c. 50), be deemed to be a highway which the parish or township is compellable to repair, though the award provides that such road is for ever thereafter to be kept in repair

by the owners or occupiers of the adjoining land. *Reg. v. Bradfield*, 9 L. R., Q. B. 552; 43 L. J., M. C. 155; 22 W. R. 693.

**Dedication to Public.**—An award under an inclosure act in 1816, set out certain public roads and private occupation roads. One of the occupation roads was a soft road, it had no gate at either end, and the public used it without any interference. On two occasions the inhabitants had repaired it by subscription :—Held, that there had been sufficient dedication and user to render the parish liable to repair, although they had never adopted the road. *Reg. v. Horley*, 8 L. T. 382; 11 W. R. 433.

In 1771 commissioners, under an inclosure act, were empowered to set out public and private roads, the former to be repaired by the township, the latter by such persons as the commissioners should direct. The public roads were to be sixty feet wide between the fences. The commissioners in their award described a road as private and eight yards wide; but in setting it out they left a space of sixty feet between the fences; and they directed both the public and private roads to be repaired by the township. The centre only of the sixty feet was ordinarily used as a carriage-road, and the township repaired it. The space said to be encroached upon was at the side of this road; and there was a diversity of evidence as to the use made of this space by the public, and its condition since the time of the award :—Held, that the commissioners had exceeded their authority in awarding that private roads should be repaired by the township; but that on the whole of this evidence it was a proper question for the jury whether or not the road in question, though originally intended to be private, had been dedicated to and adopted by the public. *Reg. v. Wright*, 3 B. & Ad. 681.

**Declaration by Justices.**—Under 41 Geo. 3, c. 109, s. 9, a road continued, as well as a road newly made, under the award of commissioners of inclosure, must be declared by justices in special sessions to be fully completed and repaired, before the inhabitants of the district are liable to repair. *Reg. v. Hatfield*, 4 A. & E. 156.

**Alteration of Old Road.**—By an inclosure act, incorporating 41 Geo. 3, c. 109, the commissioners for inclosing certain common lands were authorized to stop up, divert, or alter any public ways over the waste, with the concurrence of two justices. They were also empowered to set out new ways, which, when certified by two justices to be complete, were to be repaired by the parish. Before the inclosure acts, a private bridle-way led across a common. There was no definite track where the land lay open. The commissioners ordered the common to be closed, and set out a road thirty feet wide, with the same termini and in the same line as the old bridle-way, and in their award directed that it should be a public bridle-way, and a private carriage road for certain persons, who should keep it in repair. The road was set out accordingly. On the trial of an indictment against the parish for not keeping it in repair, no order or certificate of justices was proved :—Held, that the old public way was never effectually stopped; that the defined road set out was, in effect, the same way; and that the parish was still liable to repair it as a bridle-road, and

was not exonerated by the fact that it was now set out as a private carriage road also. *Reg. v. Cricklade (St. Sampson)*, 14 Q. B. 735; 14 Jur. 690.

**Reservation of Mines to Lord of Manor—Effect upon Assignees.**—Commissioners, acting under the powers conferred on them by a local inclosure act for inclosing commons, set out public highways over the land, and directed that they should be maintained by the inhabitants and occupiers of the township in which they were situated, and that it should be lawful for all persons to use the same. The act reserved to the lord of the manor, his successors and assigns, in the widest terms, all rights belonging to the manor, and all mines, minerals, and quarries under the commons, with power to do every act necessary for the draining, winning, and working such mines, minerals, and quarries, as fully and freely as he or they could have had, held, used, or enjoyed the same in case the act had not been made, without paying any damages or making any satisfaction for so doing. The assignees of the lord of the manor worked the mines so as to injure one of the roads set out by the commissioners. In an action against them by the local board, on whom the duty of repairing the road fell, to recover the expense of doing so:—Held, that the reservation to the lord of the manor must be taken to be subject to the public right created by the statute, and did not protect the assignees from liability. *Benfieldside Local Board v. Consett Iron Company*, 3 Ex. D. 54; 47 L. J., Ex. 491; 38 L. T. 530; 26 W. R. 114.

### iii. Persons Liable Ratione Tenuræ.

**Nature of Liability—Immemorial Usage.**—An indictment for non-repair of a road on a liability ratione tenuræ cannot be sustained, where the tenement on which the liability is charged originated within time of legal memory. *Res v. Hayman, M. & M.* 401.

**—Evidence of Prescription.**—Indictment for not repairing a highway, alleging the defendant's liability ratione tenuræ. A special verdict found that the defendant's land adjoined the sea; that anciently a highway went over this land, and that his predecessors had repaired it; that within living memory the sea encroached, and that the ancient highway was covered by the sea; that his predecessors had, from time to time, gradually removed the ancient highway as the sea encroached, and appropriated other parts of the estate for the site of a highway, so as to keep a highway along the sea-coast, and that they had always repaired such highway; that the highway mentioned in the indictment passed over a different part of the estate from that formerly occupied by any part of the ancient road; that the sea had, shortly before the finding of the indictment, made an encroachment on and washed away part of the highway alleged to be out of repair, and washed away the earth, so that the residue of the road was too narrow for passage, and was made to stand at the edge of a precipitous bank:—Held, that the defendant was entitled to judgment. *Reg. v. Bamber, D. & M.* 367; 5 Q. B. 279; 13 L. J., M. C. 13; 8 Jur. 309.

Upon the trial of an indictment for not repairing a highway, which it is alleged the defendant

is bound to repair ratione tenuræ, an award, made under a submission by a former tenant for years of the premises, can neither be received as an adjudication, the tenant having no authority to bind the rights of his landlord, nor as evidence of reputation, being post litem motam. *Res v. Cotton*, 3 Camp. 444.

Evidence of reputation is inadmissible to shew a liability in the occupiers of land to repair a road ratione tenuræ. *Reg. v. Wavertree*, 2 M. & Rob. 353.

A defendant was indicted for non-repair of a highway, which it was alleged he was liable to repair ratione tenuræ. Evidence was given of the conviction of a former owner and occupier of the lands in respect of which the liability was said to arise, for the non-repair of the same highway, shewing that he had pleaded guilty to a presentment against him alleging his liability to repair the highway. Repairs by occupiers of the same lands subsequently to this conviction were also proved; and evidence was given that the defendant purchased these lands after public notice of the liability to repair the highway, and that he was the owner and occupier of the same:—Held, that there was evidence to go to the jury of immemorial usage and liability ratione tenuræ. *Reg. v. Blakemore*, 2 Den. C. C. 410; 21 L. J., M. C. 60; 16 Jur. 154.

### iv. Owners or Occupiers generally.

**Public or Owner of Soil.**—Public highways are generally repairable by the public; an owner of land in the suburb of a town who allows the public to pass over his land, but who does not make a road at his own expense, nor propose to dedicate a highway to the public by notice under 5 & 6 Will. 4, c. 50, nor undertake to keep the road in repair for twelve months with a view of throwing the future care and expense of the highway on the surveyor and the general rate under the same act, is not liable to be compelled to sewer and pave the road as a street under the 69th section of the Public Health Act, 1848. *Healey v. Batley (Corporation)*, 19 L. R., Eq. 375; 44 L. J., Ch. 642.

**Of Streets in a Town—Adjoining Owner.**—In 1798, by a local act, trustees were appointed to repair, &c. the streets of a township, and to levy rates on the inhabitants, who on paying them were to be exempt from all other charges for paving, &c. the streets. In 1816, A. laid out a street on his land, which in 1819 became dedicated to the public by user. In 1823, by another local act, the former act was repealed, and trustees were appointed for similar purposes, as it was provided that all persons should be exonerated from statute duty and compositions and all liability for highway repairs, that surveyors should be appointed who were to be in the position of surveyors of highways, all costs to be paid by the trustees out of rates to be levied by them, and the trustees authorized to pave, &c. present and future streets, and when any new streets already or thereafter laid out and made were properly paved, &c., on application by the owners of adjoining houses to declare them public, whereupon they were to be public and repaired by the trustees, and where any streets then or thereafter set out on private property had been opened and used for three years, to cause them to be paved, &c., where-

upon they should be deemed public. In 1851, the Public Health Act, 1848, was applied to the township, and the local acts repealed as far as the liability of the surveyors, the powers of the trustees to pave, and liability of owners to reimburse them; and the local board having duly paved the street before mentioned, called on A. to contribute as an adjoining owner, under s. 69 of the last-mentioned act, which excepts highways defined by 15 & 16 Vict. c. 42, s. 13, to be highways repairable by the inhabitants at large. Rates had been paid in respect of the premises under the local acts, but the street had never been paved, &c., never been dedicated under 5 & 6 Will. 4, c. 50, and no steps taken by the trustees or the local board to make it public:—Held, that the first local act did not prevent a dedication to the public, that the second only applied to streets then in course of construction or afterwards constructed, and that therefore the street was a highway within the exception in s. 69 of the Public Health Act, 1848, and A. not liable. *Hirst v. Halifax Local Board*, 6 L. R., Q. B. 181; 40 L. J., M. C. 43; 25 L. T. 28; 19 W. R. 279.

— **Frontagers.**—By a Birkenhead local act of 1838, commissioners are required to cause all such parts of the streets, ways or places within the township, not being public or common highways, which are now in the estimation of the commissioners fully built upon, but are sufficiently paved or put in good condition, and all such streets, ways or places as are now making or may hereafter be made within the township, although not fully built upon, to be made, paved and cleansed, as to the commissioners shall seem necessary; the expenses to be paid by the frontagers. S. occupied a house in a street formed about seventeen years back, and ever since used by the public:—Held, that he was liable to contribute to the making and sewerage of this street lately resolved upon by the commissioners. *Birkenhead Improvement Commissioners v. Sanson*, 34 L. T. 175.

— **Liability on Removal of Encroachments.**—If there has been an encroachment on a highway, and a person removes it, and repairs that part of the highway which was injured by the encroachment once, and then leaves it to the trustees or parish to repair in future, he will not be liable in future. *Rea v. Skinner*, 5 Esp. 219.

But if the proprietor of the adjoining land has for any length of time repaired, it is evidence of his liability, unless he gives positive evidence of encroachment. *Id.*

— **Under Special Agreement.**—A highway board agreed with a gas company that if the highway board would give the gas company a licence to open a highway in their jurisdiction, the gas company should make good the surface of the road, and would pay to the highway board 1s. per yard of the highway so broken up:—Held, that the contract was valid; for that the agreement of the highway board to allow the gas company to interfere with the surface of the road was a good consideration, and the contract was not illegal and did not necessarily contemplate the creation of a nuisance by the gas company. *Edgware Highway Board v. Harrow District Gas Company*, 10 L. R., Q. B. 92; 44 L. J., Q. B. 1; 31 L. T. 402.

— **Under Particular Statutes—Transfer of Liability.**—Where the burden of repairing a highway is transferred, by a public act of parliament, from the parish to other persons, if the parish is indicted for not repairing this highway, there is no occasion for a special plea stating who are bound to repair it, but the exemption may be taken advantage of under the general issue of not guilty. *Rea v. St. George, Hanover Square*, 3 Camp. 222.

— **When Township still Liable.**—By a navigation act, the proprietors of the navigation were required to keep a road in repair, and were declared to be liable to indictment if it was out of repair:—Held, that this enactment did not relieve the township from their common-law liability to repair the road. *Reg. v. Brightside Bierlow*, 13 Q. B. 933; 4 New Sess. Cas. 47; 19 L. J., M. C. 50; 14 Jur. 174.

— **Proceedings to Enforce—Validity.**—A navigation company, holding lands partly occupied as a wharf, were directed by statute to uphold and repair a road between certain points of the navigation; it was enacted, that they should be liable to indictment for any default in so doing; and they were empowered to take tolls for goods carried along the line of navigation (over and above lock dues which were payable to them), and were required to apply such tolls to the making and repairing of the road. By a subsequent act, a canal company (whose works would interfere with the revenue of the navigation company) was required to purchase the navigation, and the navigation company's lands, and all rights thereto belonging (including the right to the tolls to be applied towards the repair of the road), and it was enacted, that the canal company should for ever after repair the road, and should be liable to indictment for non-repair, and should indemnify the navigation company from the maintenance of the road, and from indictment for non-repair; the conveyance of the premises to be subject to such condition, with power of re-entry by the navigation company in default of compliance. The canal company purchased the lands and navigation, and took a conveyance according to the statute:—Held, first, that a count, stating these facts, and that the canal company, by reason of the premises, and by force of the statute, became liable to repair (averring non-repair), was sufficient to charge the company. *Reg. v. Sheffield Canal Company*, 13 Q. B. 913; 4 New Sess. Cas. 25; 19 L. J., M. C. 44; 14 Jur. 170.

Held, secondly, that the company was properly charged by such count with breach of an obligation to repair, and that it was not requisite to charge them specifically with disobedience. *Id.*

Held, thirdly, that a count, stating the road to have been made under the first-mentioned act, and alleging that the company, under and by virtue of the last-mentioned act, ought to have repaired, was not too general, both statutes being public. *Id.*

But that a count merely stating the existence and non-repair of the road, and that the company, by reason of the then tenure of certain lands and tenements in the parishes, ought to have repaired, was not maintainable. *Id.*

Held, fourthly, that the company was rightly charged with liability to repair generally, and

not merely to the extent of the tolls, though in fact the tolls received were inadequate to the cost of repair; and this whether the company had or had not other adequate sources of revenue. *Ib.*

**In the Case of Railway Companies.]—See RAILWAYS.**

#### v. Jurisdiction to Determine.

**Order of Justices—Conclusiveness of.]—**Justices have jurisdiction under 25 & 26 Vict. c. 61, s. 18, to order a highway board to repair a highway if the waywarden of the parish denies the fact that such road is a highway: and although the denial, if not made *bonâ fide*, will not oust their jurisdiction if they are satisfied that the road is really a highway, yet their decision that the denial is not made *bonâ fide* is not conclusive, and may be reviewed by the court. *Reg. v. Odell*, 21 L. T. 556.

An order of magistrates under 34 Geo. 3, c. 64, for dividing a road lying partly in one parish and partly in another by a transverse line, for the purpose of repair, such order pursuing the form given by that statute, is conclusive as to the liability of each parish to repair the portions of road allotted to them; and it is not open to either parish, on an indictment for the non-repair of the portion so allotted, to impeach the jurisdiction of the magistrates by producing evidence to prove that no part of the road ever was within such parish. *Reg. v. Hickling*, 7 Q. B. 880; 2 New Sess. Cas. 117; 14 L. J., M. C. 177; 9 Jur. 1075.

Where there was no evidence that the boundary of two hamlets passed through the middle of two public roads, the roads cannot be divided by a transverse line by order of justices, under 5 & 6 Will. 4, c. 50, s. 58. *Reg. v. Perkins*, 14 Q. B. 229; 19 L. J., M. C. 105; 14 Jur. 362.

The proviso of s. 58 does not apply to cases in which there is a divided common-law liability to repair, but to cases of a liability *ratione tenuræ* or *clausuræ*. *Ib.*

**—Appeals against Orders.]—**A complaint having been made to justices that certain roads alleged to be highways under the jurisdiction of a highway board were out of repair, a summons was issued against such board. Upon the hearing, a land surveyor was appointed to view and report on the state of the roads in question. The report was duly made, and the justices, upon the evidence and admissions before them, ordered the highway board to do the repairs. The highway board neglected to obey this order; and the justices appointed such land surveyor to put the highway in repair, and ordered the board to pay the expenses. At several hearings before the justices, the highway board never denied that they were liable to repair the roads in question. The board appealed to quarter sessions against the order upon them for the expenses of repairing the roads. The following were the grounds of appeal:—"1. That the said justices had no jurisdiction to make the said order. 2. That the said order is contrary to law. 3. That the said order is contrary to the evidence. 4. That the justices wrongfully admitted evidence of witnesses other than the person appointed by them under s. 18 of 25 & 26 Vict. c. 61. 5. That at the time of the making of the said order the said

highways had been put into a state of complete and effectual repair. 6. That the sum mentioned in the said order to be spent in putting the said roads into repair is excessive. 7. That the said highway board was and is not liable to repair the said highways, and that the liability to repair the said highways was at all the hearings before the said justices recited in the said order, and also at the time of the hearing when the said order was made, and at the time of the making thereof, disputed." Upon the appeal it was contended on behalf of the board that the roads in question were not highways, and the order was quashed on that ground:—Held, that the highway board were entitled to appeal to quarter sessions against the order, but were not entitled on the appeal to raise the question whether the roads were highways—(1) because they were estopped by their admissions before the justices; (2) because their grounds of appeal gave no notice that the point would be taken; and (3) because the question was not open to them when the order appealed against was made. *Illingworth v. Bulmer East Highway Board*, 52 L. J., Q. B. 680; 48 J. P. 37.

Held, also, that the quarter sessions, by deciding the question, did not thereby necessarily decide that it was open to the highway board to raise it. *Ib.*

#### b. Obtaining of Materials.

**Right of Inhabitants to Take.]—**The right for the inhabitants of a township to take stones from the land of another person for the purpose of repairing the highways, is a profit à prendre, and cannot therefore be claimed by custom; neither can it be claimed by prescription, as inhabitants are incapable by that description of taking such an easement, unless under a grant which would incorporate them. *Constable v. Nicholson*, 14 C. B., N. S. 230; 32 L. J., C. P. 240; 11 W. R. 698.

**Trespass by Surveyor.]—**A surveyor cannot justify a trespass under a prescriptive right, or a custom, to take stones from the waste, whether adjoining the sea-shore between high and low water mark, or otherwise, for the purpose of repairing the highways of a parish. *Padwick v. Knight*, 7 Ex. 854; 22 L. J., Ex. 198.

**—Removal of Shingle.]—**A highway board is not entitled under 5 & 6 Will. 4, c. 50, ss. 51, 52, to remove shingle for the repair of the highways from below high-water mark, so as to cause increased danger of encroachment by the sea. *Pitts v. Kingsbridge Highway Board*, 25 L. T. 195; 19 W. R. 884.

A special custom to take shingle from the beach above high-water mark for the repairing of the highways of the parish, is bad as to such portion of the beach as is private property, being a custom of a profit à prendre in another man's land. *Ib.*

**Licence from Magistrates.]—**A licence may be granted to get materials for the repair of the highways under 5 & 6 Will. 4, c. 50, s. 54, although the materials when got must be carried away by an "avenue to a house," the exception of such an avenue (*inter alia*) in the section referring only to the digging or getting of the materials, not to the carrying of them away

when got. *Ramsden v. Yeates*, 6 Q. B. D. 583; 50 L. J., M. C. 135; 44 L. T. 612; 29 W. R. 628; 45 J. P. 538.

The licence granted by justices to the surveyor to get materials from inclosed lands for the repair of the highways, in accordance with s. 54 of 5 & 6 Will. 4, c. 50, is limited to the necessities of that particular occasion in respect of which the application for the licence is made. *Manvers (Earl) v. Bartholomew*, 4 Q. B. D. 5; 48 L. J., M. C. 3; 39 L. T. 327; 27 W. R. 167.

Justices in special sessions, under 5 & 6 Will. 4, c. 50, s. 54, granted in 1866 to the surveyor of highways a licence to take materials for the repairs of the highways from lands in the parish of which plaintiffs were the owner and occupier respectively. Materials had been got under that licence down to 1877, when the plaintiffs gave notice to the present surveyor not to get any more. The defendant continued to do so nevertheless, and the plaintiffs brought an action of trespass against him:—Held, that the defendant had no right to enter upon the land, inasmuch as the licence granted by the justices only extended to the necessities of the particular occasion in respect of which it was granted. *Id.*

— **Right to Compensation.**—Under the Highway Act (5 & 6 Will. 4, c. 50), s. 51, justices are entitled to grant the surveyor of highways a licence to gather stones upon inclosed land within the parish for the repair of its highways, without making any compensation to the owner for the value of such stones. *Alresford Rural Sanitary Authority v. Scott*, 7 Q. B. D. 210; 50 L. J., M. C. 103; 45 L. T. 73; 29 W. R. 741; 45 J. P. 619.

— **Sufficiency of Amends.**—Surveyors having broken a new way over the plaintiff's land, in order to carry such materials for repair, in a case where an old, but circuitous, road existed before, and having, after the damage done, and after an action brought against them, paid money into court by way of amends:—Held, under 13 Geo. 3, c. 78, s. 27, that the sufficiency of such amends could not be questioned at nisi prius, the statute having referred the quantum of amends, if not agreed upon, to the decision of justices of the peace. *Boyfield v. Porter*, 13 East, 200.

The amount of satisfaction can only be ascertained by the justices at a special session. *Peters v. Clarkson*, 7 M. & G. 548; 8 Scott, N. R. 384; 1 New Sess. Cas. 519; 18 L. J., M. C. 153; 8 Jur. 648.

— **Contract for Materials.**—A highway board contracted with the plaintiff for the supply of materials to repair, during 1866, the roads in one of the parishes in their district. On 24th of March, 1866, the parishioners passed a resolution adopting the Local Government Act, 1858. The board continued to repair the roads up to the 26th July with materials supplied by the plaintiff, who brought an action to recover their value:—Held, that he was, under 25 & 26 Vict. c. 61, s. 41, entitled to recover. *Driver v. Kingston Highway Board*, 24 L. T. 480.

— **Working of Gravel Pits.**—By a private act passed in 1764 for the purpose of extinguishing the right of common over the commonable lands

in a manor and parish, of which lands S. was then in possession as lessee of the lord of the manor, it was enacted that the surveyors of highways of the parish might at all times thereafter cut, dig and carry away any quantity of gravel for the repair of roads within the parish from any pit or pits then in the possession of S., without payment, and the surveyors were thereby required to fence in the pits, and to repair the fences as occasion should require. These lands included a field of nine acres, in which one of the pits was situated. The field having become vested in the plaintiff, he sought to restrain the surveyors from extending the pit laterally so as to destroy the surface:—Held, that the right conferred by the act was to work the gravel in the ordinary manner of working a gravel pit, and that consequently the surveyors were entitled to extend the area of the pits, although the surface was thereby destroyed. *Ellis v. Bromley Local Board*, 45 L. J., Ch. 763; 35 L. T. 182; 24 W. R. 716.

Where gravel pits had been opened on rectory land, and gravel taken therefrom by the surveyors of the highways, for the purpose of their repair, without sloping down the ground as required by 13 Geo. 3, c. 78, s. 31:—Held, that neither the taking such gravel, and omitting to slope down, nor neglecting to compel the surveyors to slope down, could be considered waste on the part of the rector. *Huntley v. Russell*, 13 Q. B. 572; 18 L. J., Q. B. 239; 13 Jur. 837.

— **Extinguishment of Surveyor's Title.**—A gravel pit and a road to it were allotted to surveyors of highways under a local act. The surveyors continued to take gravel from the pit till 1837, but from that year till 1863 they took no steps whatever to assert their rights over either the road or the pit. In 1837, the tenant of the plaintiff's predecessor in title filled up part of the pit with rubbish, and from that year till 1863 took the surface of it into regular cultivation. In 1839, another such tenant ploughed up the remaining portion of the pit, and from that time till 1863 this portion of the pit and the whole of the road were taken into cultivation by the plaintiff's tenants. In 1844, one of the plaintiff's tenants, who was in the occupation of the greater portion of the surface of the pit, was elected surveyor of highways, and held the office for one year:—Held, first, that the plaintiff had by his tenants been in actual possession of the gravel pit and road from 1837 to 1863, so that the title of the surveyors to the soil and their right to dig gravel had become extinguished by twenty years' adverse possession. *Smith v. Stocks*, 38 L. J., Q. B. 306.

Held, secondly, that the fact that the tenant occupying a portion of the pit had been elected surveyor after possession had been taken made no difference, as the character of the previous possession was not altered during the tenant's year of office. *Id.*

— **Sale of Exhausted Gravel Pits—Pre-emption of Adjoining Owners.**—Where, under the Highway Act (5 & 6 Will. 4, c. 50), s. 48, an exhausted gravel pit is offered for sale to the owner of adjoining lands to whom the statute gives the right of pre-emption, it is the duty of the justices at the special sessions, in fixing the price to be paid by him, to consider his interests as well as those of the parish. They are, therefore, while in the

interests of the parish fixing a minimum below which the land shall not be sold, yet in his interests to fix a price fair for him to pay, and not to take as a standard of value a price which might be obtained on a sale by auction, or to some person who for some private or personal reasons would give an extraordinary price. *Reg. v. Drayton-in-Hales Highway Board*, 1 Q. B. D. 608; 45 L. J., M. C. 126; 35 L. T. 251; 24 W. R. 756.

— **Appeal to Sessions—When it Lies.**—An appeal to the quarter sessions, under s. 105, lies against the consent or determination of justices under s. 48. *Id.*

#### c. Fines for Non-Repair.

**Application of.**—The fine, which the court, under 5 & 6 Will. 4, c. 50, s. 96, may order to be imposed on defendants convicted on an indictment for the non-repair of a highway, to be applied pursuant to the directions of the statute, can only be applied towards the repair and amendment of such highway; and if, after conviction and order, and before payment of the fine, the defendants effectually repair the road, they are entitled to a stay of further proceedings on the order; and the prosecutors cannot claim the fine on behalf of third parties for repairs done previously to the conviction. *Reg. v. Barnard Castle*, 1 Q. B. 246; 5 Jur. 799.

— **Apportionment.**—If a parish, consisting of two districts which are bound to repair separately, is convicted for not repairing the road in one of the districts, the other district having no notice of the indictment, the court will consider it as being substantially the conviction of the one district; and, if the fine is levied on all the inhabitants of the other, will grant a special mandamus for the rate to be levied on the district bound to repair the indicted part of the road. *Re w. Twonshend*, 2 Dougl. 421.

Under 13 Geo. 3, c. 84, s. 33, the court might apportion the fine for non-repair of a road between the parish and the trustees of a turnpike, though the indictment was originally preferred at the assizes, and afterwards removed by certiorari.

**To whom Payable.**—Fines for not repairing roads *ratione tenuræ* were formerly payable to the surveyor of the parish highways. *Re w. Wingfield*, 1 W. Bl. 602.

**Verdict of Guilty—Mode of Repair.**—A verdict of guilty had been found against a parish upon an indictment for non-repair of a highway, and the parish afterwards neglected to repair with hard materials. An application was then made for the imposition of a fine for such neglect, when it appeared that the road never had been repaired with hard materials, probably not at all; that it was continued into an adjoining parish, which denied that it was a highway; and further, that it was so little used that the repair required would be a useless expense:—Held, that these facts were no answer to the application, and did not excuse the parish from the consequences of the verdict. *Reg. v. Clabby*, 3 C. L. R. 986; 24 L. J., Q. B. 223; 1 Jur., N. S. 710.

The court will not prescribe the particular mode of repair, but when it appears a certain

amount is necessary to put the highway in a substantial state of repair, a fine of that amount will be imposed. *Id.*

**Winter Months.**—The court will not make a rule for a fine for non-repair of a road absolute in the winter months; but will enlarge the rule till Easter term. *Reg. v. Walton*, 4 Jur. 195.

**Wrongful Levy—Application to Reimburse.**—An application under 13 Geo. 3, c. 78, s. 47, for a rate to reimburse two inhabitants of a parish on whom a fine for the non-repair of a highway had been levied, after a conviction upon an indictment against the parish for non-repair, ought to have been made within a reasonable time after such levy, before any material change of inhabitants. *Re w. Lancashire (Justices)*, 12 East, 366.

**In the Case of Surveyor.**—*See ante*, col. 685.

#### d. Liability for Damages.

**Parish.**—No action lies against a parish for damage resulting from an accident caused by the neglect to repair a highway within such parish. *Parsons v. St. Matthew's, Bethnal Green (Vestry)*, 3 L. R., C. P. 56; 37 L. J., C. P. 62; 17 L. T. 211; 16 W. R. 81.

**Surveyors.**—An action for a personal and pecuniary damage resulting from the non-repair of a county bridge will not lie against the county surveyor either at common law or under 43 Geo. 3, c. 59. *McKinnon v. Penon*, 9 Ex. 609; 23 L. J., M. C. 97; 18 Jur. 513—Ex. Ch.

No action lies against a surveyor for damage resulting from an accident caused by his neglect to repair the highway. *Young v. Davis*, 7 H. & N. 760; 31 L. J., Ex. 250; 8 Jur., N. S. 286; 6 L. T. 363; 10 W. R. 524. Affirmed on appeal, 2 H. & C. 177; 8 Jur., N. S. 79; 9 L. T. 145; 11 W. R. 735—Ex. Ch.

**Improvement Commissioners.**—The commissioners under 10 & 11 Vict. c. 34, Towns Improvement Clauses Act, 1847, are liable to an action, in their corporate capacity, at the suit of a person who has suffered damage from a highway, within the limits of their special act, being allowed by them to remain in a dangerous condition. *Hartnall v. Ryde Commissioners*, 4 B. & S. 361; 33 L. J., Q. B. 39; 10 Jur., N. S. 257; 11 W. R. 763.

**Local Boards.**—An action for personal injuries sustained by one of the public owing to the non-repair of a highway, does not lie against a local board of health. *Gibson v. Preston (Mayor, &c.)*, 5 L. R., Q. B. 218; 39 L. J., Q. B. 131; 22 L. T. 293; 18 W. R. 689; 10 B. & S. 942.

By 15 & 16 Vict. c. 42, s. 13, the term "highway" in the Public Health Act (11 & 12 Vict. c. 63), s. 68, by which highways are vested in the local board, shall mean "any highway repairable by the inhabitants at large":—Held, that the words "repairable by the inhabitants at large" are used in contradistinction to repairable by individuals *ratione tenuræ*. *Id.*

The municipality of B., incorporated under New South Wales Acts No. 13 of 1858 and No. 12 of 1867, and having thereunder the care, construction, and management of the roads and streets within their municipality, constructed therein a barrel drain into which

ran an open drain, the brickwork of which having broken away, and not having been repaired, a hole was caused, into which the plaintiff's horse fell. In an action claiming damages against the municipality (a) for negligence in constructing the street, (b) for negligence in keeping and maintaining the street, and not repairing the drain, gutter, or sewer in the said street (plea, the general issue), the chief justice directed the jury that the defendants under their act of incorporation were not liable for the result of any mere nonfeasance; that if they thought fit to construct a sewer, and they did the work in so negligent a manner as to bring about the accident, they were liable for that misfeasance; but if they constructed the sewer properly in the first instance and it became defective afterwards they were not bound to repair it; and further, that if the defective state in which the drain was arose from the operation of the weather, or wear and tear, it having been properly constructed originally, they were not liable. Verdict for defendants:—Held, on motion for a new trial, that as regards (b) there was misdirection. The barrel drain was not only made by the defendants, but the sole control and management of it were by the statute vested in them. By reason of their construction of that drain and their neglect to repair it, whereby, as an indirect but natural consequence, the dangerous hole was formed, which was left open and unfenced, they caused a nuisance in the highway for which, whatever their statutory obligation to repair may have been, they were liable to an indictment, and also to an action by the plaintiff who sustained direct and particular damage from their breach of duty. *Bathurst (Borough) v. Macpherson*, 4 App. Cas. 256; 48 L. J., P. C. 61—P. C.

A local board had vested in them, under the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 43, a sewer which ran under a highway, of which, by virtue of the act, they were surveyors. A grid or grating in the highway, used for the purpose of carrying the surface water from the road into the sewer, was allowed by the board to get out of repair, by reason of which a horse of the plaintiff was injured:—Held, that, whether the local board was liable or not, as surveyors of the highway, the grid must be taken to be part of the sewer, and they were liable, as owners of the sewer and grid, for their negligence in not keeping the latter in repair. *White v. Hindley Local Board of Health*, 10 L. R., Q. B. 219; 44 L. J., Q. B. 114; 32 L. T. 460; 23 W. R. 651.

— **Liability for Negligent Workmanship.**—A local board of health, which was both the highway authority and the sewer authority of the district, employed a contractor to construct a pipe-sewer under a highway within the district. The contractor in the laying the pipes dug a trench, which he afterwards filled in with earth, and the roadway was apparently made good. The work was done under the directions and to the satisfaction of the surveyor of the local board. Some months after it was finished, a subsidence of the soil in the trench took place without any assignable cause, leaving the road apparently sound. The plaintiff's horse, in consequence of the surface giving way, fell into the trench, and was injured:—Held, that there was evidence that the work of filling in the trench had been negligently and improperly done, and that the local board, either as the sewer or the highway

authority, or as both, was responsible. *Smith v. West Derby Local Board*, 3 C. P. D. 423; 47 L. J., C. P. 607; 38 L. T. 716; 27 W. R. 137—C. A.

**Occupier of House—Coal Shoot.**—A. was injured by the giving way of a grating in a public footway, which was used for a coal shoot and for letting light into the lower part of the premises adjoining. These premises were at the time of the accident under lease to B., who covenanted to repair and keep in repair all except the roofs, main walls and main timbers. At the time of the demise the grating was unsafe; but there was no evidence that the landlady had any knowledge of its unsafe state; and the jury found that no blame was attributable to her for not knowing it:—Held, that no action was maintainable against the landlady. *Gwynnell v. Eamer*, 10 L. R., C. P. 658; 32 L. T. 835.

At the time of the accident A. was not passing along the way, but was standing on the grating to talk with a person at the window above it:—Held, that he was not making an improper use of the grating. *Id.*

— **Structure Part of Highway.**—A row of houses stood a few feet from a raised causeway, the centre of which was a carriage road, the sides being foot pavement. The ground-floor of the houses was on a lower level than the causeway. There was a continuous structure, consisting of flagstones and gratings, from the row of houses to the foot pavement, with which it was on a level; an outer door of each house opened upon this structure; it had been dedicated to the public, and used by them as part of the highway for foot passengers. The carriage and foot roads on the causeway were repaired by the parish. The structure became in a bad state of repair, and, owing to this, R. fell through one of the gratings forming part of it, and was killed:—Held, in an action by his administrator against the lessee of the houses, that the structure was part of the highway, and that the parish was bound to repair it, and that, therefore, the action against the lessee was not maintainable. *Robbins v. Jones*, 33 L. J., C. P. 1; 10 Jur., N. S. 239; 9 L. T. 523; 12 W. R. 248; 15 C. B., N. S. 221.

— **Defective Lamp.**—The occupier of premises adjoining a highway is bound to keep them in such a state of repair that they shall not endanger passers by. The occupier does not discharge himself of this duty by employing a competent person to repair the premises. *Tarry v. Ashton*, 1 Q. B. D. 314; 45 L. J., Q. B. 260; 34 L. T. 97; 24 W. R. 581.

Therefore, where the defendant had a lamp and lamp iron projecting from his premises over the street, and had given orders to a competent contractor to repair it, but the contractor had done the work badly, by reason of which the lamp fell and injured the plaintiff:—Held, that the defendant was liable. *Id.*

#### e. Indictment for Non-Repair.

##### i. Generally.

**Exclusiveness of Remedy.**—The court will not entertain an application for a mandamus to repair a road, because the remedy is by in-

dictment. *Reg. v. Oxford and Witney Turnpike Roads (Trustees)*, 12 A. & E. 427; 4 P. & D. 154; 6 Jur. 216, n.

**Form of—Sufficiency of Allegations.**—It must be affirmatively stated that the road is within the district which is bound to repair it. *Res. v. Upton*, 6 C. & P. 133.

Stating a road to be out of repair, "from and through" a place, excludes the terminus. *Ib.*

An indictment charged that the defendants removed a culvert in the parish of S., opposite to a mill there, in a highway there, leading from S. to H.:—Held, on motion in arrest of judgment, that it sufficiently appeared that the culvert removed was in the parish of S. *Res. v. Knight*, 7 B. & C. 413; 1 M. & R. 217.

An indictment for not repairing one side of a road should state a liability to repair it to the middle. *Res. v. St. Pancras*, Peake, 219. And see *Res. v. Eardisland*, 2 Camp. 494.

An indictment against the parish of B. for not repairing a road leading from A. to B., is exclusive of B. and therefore bad; and it is not aided by a subsequent allegation that a certain part of the same highway, situate in B., is in decay. *Res. v. Gamlingay*, 3 T. R. 513; 1 Leach, C. C. 528.

An indictment charged that the inhabitants of the township of Bondgate in Auckland, Newgate in Auckland, and the borough of Auckland, in the parish of St. Andrew, Auckland, were immemorably liable to repair a highway in the town of Bishop Auckland, in the parish of St. Andrew, Auckland, and no consideration was laid:—Held bad, in arrest of judgment, as not shewing that the highway was in the defendant's district. *Res. v. Auckland (Bishop)*, 1 A. & E. 744; 1 M. & Rob. 286.

Held to be no objection that the inhabitants of the three townships were charged conjointly. *Ib.*

If a parish is indicted for the non-repair of a pack and prime way, and it is proved that the way is a carriage-way, this is a misdescription of the way. *Res. v. St. Weonard*, 6 C. & P. 582.

It is not necessary to state the termini; but if they are stated, they must be proved. *Ib.*

A road had been repaired by a parish, and persons on horseback had used it; but there was no evidence that any carriage had ever gone along the whole length of it:—Held, that the parish could not be convicted of non-repair of it on an indictment stating it to be a way for carriages; and that there should have been a count charging it to be a way for horses. *Res. v. St. Weonard*, 5 C. & P. 572.

An indictment stated, that there was a queen's highway for carriages, "leading from the town of A. in the county of B. towards and unto the village of E. in the same county," a part of which was out of repair. The part of the road charged to be out of repair was a portion of a lane called F. lane, and it was proved that, to go from the town of A. to the village of E. with a carriage, a person must go four miles along the C. turnpike road, then all along F. lane, and then across the W. turnpike road, and for a short distance go along a road which goes from the W. turnpike road to the village of E.:—Held, that the road was not misdescribed. *Reg. v. Steventon*, 1 C. & K. 55.

Indictment for non-repair of a highway within certain limits, charging a corporation with a

prescriptive liability to repair all common highways, within such limits, "excepting such as ought to be repaired according to the form of the several statutes in such case made," is bad, for want of shewing that the highway was not within any of the exceptions. *Res. v. Liverpool (Mayor)*, 3 East, 86.

A count, stating the defendant's liability to arise by virtue of an agreement with the owners of houses alongside of it, is also bad; for the parish, who are *prima facie* bound to the repair of all highways within their boundaries, cannot be discharged from such liability by an agreement with others. *Ib.*

Indictment stated that, from time whereof the memory of man is not to the contrary, there was a queen's common highway leading from T. to E.; that part of the same common highway was and yet is out of repair; and that the inhabitants of the parish ought to repair the same. On the trial, it appeared that the highway had been made within living memory:—Held, no variance; for that, in an indictment against a parish, it was not material whether the way was immemorial or not; and the antiquity of the road was not so averred in the indictment as to become an essential part of the description. *Reg. v. Turweston*, 16 Q. B. 109; 4 Cox, C. C. 349; 20 L. J., M. C. 46; 15 Jur. 650.

It appeared also that the way from T. to E. referred to in the indictment led from T. into the turnpike road from Buckingham to Brackley; then lay, for a short distance, along that road, and then branched off to E. This was the direct way between T. and E.:—Held, that the way was properly described as from T. to E. *Ib.*

Upon the trial of an indictment against the inhabitants of the township of H. for the non-repair of a highway, a prior judgment of quarter sessions upon a presentment by a justice under 13 Geo. 3, c. 78, for non-repair of the same highway by H. was put in. The presentment alleged that the highway was in H., and that H. was liable to repair it. It also appeared by the judgment that two of the inhabitants of H. had appeared, and pleaded guilty, and that a fine was imposed. The presentment did not state how the township was liable to repair:—Held, that although it might be bad for this reason on demurrer or error, yet that, having been submitted to by the defendants, they were exclusively bound by it. *Reg. v. Haughton*, 1 El. & Bl. 501; 6 Cox, C. C. 101; 22 L. J., M. C. 89; 17 Jur. 455.

An indictment against a township for the non-repair of a highway must aver that the road in question was a road which, but for the custom, would have been repaired by the parish. *Reg. v. Colling*, 2 Cox, C. C. 184.

Where, between the finding of an indictment for non-repair of a road and plea pleaded, the statute, upon which alone the indictment could be supported, was repealed, and afterwards the indictment was proceeded with and a conviction obtained, the court arrested the judgment. *Reg. v. Denton*, 16 Q. B. 832; 1 Dears. C. C. 3; 21 L. J., M. C. 207; 17 Jur. 453.

Indictment stated that a part of the highway, from W. to M., at a place called A., and extending thence to L. highway, was out of repair. The evidence was that the place mentioned as A. was in fact a place called B.:—Held, no material variance; the erroneous description relating to a terminus not of the road,

but only of the part out of repair. *Reg. v. Wacerton*, 2 Den. C. C. 340; 17 Q. B. 562; 21 L. J., M. C. 7; 16 Jur. 6.

Variances and misdescriptions in the indictment are the subject of amendment under 14 & 15 Vict. c. 100, s. 1. See *Reg. v. Sturge*, 3 El. & Bl. 734; 23 L. J., M. C. 172.

**Plea — Sufficiency of.**—To an indictment against a parish for non-repair of a highway lying within it, a plea that the inhabitants of another parish have repaired, and been used and accustomed to repair, and of right ought to have repaired, is ill, as it does not shew any consideration. *Rez v. St. Giles, Cambridge*, 5 M. & S. 260.

On an indictment against a parish for non-repair of a highway, it is not essential, in support of a plea, that the several townships in it have been accustomed from time immemorial to repair their own highways, to shew by direct affirmative evidence that there have been ancient highways in each of the townships. The existence and several repair of ancient highways in one township may be inferred from their existence and several repair in the other township. *Reg. v. Barnoldswick*, 3 G. & D. 545; 4 Q. B. 499; 12 L. J., M. C. 44.

But in a plea by the inhabitants of a county, that the inhabitants of a particular township have immemorially repaired the highway at the end of a county bridge, situate within the township, it is not necessary to state any consideration for such prescription. *Rez v. Yorkshire, W. R.*, 4 B. & A. 623.

So on indictment against the inhabitants of a parish for not repairing a road, a plea, that the inhabitants of a particular district within the parish have immemorially repaired all the roads within that district, of which the road indicted was one, is a good plea, although it does not state any consideration for the liability of the inhabitants of the district. *Rez v. Ecclesfield*, 1 B. & A. 348; 1 Stark. 393.

To an indictment against the inhabitants of a parish for non-repair of a highway within it, a plea, stating that the parish was immemorially divided into seven townships, the inhabitants of which respectively were immemorially bound to repair the highways within their respective townships; and that part of the highway indicted was within the township of G. B., and that the residue, &c., was within the township of L. B., and that the respective parts ought to be repaired by the inhabitants of the respective townships, is bad; without specifying what part of the highway lay within one township, and what part within the other. *Rez v. Bridekirk*, 11 East, 304. And see *Rez v. Tuunton*, 3 M. & S. 465.

In a plea by a parish to an indictment for the non-repair of a highway, they must shew, not merely that they are not liable, but who is liable, to repair it. *Rez v. Eastington*, 1 N. & P. 193; 5 A. & E. 765; 2 H. & W. 373.

**Replication.**—To an indictment for non-repair of a highway in parish A., it was pleaded that the parish of G. was bound from time immemorial to repair such highway, in consideration of levying and receiving rates in respect of certain lands of parish A., adjoining to such highway. Replication, that the agreement referred to in the plea was put an end to by notice:—Held, that the replication was a good

answer to the plea. *Reg. v. Ashby Folville*, 1 L. R., Q. B. 213; 35 L. J., M. C. 154; 12 Jur., N. S. 520.

## ii. Evidence of Liability.

**Agreement to Execute Repairs.**—Where township A. was liable by custom to repair the highways within it, and was indicted for non-repair, the defence set up was, that township B. was liable; and an agreement was produced, made between the owners of the soil of the two townships, in 1591, by which the owner of township B. agreed to repair the roads in township A.; and it was agreed that a lawyer should be elected to carry the agreement into effect; it was proved also, that township B. had repaired the road up to within a short time of the trial:—Held, that on such evidence it was not incumbent on the judge to leave it to the jury to presume that legal instruments had been executed, casting the liability on township B. *Rez v. Scarsbrook*, 1 N. & P. 582; 6 A. & E. 509; 1 W., W. & D. 246.

**Immemorial User.**—An indictment, describing the way as immemorial, is not supported by proof of a highway extinguished as such sixty years before by an inclosure act, but since used by the public, and repaired by the district charged. *Reg. v. Westmark (Tithing)*, 2 M. & Rob. 305.

On an indictment against a township for non-repair of a common and ancient highway, it was proved that the lane had always been used as a common highway, but it was admitted that the township had never repaired this particular highway, and that it had been repaired by private persons occasionally:—Held, that the highway being in use previously to 5 & 6 Will. 4, c. 50, s. 23, proof of repair by the township was not necessary to support a conviction. *Reg. v. Newbold*, 19 L. T. 656; 17 W. R. 295.

Where, in an indictment against a township for the non-repair of a road, the prescription stated and proved was, that its inhabitants had been immemorially used to repair all roads situate within it, which, but for such usage, would be repairable by the parish at large:—Held, that this placed the township in the situation of a parish, and that it was necessary for the defendants to prove with certainty, that some other persons were liable, in order to exonerate themselves from their liability to repair. *Rez v. Hatfield*, 4 B. & A. 75.

**Custom.**—To charge a township with liability by custom to repair a highway within it which would otherwise be repairable by the parish comprising such township, it is not necessary to prove that such highway has been hitherto repaired by such township. *Reg. v. Ardaley (Township)*, 3 Q. B. D. 255; 47 L. J., M. C. 65; 38 L. T. 71; 26 W. R. 405.

Without such proof a jury may infer the custom from other evidence; such as that the parish at large has never done any repairs, nor appointed surveyors, nor levied highway rates. *Id.*

An indictment against a township, for non-repair of a road, charged the township with a liability, by custom, to repair all common and public highways within it:—Held, that the custom so laid might exist; and that it need

not be confined to highways which, but for such custom, would be repairable by the parish. *Reg. v. Heage*, 1 G. & D. 548; 2 Q. B. 128; 6 Jur. 367.

**Plea of Guilty to former Indictment.**—On an indictment against a parish for non-repair of a highway, a plea of guilty to a former indictment against the same parish for non-repair of the same highway is conclusive evidence that it is a public way. *Rez v. Whitney*, 7 C. & P. 208.

**—As to Part of Highway.**—Indictment against a township for not repairing an ancient highway. On the trial a record of an indictment against an adjoining township for non-repair of a part of the same line of road, and to which that township had submitted, was received:—Held, that it was properly received as evidence that the whole highway was ancient. *Reg. v. Brightside Bierlow*, 13 Q. B. 933; 4 New Sess. Cas. 47; 19 L. J., M. C. 50; 14 Jur. 174.

**—Prior Judgment.**—Upon the trial of an indictment against the inhabitants of the township of H., for the non-repair of a highway, a prior judgment of quarter sessions, upon a presentment by a justice under 13 Geo. 3, c. 78, for non-repair of the same highway by H., was put in. The presentment alleged that the highway was in H., and that H. was liable to repair it. It also appeared by the judgment that two of the inhabitants of H. had appeared and pleaded guilty, and that a fine was imposed:—Held, conclusive evidence that the highway was in H., and that H. was liable to repair it. *Reg. v. Haughton*, 1 El. & Bl. 501; 6 Cox, C. C. 101; 22 L. J., M. C. 89; 17 Jur. 455.

The fact of the fine imposed by the sessions not being shewn to have been paid, did not prevent the judgment from acting as an estoppel, no fraud being imputed. *Ib.*

A recital in a private act (since repealed), that the road was in D., is at most only evidence, and that fact is not admissible against the estoppel. *Ib.*

**Admissibility limited by Indictment.**—Evidence that a parish did not put guard fences at the side of a road, is not receivable on an indictment which charges that the king's subjects could not pass as "they were wont to do," if no such fences existed before. *Rez v. Whitney*, *supra*.

**Disputing Order of Justices.**—An order of justices, determining the liability of certain parishes for the repair of a common highway, cannot be disputed on the indictment for non-repair by production of evidence to prove that no part of the road was within one of such parishes. *Reg. v. Hickling*, 7 Q. B. 88; 2 New Sess. Cas. 117; 14 L. J., M. C. 177; 9 Jur. 1075.

### iii. Orders of Justices.

**Directing an Indictment—Ministerial Duty.**—The 5 & 6 Will. 4, c. 50, s. 95, imposes a ministerial, and not a judicial, duty upon justices to direct an indictment to be preferred for non-repair of a highway, where the liability to repair is simply denied by the party summoned before them. *Reg. v. Surrey (Justices)*, 1 B. C. C. 70; 21 L. J., M. C. 195; 16 Jur. 641.

**—Validity of.**—An order made by such justices is good, although it subsequently appears that one of them is interested in the subject-matter of the order. *Ib.*

Where justices at special sessions make an order, directing an indictment to be preferred for non-repair of a highway, the order must state that the special sessions were held within the "division in which the highway was situate." *Reg. v. Martin*, D. & M. 386; 2 Q. B. 1037; 13 L. J., M. C. 457; 8 Jur. 36; *S. P.*, *Reg. v. Hickling*, 7 Q. B. 890; 15 L. J., M. C. 23.

**—Jurisdiction—Where Liability Denied.**—Under 5 & 6 Will. 4, c. 50, s. 95, if, on the hearing of a summons respecting the repair of a highway, the duty, liability, or obligation to repair is denied by the surveyor, the justices are bound to order an indictment to be preferred against the parish, and have no jurisdiction to inquire whether the highway is one which the parish is liable to repair. *Reg. v. Arnould*, 8 El. & Bl. 560; 27 L. J., M. C. 92; 4 Jur., N. S. 162.

Where the liability of a parish to repair a road has been denied, and an indictment preferred under 5 & 6 Will. 4, c. 50, s. 95, and a verdict of not guilty found, and a fresh information laid before justices, upon which they declined to order another indictment:—Held, that they were justified in refusing to order another indictment. *Bartlett, Ex parte*, 3 El. & Bl. 253; 30 L. J., M. C. 65; 6 Jur., N. S. 1196; 3 L. T. 316; 9 W. R. 54.

Where upon information and summons, under 5 & 6 Will. 4, c. 50, s. 94, a parish denies its liability to repair a road, upon the ground that it is not a highway, the justices, before directing an indictment, should hear evidence upon the question of highway or no highway, upon which question their jurisdiction depends. *Reg. v. Johnson*, 34 L. J., M. C. 85; 11 Jur., N. S. 467; *S. C.*, nom. *Reg. v. Askerton*, 11 L. T. 706; 13 W. R. 309.

Under 25 & 26 Vict. c. 61, s. 19, which enacts, that when on the hearing of a summons under s. 18, respecting the repair of any highway, the liability to repair is denied by the waywarden on behalf of his parish, the justices shall direct a bill of indictment to be preferred, at the next assizes or quarter sessions, against the inhabitants of the parish for the non-repair, the power to direct an indictment to be preferred does not arise where the liability to repair is denied on the ground alone, that the road is not a highway, and the liability is admitted, if the road is in fact a highway, and the denial of the road being a highway is made *bonâ fide*. *Reg. v. Farrer*, 10 Cox, C. C. 261; 1 L. R., Q. B. 558; 35 L. J., M. C. 210; 14 L. T. 515; 14 W. R. 777.

In order to give the justices such a power, the liability must be denied on some ground other than that the road is not a highway, such as that some one else is bound to repair. *Ib.*

The expression in s. 19, when the liability to repair is denied, is to bear the same construction as the expression, if the duty or obligation of such repairs is denied, in 5 & 6 Will. 4, c. 50, s. 95. *Ib.*

When on the hearing of a summons under 23 & 24 Vict. c. 68, South Wales Highway Act, s. 40, against the district surveyor for the non-repair of a highway in a parish, the liability to repair is disputed on behalf of the parish, the justices

have power to direct an indictment to be preferred under 5 & 6 Will. 4, c. 50, s. 95. *Reg. v. James*, 3 B. & S. 901; 32 L. J., M. C. 211.

— **Removal of Indictment by Certiorari.**—An indictment for non-repair of a highway preferred and found at the assizes by an order of justices, made under 5 & 6 Will. 4, c. 50, s. 95, may be removed by certiorari. *Reg. v. Sandon*, 3 El. & Bl. 547; 2 C. L. R. 1699; 23 L. J., M. C. 129; 18 Jur. 401.

#### iv. Trial.

**Practice.**—On the trial of an indictment for non-repair of a highway, counsel for the defendants not allowed to sum up. *Reg. v. Field*, 2 F. & F. 498.

Practice as to pleading by inhabitants of a township. *Reg. v. Stamhall*, 1 F. & F. 363.

— **Appearance.**—Where inhabitants of a parish are indicted for non-repair of a highway, and appear and plead not guilty by two surveyors, it is not competent to one only to appear and retract the plea of not guilty, and plead guilty; the other appearing and pleading by a clerk of his attorney. *Reg. v. Langley*, 8 Cox, C. C. 366; 2 F. & F. 170.

#### v. Costs.

**Jurisdiction to Order and Award.**—Where justices have directed an indictment against a parish, under 5 & 6 Will. 4, c. 50, s. 95, for non-repair of a highway, and the judge of assize directs payment of the costs out of the parish highway rate, he must ascertain the amount of costs, and order payment of the sum so ascertained. *Reg. v. Clark*, 5 Q. B. 887; D. & M. 687; 1 New Sess. Cas. 143; 13 L. J., M. C. 91; 8 Jur. 489.

Where the judge's order is only to pay the costs generally, the court cannot enforce such an order by mandamus. *Id.*

An order for the costs can only be made when the road is proved affirmatively to be a highway, and the court will not go into that question on affidavit. *Reg. v. Down Holland (Township)*, 2 New Sess. Cas. 177; 15 L. J., M. C. 25; 9 Jur. 1077.

— **Out of what Funds.**—A judge's order for costs of the prosecution of an indictment for non-repair of a highway, should state on the face of it out of what funds the costs are to be paid; and where it did not do so, the court set the order aside. *Reg. v. Watford*, 4 D. & L. 593; 1 B. C. Rep. 336; 11 Jur. 332.

A judge has no power to direct the costs of an indictment for non-repair of a road, preferred by the direction of justices, to be paid out of the highway rate, except where there is a highway, and the liability to repair it is in dispute. *Reg. v. Heanor*, 6 Q. B. 745; 1 New Sess. Cas. 460; 14 L. J., M. C. 38; 9 Jur. 105.

**Where Order directing Indictment Void.**—An order directing an indictment for non-repair of a road under 5 & 6 Will. 4, c. 50, ss. 94, 95, must shew on the face of it that it was made at a special session for the highways held within the division in which the road is situate. If it does not it is void, and an order for costs made

under s. 95, by the judge who tried the cause, will be set aside. *Reg. v. Hickling*, 7 Q. B. 890; 2 New Sess. Cas. 117; 15 L. J., M. C. 23.

**Where Indictment not Tried.**—If an indictment is preferred, and the defendants plead guilty, the judge will not direct the prosecutor's costs to be paid, as the indictment was not tried before him. *Reg. v. Vowchurch*, 2 C. & K. 393.

Upon an indictment for non-repair of a highway, preferred under 5 & 6 Will. 4, c. 50, s. 95, by an order of justices against the inhabitants of a parish, a judge of assize has power to make an order for the costs of the prosecution, although the defendants plead guilty, and there is no actual trial of the indictment. *Reg. v. Haslemere*, 3 B. & S. 813; 32 L. J., M. C. 30; 9 Jur., N. S. 573; 7 L. T. 382; 11 W. R. 115.

**When Jury Disagree.**—An indictment for non-repair of a highway came on to be tried at the assizes, when the jury was discharged without a verdict, they being unable to agree:—Held, that the judge could not direct the costs of such trial to be paid out of the highway rate. *Reg. v. Heytesbury*, 8 L. T. 315.

**When Indictment Defective.**—An order was made by justices, for an indictment to be preferred for the non-repair of a highway called Quaker-lane. Before the justices, it was sought to fix the defendants with liability to repair the highway as a cart and carriage-way. The indictment contained counts for a cart and carriage-way, and also for a pack and prime way. At the trial the jury found that it was not a cart and carriage-way, and the defendants admitted that it was a pack and prime way, and contended that it was not out of repair, and the jury found that as a pack and prime way it was not out of repair:—Held, that the prosecutor was not entitled to his costs under 4 & 5 Will. 4, c. 50, s. 95. *Reg. v. Cleckheaton*, 11 L. T. 305.

If, upon the trial of an indictment for the non-repair of a highway ordered by justices, it appears that the road indicted is not, the road set out in the order of justices, and the prosecution fails in consequence, the judge has no jurisdiction to certify for the costs. *Reg. v. Fifehead*, 3 Cox, C. C. 59.

**Discretion of Judge.**—A prosecutor obtained a summons under 5 & 6 Will. 4, c. 50, s. 94, calling upon the parish surveyors to shew cause why a highway should not be repaired. The surveyors denied the liability of the parish to repair, and the magistrates ordered an indictment against the inhabitants of the parish, which was preferred, and was tried as a traverse on the crown side of the assizes, and the defendants found guilty:—Held, that the prosecutor was entitled to an order to have his costs paid out of the highway rate, and that the statute as to this was imperative, and left no discretion whatever in the judge. *Reg. v. Yorkhill*, 9 C. & P. 218.

**Justices must have had Jurisdiction.**—To enable a judge before whom an indictment preferred by order of justices under 5 & 6 Will. 4, c. 50, s. 95, for non-repair of a highway, is tried, to make an order for the costs of "such prosecution" to be paid out of the rate under

that section, it is necessary that the prosecution be one which the justices had jurisdiction to order, and be the one which they did order. *Reg. v. Lee*, 1 Q. B. D. 198; 45 L. J., M. C. 54; 34 L. T. 445; 24 W. R. 550.

Therefore, where an indictment, charging the inhabitants of a township with the non-repair of a general highway, was amended at the trial so as to charge them in respect only of a limited highway:—Held, that the judge had no power to order the costs to be paid out of the rate levied in the township, the prosecution of the amended indictment not being "such prosecution" within s. 95. *Ib.*

**Under Highway Act of 1862—Verdict of Not Guilty.]**—Under 25 & 26 Vict. c. 61, s. 19, the court has no power to direct the costs of an indictment for non-repair of a road, preferred by the direction of justices against the inhabitants of a parish, to be paid by them where the jury has found a verdict of not guilty, on the ground that the road was a private road, and not a highway. *Reg. v. Buckland*, 10 Cox, C. C. 116; 34 L. J., M. C. 178; 11 Jur., N. S. 821; 12 L. T. 380; 13 W. R. 715; 6 B. & S. 397.

**When Defence Frivolous.]**—Upon an indictment for not repairing a highway, removed by the prosecutor, if the judge at nisi prius certifies that the defence was frivolous, the prosecutor will have his costs, notwithstanding the defendants have obtained a rule nisi to arrest the judgment. *Rez v. St. John, Margate*, 6 M. & S. 130.

By 5 & 6 Will. 4, c. 50, s. 98, it shall be lawful for the court, before whom any indictment shall be preferred for not repairing highways, to award costs to the prosecutor, to be paid by the person so indicted, if it shall appear to the court that the defence made to such indictment was frivolous or vexatious:—Held, that a plea of not guilty to an indictment for non-repair of a highway, is not a defence within the meaning of the section, and that no order for costs can be thereupon made. *Reg. v. Denton*, 5 B. & S. 821; 34 L. J., M. C. 13; 11 Jur., N. S. 172; 11 L. T. 371; 13 W. R. 143.

Where an indictment for not repairing a turnpike road has been preferred at the quarter sessions, and removed by certiorari into the Queen's Bench, that court has power, under 5 & 6 Will. 4, c. 50, s. 98, to award to the prosecutor costs incurred previously to the removal of the indictment, if the defence has been frivolous or vexatious in the opinion of the judge trying the cause. *Reg. v. Preston*, 7 D. P. C. 593; overruling the decision of Alderson at nisi prius, 2 M. & Rob. 137.

**Enforced by Attachment.]**—Where a certificate has been granted under 5 & 6 Will. 4, c. 50, s. 98, that the defence to a road indictment, removed by certiorari into the Queen's Bench, is frivolous, and costs have been awarded against the defendants, the payment of such costs may be enforced by attachment. *Reg. v. Pembridge*, 3 G. & D. 603; 3 Q. B. 901; 12 L. J., Q. B. 47; 6 Jur. 1037.

In such case the judge may certify for the costs of a special jury. *Ib.*

**On Removal by Certiorari.]**—Where an indictment, ordered by justices to be preferred at the next assizes against the inhabitants of a town-

ship, is removed by them by certiorari into the Queen's Bench, and is tried at nisi prius, and a verdict is found for the defendants, the judge has no power, under 5 & 6 Will. 4, c. 50, s. 95, to order the payment of the costs of the prosecution out of the highway rate; the section giving the power only to the judge of assize, that is, the judge sitting under the commission of oyer and terminer. *Reg. v. Ipstones*, 3 L. R., Q. B. 216; 37 L. J., M. C. 37; 17 L. T. 497; 16 W. R. 538; 9 B. & S. 106.

**Effect of Recognisance.]**—A prosecutor removing an indictment for non-repair of a highway by certiorari is only liable for costs by virtue of the recognisance required by 16 & 17 Vict. c. 30, s. 5, and if he has not entered into such a recognisance, costs cannot be recovered against him. *Reg. v. East Stoke*, 13 W. R. 737.

The proper remedy for such a default is that given by s. 7, which provides that in that case the certiorari may be disregarded. *Ib.*

**Who Entitled.]**—Several persons were held entitled to costs under 5 Will. & M. c. 11, as prosecutors of an indictment, removed by certiorari, for not repairing a highway, one as constable of the manor within which the highway lay, the others as parties grieved, they having used the way for many years in passing and re-passing from their homes to the next market town, and being obliged, by reason of the want of repair, to take a more circuitous route. *Rez v. Taunton, St. Mary*, 3 M. & S. 465. And see *Rez v. Bird*, 2 B. & A. 522.

**By one Inhabitant—Effect of.]**—Where one inhabitant of a parish has removed an indictment against it for the non-repair of a road, and has entered into the usual recognisance for costs, in case a verdict of guilty should pass, the other inhabitants of the parish will not be permitted to plead guilty to the indictment. *Rez v. Laxborough*, 1 D. P. C. 527.

**Taxation.]**—An order of sessions for payment of costs of a prosecution for non-repair of a highway is bad, unless the amount of costs is ascertained and ordered by the same sessions. The sessions cannot refer the costs to be taxed by their officer after the sessions. *Reg. v. Lambeth (Surveyors)*, 3 C. L. R. 35.

**Mode of Recovery.]**—The costs of an indictment against a parish for non-repair of a highway ordered to be paid to the prosecutor by the quarter sessions, under 5 & 6 Will. 4, c. 50, s. 95, are not recoverable by distress against the surveyor, but are to be paid out of the rate made and levied in pursuance of the act. *Tryddyn, In re*, 23 L. J., M. C. 45; S. C., nom. *Reg. v. Eyton*, 3 El. & Bl. 390; 18 Jur. 399.

**Duty of Surveyor.]**—It is the duty of the surveyors who are in office when such an order for costs is made, or of their immediate successors in office, to pay the costs out of any funds then in their hands, or, if they have none, to make a rate for the purpose of putting themselves in funds. *Ib.*

#### vi. Other Matters.

**Discharge from an Indictment.]**—In order to

be discharged from an indictment for not repairing a highway, the parties must produce an affidavit that the road is actually repaired since the conviction, and is likely to continue so. *Re v. Loughton*, 3 Smith, 575.

The inhabitants of a parish cannot be discharged from an indictment for the non-repair of a highway, until it is ascertained whether the repairs effected will stand during the winter. *Re v. Witney*, 5 D. P. C. 728; 1 W., W. & D. 381.

**Quashing an Indictment.**—An indictment against a parish for not repairing a highway cannot be quashed on an affidavit that the way was then in repair; but the defendant must plead guilty, and pay a nominal fine. *Re v. Lincombe*, 2 Chit. 214.

**Setting aside an Award.**—The court will not entertain an application for setting aside an award founded on an indictment at the assizes for not repairing a road, though the question in dispute is of a civil nature. *Re v. Cotesbatch*, 2 D. & R. 265.

**New Trial—On what Grounds.**—After a verdict for the defendant upon an indictment for the non-repair of a highway, the court refused an application for a new trial, on the ground of the improper rejection of evidence, but suspended the judgment in order that another indictment might be preferred. *Re v. Sutton*, 2 N. & M. 57; 5 B. & Ad. 52.

After a verdict of not guilty, upon an indictment for obstructing a highway, the court will not grant a new trial upon the ground that the verdict was against the weight of evidence, although the judge who tried the case reports that he is dissatisfied with the verdict. *Reg. v. Johnson*, 2 El. & Bl. 613; 29 L. J., M. C. 133; 6 Jur., N. S. 553; 8 W. R. 236.

Or on the ground of the misdirection of the judge. *Reg. v. Russell*, 3 El. & Bl. 942; 23 L. J., M. C. 173.

## 6. RATES.

### a. Validity of.

**Concurrent Rates.**—Concurrent rates for repairs of highways are invalid if made for the same period of time; but a second rate may be made where a former rate for the same purpose has not been wholly collected. *Reg. v. Best*, or *Reg. v. Surrey (Justices)*, 2 New Sess. Cas. 655; 5 D. & L. 40; 11 Jur. 489.

**Signature of Surveyor and Allowance.**—The signature of the surveyor, and allowance by justices, were by inadvertence inserted in the middle of a highway rate, instead of at the end:—Held, that this was no allowance of the rate in respect of matters which followed such signature and allowance, and therefore that the justices had no jurisdiction to enforce the rate by issuing a distress warrant for the amount of an assessment which appeared in a part of the rate subsequent to the signature and allowance. *Skelton (Surveyor), Ex parte*, 1 B. C. C. 211; 2 C. L. R. 130; 23 L. J., M. C. 17; 17 Jur. 1165.

**Proof of Publication.**—The production of the rate book is not sufficient evidence of the due

publication of a highway rate, although it is *prima facie* evidence in the case of a poor rate. *Bird v. Adcock*, 47 L. J., M. C. 123; 26 W. R. 634.

### General Highway Rate—Exempted District.]

—A local act exempted a district from all rates towards paving and lighting the rest of the parish:—Held, that a general highway rate on the whole parish was not void, though part of the money thus raised might be applied to paving the rest of the parish. If that should be a misapplication, it might be ground of appeal, but would not make the rate void. *Richards v. Twbbe*, 4 C. B. 304; 16 L. J., C. P. 315.

— **Public Works of Paving.**—By s. 216, sub-s. 3, of the Public Health Act, 1875, it is provided that "where no public works of paving, water supply, and sewerage are established in the district, the cost of repair of highways in the district shall be defrayed out of a highway rate to be levied throughout the whole district by the urban authority as surveyor of highways." The appellants, a local district board, made a general district rate, and a highway rate, and demanded the same from the respondents, who had constructed two compensation reservoirs in connection with the supply of water for the town of B. The respondents contended that the local board had no power to levy a highway rate because in 1880 they laid down in their district a curbstone (about 300 yards long) as a coping to a cinder pathway of a carriage road:—Held, that putting down the curbstone did not constitute the establishment of public works of paving within the meaning of s. 216, sub-s. 3 of the Public Health Act, 1875, and therefore the appellants were entitled to levy a highway rate. *Osenhope District Local Board v. Bradford (Mayor)*, 47 L. T. 344; 31 W. R. 322; 47 J. P. 21.

### Urban District—Part of Parish Excluded

— **Amount.**—By s. 29 of the Highway Act, 1835, no highway rate to be levied or assessed shall exceed at any one time the sum of 10d. in the pound, or 2s. 6d. in the pound in the whole in any one year, without the consent of four-fifths of the inhabitants assembled at a specially called meeting. By s. 216 of the Public Health Act, 1875, where parts of a district are not rated for works of paving, water supply, and sewerage, or for some of them, the cost of repair of highways in those parts shall be defrayed out of a highway rate to be separately assessed and levied in those parts by the urban authority as surveyor of highways; provided that where part of a parish is included within an urban district, and the excluded part was, before the constitution of that district, liable to contribute to the highway rates for such parish, such excluded part shall, for all highway purposes, be treated as forming part of such district. The hamlet of G. was formerly a "parish" maintaining its own highways. Prior to 1875 part of the hamlet was formed into a local government district, called the Inner District, with a local board, and became an urban district under the Public Health Act, 1875. Part of the hamlet, called the Outer District, was excluded from it. The local board of the inner district repaired the highways in the outer district, and separately assessed a rate of 3s. 4d. in the pound on the inhabitants of the outer district, without first obtaining the consent of four-

fifths of them. The appellants objected to the validity of the rate:—Held, that the consent of four-fifths of the inhabitants of the outer district was rendered unnecessary by s. 216 of the Public Health Act, 1875, and that the rate was valid. *Dyson v. Greetland Local Board*, 48 L. T. 636; 47 J. P. 552.

Before the Towns Improvement Clauses Act, 10 & 11 Vict. c. 34, the borough of A. was divided into a town and a country district, each maintaining its own highways. That act was incorporated in a local act for the improvement of the borough of A. except so far as anything in the former act was varied or otherwise provided for by this. By the latter act the mayor, aldermen, and burgesses of A. were empowered to cause any street in the borough to be sewered and paved at the expense of the adjoining landowners, and certify the same when completed to be a public highway, and that it should be lawful for them from time to time to make a rate for the maintenance of such highways upon the occupiers of all houses and lands within the borough. By 10 & 11 Vict. c. 34, s. 48, commissioners (that is, the persons or body corporate entrusted to execute any local improvement act incorporated with this) shall be the surveyors of all highways within the limits of such local act, and shall have within those limits all the powers of surveyors, and the inhabitants of the district within those limits shall not be liable to highway rates in respect of roads within other parts of the parish in which the district is situated. By s. 49 the commissioners are to be indictable for non-repair of any public highway within the limits of such local act in the same manner as the inhabitants thereof, or of any parish or other district therein, were liable before the passing of such act:—Held, that the mayor, aldermen, and burgesses of A. were bound as commissioners under 10 & 11 Vict. c. 34, to rate the whole borough for the repair of highways, paved and certified under the local act, and likewise to rate the whole for repair of the public highway not so paved and certified, and that a rate upon the country district alone, for repair of the highways within it (not proved or certified), was bad. *Slater v. Ashton-under-Lyne (Mayor, &c.)*, 18 Q. B. 398; 21 L. J., M. C. 185; 16 Jur. 992.

#### Exercise of Statutory Powers—Construction.]

—By a local act for improving a town, and repairing the highways, commissioners were invested with the powers, provisions and authorities contained in 13 Geo. 3, c. 78, and by a subsequent section were enabled to make a rate of not more than 8d. in the pound in any one year. A subsequent local act, amending and altering the former, recited the rate of 8d., and empowered the commissioners to raise it to 1s. and 1s. 6d.:—Held, that, under the words "powers, provisions and authorities," the justices of the peace for the borough had no authority to order and allow a rate under 13 Geo. 3, c. 78, s. 45. *Higgins v. Green*, 10 M. & W. 703; 12 L. J., M. C. 27.

**According to Amount.]**—In a cognizance for a highway rate, made for the purposes mentioned in 13 Geo. 3, c. 78, ss. 30 and 45, such rate must have been expressly alleged to be an equal assessment of 9d. in the pound on the yearly value of the lands, &c. The statement of its

being an equal assessment of 9d. in the pound upon all occupiers of lands within the parish was not sufficient. *Morrell v. Harvey*, 6 N. & M. 85; 4 A. & E. 684; 1 H. & W. 728.

#### b. Liability to.

**Property or Premises "Usually Rated."]**—The words "usually rated," in 5 & 6 Will. 4, c. 50, s. 27, refer not to legal rateability, but to rating in point of fact, and to the practice of rating in the particular parish, not in the country generally. *Reg. v. Rose*, 6 Q. B. 153; D. & M. 300; 13 L. J., M. C. 155; 8 Jur. 777.

On appeal against a surveyor's rate on timber woods, the sessions found for the appellant, subject to a case, which stated, that the woods were not liable to poor rate, that from 1809 down to the passing of the 5 & 6 Will. 4, c. 50, they had not been rated to the highways; and that timber woods of a like description had always been rated to the highways in the majority of parishes in the country and neighbourhood, but in some they had not been so rated since 1809:—Held, that the woods were not shewn to be chargeable under s. 27. *Id.*

**— Mines.]**—Mines not rateable to the relief of the poor opened into a parish since the passing of that act are rateable to the highway rate, if mines of a similar description were before the act usually rated to the highways in that parish. *Reg. v. Randall or Saunders*, 4 El. & Bl. 564; 24 L. J., M. C. 57; 1 Jur., N. S. 255.

**Tithes and Commutation Rents.]**—An owner of tithes, which are retained by the occupier of the land under prospective compositions from year to year, is rateable to the repair of the highways as an occupier of tithes. *Chanter v. Glubb*, 4 M. & R. 334; 9 B. & C. 479.

Where an inclosure act directed that all great tithes, payable to the rector of a parish, should be extinguished, and that the commissioners should ascertain the net value of such tithes, and affix a fair, clear, annual rent or sum of money per acre in lieu of such tithes, and as an adequate compensation for the same to the rector:—Held, that the rector was, in respect of such rents, rateable to the repair of the highways. *King v. Lacy*, 5 B. & C. 702; 8 D. & R. 457.

**Occupier of Bridge and Toll-house—Repairs under Local Act.]**—Mandamus to a justice to issue his distress warrant against the occupiers of Putney Bridge for a highway rate, assessed on them under 5 & 6 Will. 4, c. 50, s. 27, in respect of their occupation of the bridge and toll-house, and the land on which the same were erected. Return, that Putney Bridge was paved, repaired, and cleansed under a local act:—Held, that the return was no answer, as s. 113 of the 5 & 6 Will. 4, c. 50, did not exempt the property from liability to the rate imposed under s. 27. *Reg. v. Paynter*, 13 Q. B. 399; 3 New Sess. Cas. 465; 18 L. J., M. C. 169; 13 Jur. 281.

**Exemptions—Hamlet Repairing its own Highways—Sufficiency of Evidence.]**—The parish of A. contained several hamlets all included in the poor rate for the parish, with one set of overseers. M., one of these hamlets adjoining the parish of B., had, so far as living memory extended, been assessed to the property and income tax, land tax,

and assessed taxes, as part of B. The occupiers of land in M. had at various times held the offices of guardian of the poor, overseer, churchwarden, and dike reeve for A., and had never held similar offices in B. M. had time out of mind paid poor rates, church rates, sewer rates, and tithes to A. So far as living memory and evidence of reputation went, the occupiers of lands in M. had always been assessed, and had contributed to the highway rates of B., and the highways in M. had always been repaired by B. until 1841, when, by private arrangement with the surveyors of the highways of B., the lands in M. ceased to be assessed in that parish; and the highways in M. had still been repaired by the occupiers of lands in M. without any rate, the surveyors of the highways of B. expressly reserving to themselves the right of assessing the lands in M. to the highway rates at any future time:—Held, that M. was assessable to the highway rates for A., there not being sufficient evidence to warrant the conclusion, that M. was a hamlet repairing its highways separately. *Dawson v. Willoughby Highways (Surveyor)*, 5 B. & S. 920; 34 L. J., M. C. 37; 11 Jur., N. S. 240; 11 L. T. 597; 13 W. R. 287.

H. and others, the owners and occupiers of lands in the hamlet of G., in the township of W., had been immemorably exempt from the repair of the highways, by reason of their repairing a particular road in the hamlet, but had always been rated to the relief of the poor. W. was included in a highway district under 25 & 26 Vict. c. 61, and a precept to the overseers of W. was duly made, and they made a uniform rate of 1s. on all the lands in W., being 8d. for poor rate and 4d. for highway rate, and H. was rated like others:—Held, that H., by reason of his former exemption, continued exempt from the highway rate, and that he ought to have been rated at 8d. only in the pound. *Heath, In re*, 1 L. R., Q. B. 218; 35 L. J., M. C. 113; 12 Jur., N. S. 355; 13 L. T. 669; 14 W. R. 388.

—**Of a Tithing.**—A tithing, consisting of two farms, had from time immemorial repaired its own highways, and had never contributed to the repairs of highways in other parts of the parish in which it was situate, although rated to the poor rate:—Held, that these facts afforded sufficient evidence of exemption from the *prima facie* liability to the repairs of the highways in the parish at large. *Freeman v. Read*, 4 B. & S. 174; 32 L. J., M. C. 226; 10 Jur., N. S. 149.

—**Trial of Validity.**—A rule under 11 & 12 Vict. c. 44, s. 5, is not the proper remedy to try the validity of an exemption from a highway rate. *Reg. v. Shropshire (Justices)*, 3 New Sess. Cas. 641.

—**Under Particular Statutes.**—By a paving act, commissioners were authorized to impose a paving rate, for paving and repairing the streets, squares, &c., within a city, and certain suburban parishes, upon the occupiers of houses, buildings, lands, &c., "except all arable, meadow, and pasture land without the walls of the city, and also except all that messuage, &c., together with the barns, stables, &c., and grounds thereunto belonging, situate, &c., and now in the tenure or possession of S. T., called or known by the name of B. farm." A part of the grounds so exempted was afterwards occupied by a company for the purposes of their

railway:—Held, that such part was still exempt from the rate. *Todd v. London and South-Western Railway Company*, 7 M. & G. 336; 8 Scott, N. R. 56.

By an act for improving a particular portion of a parish, it was provided that every inhabitant or owner who should be assessed to the rates made under that act, for any lands or tenements within the limits of the act, should be released and free from all rates and assessments towards the paving and lighting any other street, road or place within the parish, in respect of such lands or tenements:—Held, that this did not exempt an occupier of premises assessed within the local district from being assessed in a general highway rate imposed upon the whole parish, although a portion of such rate might be expended in paving parts of the parish out of the district. *Richardson v. Tubbs*, 4 C. B. 304; 16 L. J., C. P. 315.

—**Apportionment between Adjoining Parishes—Jurisdiction of Justices.**—The 5 & 6 Will. 4, c. 50, s. 58, enacts that where the boundaries of parishes pass across or through the middle of a highway, justices in special sessions may, on complaint, summons and hearing, apportion the future liability to repair between the parishes; proviso, that in the case of such highway the repairs of any part of which belong to any body politic or corporate, or to any person by the reason of tenure of any lands, or otherwise howsoever, the same proceedings may be adopted. Two justices made an order of apportionment in the form given in the schedule, which form does not contain any express finding as to boundary. On appeal against this order, evidence was heard on the question, whether or not the highway was upon a parochial boundary; the appellants denied the jurisdiction of the justices, because, as they contended, the highway did not appear to be on such boundary; the respondents argued that, even if it were not so, the justices had jurisdiction under the proviso. The sessions confirmed the order, but stated a case setting forth the facts on the question of boundary, and the objection taken to the jurisdiction, and adding, that if the court should be of opinion that under the circumstances stated the road could not be divided, by order of justices under the statute, the order of sessions was to be confirmed; if not, both orders to be quashed:—Held, that the court, though the order of justices made in the statutory form, and confirmed at sessions, might go into the whole question raised by the case; namely, whether there was evidence of a boundary intersecting the highway, or if not, whether upon the evidence the two justices appeared to have had jurisdiction under the proviso. *Reg. v. Perkins*, 14 Q. B. 229.

Held, also, that the case did not come within s. 58, as the evidence did not shew a boundary intersecting the highway, and that the proviso did not apply. *Id.*

### c. Recovery.

—**By one of two Surveyors.**—By 5 & 6 Will. 4, c. 50, s. 34, for levying and recovering highway rates, the surveyor shall have the same powers, remedies and privileges, as the overseers of the poor in the parish have by law for the recovery of any rate made for the relief of the poor; and s. 6 empowers parishes to appoint "one or more persons to serve the office of surveyor." Two

persons were appointed under the act:—Held, that a demand of a rate, and application for a warrant of distress were sufficient, though made by only one of the persons so appointed, in his own name. *Morrell v. Martin*, 8 Scott, 688; 6 Bing. N. C. 373; 4 Jur. 891.

See also SURVEYORS, ante, col. 678.

**Warrant of Commitment—Validity.**—The 3 Geo. 4, c. 23, s. 2, enacts, that after examination and adjudication of a complaint by any two justices, all subsequent proceedings to enforce obedience thereto may be enforced by either of the justices, or any other justice for the same county, in like manner as if done by the same two justices who had heard and adjudged the complaint:—Held, that a warrant of commitment, which recited that a party had been summoned before two justices to shew cause why he should not pay rates (not stating that they were the same justices who granted the warrant), was bad, for not shewing that the same justices who issued the summons also adjudicated upon the case. *Ramsden, In re*, 2 New Sess. Cas. 427; 1 B. C. Rep. 133; 15 L. J., M. C. 113; 10 Jur. 879.

**Mandamus to Issue Distress Warrant—When Liability Doubtful.**—On an application to justices for a distress warrant to levy a highway rate upon A. as occupier of premises, he claimed to be exempt, by reason of having never contributed to the repair of the highways or been rated, but having always repaired so much of a highway as was within his premises, and half a bridge at the extremity of the highway. He shewed no origin for the exemption, but insisted that he was protected by 5 & 6 Will. 4, c. 50, s. 33. The justices refused a warrant. On an application to the court, for an order on the justices to issue the warrant, held, too doubtful a question to justify the court in acting under 11 & 12 Vict. c. 44, s. 5, and left the applicants to move for a mandamus, or to try the question by having another rate made, and against which A. might appeal (the objection that he ought to have appealed having been waived by consent). *Reg. v. Browne*, 13 Q. B. 654.

The court would not compel a magistrate by mandamus to issue a warrant for a parish highway rate, under 13 Geo. 3, c. 78, ss. 45, 67, made upon the occupier of lands within his district, if it appeared that, in the magistrate's belief, and in fact, there was a legal doubt as to the occupier being liable to contribute to the repairs of the parish highways. *Reg. v. Greame*, 2 A. & E. 615.

The court refused to award a mandamus, commanding justices to enforce, by issuing a warrant of distress, a highway rate assessed upon land which had never been rated before, and the liability of which to be rated was denied. *Reg. v. Somersetshire (Justices)*, 4 N. & M. 394.

**Neglect to Appeal.**—After a highway rate has been regularly made and assessed, and an occupier of premises included in such rate has neglected to appeal within the time allowed by 5 & 6 Will. 4, c. 50, for that purpose, he cannot afterwards successfully set up a claim to exemption from that particular rate; and the court will grant a rule to compel the issuing of a distress warrant for the amount, where the justices applied to for that purpose refused to issue their warrant, after hearing the grounds of

such exemption, even though the claim of exemption appears to be a substantial one. *Reg. v. Oxfordshire (Justices)*, 6 D. & L. 288; 3 New Sess. Cas. 640; 18 L. J., M. C. 222; 14 Jur. 573.

#### Of a Paving Rate—County Court Proceedings.]

—A paving rate, imposed under authority of an act of parliament, is not an incorporeal hereditament, and may, therefore, be sued for in a county court. *Baddeley, In re*, 4 Ex. 504; 19 L. J., Ex. 44.

#### —Reimbursement of Expenses—Previous Notice.]

—An act for paving and improving a town appointed commissioners, and authorized them to pave new streets, and provided that the expenses of such new pavements should be paid and reimbursed to the commissioners by the owners or occupiers of the land adjoining the streets; and empowered the commissioners to recover such expenses by action. A subsequent section commencing, "Provided always, and be it enacted," directed, that, before the commissioners should cause the streets to be paved, they should in the first place give notice to the owner or occupier of every house, land, &c., adjoining the street, requiring him to pave the same as the commissioners should direct; and if he should for six months neglect to pave pursuant to the notice, then it should be lawful for the commissioners, and they were required to cause the same to be done, and to recover the expenses from such owner or occupier:—Held, that the giving of this notice was a condition precedent to the commissioners executing the paving themselves and charging the expenses on the owner or occupier, and that it must be averred in the declaration in an action brought for the recovery of such expenses. *Salford (Mayor, &c.) v. Ackers*, 16 M. & W. 85; 16 L. J., Ex. 6.

**Proceedings before Justices.**—By s. 34 of a local improvement act, a corporation might require owners of premises fronting a street to pave the same, and in default the corporation might execute the works, and recover the expenses as damages. The 10 & 11 Vict. c. 34 was incorporated; and by s. 149 of the latter act the expenses incurred in default of payment by the owner may be recovered "in the same manner as damages, or in an action of debt." Sect. 210 of the latter act incorporates the clauses of the Railway Clauses Act, 8 & 9 Vict. c. 20, which relate to the recovery of damages, and by s. 140, "in all cases where any damages, costs or expenses are by this act or the special act, or any act incorporated therewith, directed to be paid, and the method of ascertaining the amount, or enforcing payment thereof, is not provided for, such amount, in case of dispute, shall be ascertained and determined by two justices:—Held, that the mode of recovering expenses incurred in works executed by the corporation upon the default of the owner, under s. 34 of the local act, was by proceeding before justices, and not by action. *Blackburn (Mayor, &c.) v. Parkinson*, 1 El. & El. 71; 28 L. J., M. C. 7; 5 Jur., N. S. 572.

#### —Refusal to Pay—Offence under 7 Will. 4

& 1 Vict. c. 78.]—Commissioners under an act for lighting and paving the parish of Bathwick were empowered to levy rates, and power was given to justices for the county of Somerset to enforce payment of them by distress. A charter

of incorporation was granted by Queen Elizabeth to the city and borough of Bath. Before 5 & 6 Will. 4, c. 76, passed, the parish of Bathwick was situate partly in Somerset and partly in the city of Bath; but, by s. 7, the whole parish was included within the city of Bath. An inhabitant of the parish of Bathwick was duly assessed under the local act, and the amount not being paid, a magistrate for the city and borough of Bath refused to grant a warrant of distress:—Held, that the refusal to pay these rates was an offence against the provisions of the local act within the meaning of the 7 Will. 4 & 1 Vict. c. 78, s. 31, and that the justices for the city and borough of Bath had jurisdiction to enforce the payment of them. *Reg. v. Sutcliffe*, 3 New Sess. Cas. 634; 18 L. J., Q. B. 301; 13 Jur. 840.

**Liability of Collector for Balance in Hand—Sufficiency of Demand.**—A collector of highway rates had in his hands a balance arising from the sale of goods of A., distrained for non-payment of rates, after satisfying the rates and the costs of distress and sale. A person came and demanded the balance, and on being asked if he had authority from A. to demand it, said he had a written authority in his pocket, but refused to produce it, saying there was no need for him to shew it:—Held, that this was not a sufficient demand within 27 Geo. 2, c. 20, s. 2, to entitle A. to sue the collector for such balance. *Charlington v. Johnson*, 13 M. & W. 856; 14 L. J., Ex. 299.

See also HEALTH and METROPOLIS.

#### d. Appeal against Distress.

**Notice of.**—The notice of appeal required by 13 Geo. 3, c. 78, s. 80, against a distress for non-payment of a highway rate, might be within six days after the levy, and need not be within six days after the granting the warrant of distress. *Rez v. Devon (Justices)*, 1 M. & S. 411.

The notice of appeal need not disclose the grounds upon which the appellant objects to the regularity of the distress. *Id.*

## II. TURNPIKE ROADS.

### 1. GENERALLY.

**Meaning of.**—The legal meaning of the words "turnpike road" is a road on which parties have by law a right to erect gates and bars, for the purpose of taking toll, and of refusing the permission to pass to all persons who refuse to pay. *Northam Bridge and Roads Company v. London and Southampton Railway Company*, 6 M. & W. 428; 1 Railw. Cas. 665; 4 Jur. 892.

The words "turnpike road" in the Railways Clauses Act (8 & 9 Vict. c. 20), s. 50, mean a road which is repaired by tolls payable by passengers for the use of the road. *Reg. v. East and West India Docks and Birmingham Junction Railway Company*, 1 C. L. R. 496; 2 El. & Bl. 466; 22 L. J., Q. B. 380; 17 Jur. 1181.

**Within 4 & 5 Vict. c. 59.**—A turnpike road is within 4 & 5 Vict. c. 59, although made and maintained under a local act comprising the making and maintaining sea-defences and other objects. *Reg. v. Worthing and Lancing Turnpike Roads (Trustees)*, 3 El. & Bl. 989; 2 C. L. R. 1678; 23 L. J., M. C. 187; 18 Jur. 907.

**Completion of—Certificate of Justice.**—The 4 Geo. 4, c. 95, s. 87, gives an appeal to any person who shall think himself aggrieved by anything done by any two justices, in pursuance of that act or any local turnpike act; and declares that the determination of the sessions shall be final and conclusive, and that no proceeding to be had in pursuance of that act shall be removed by certiorari. The sessions, on appeal against a certificate of two justices, that a turnpike road, made under a local act, had been completed, and was fit to be travelled upon, having decided that the certificate was void in point of law, and having refused to go into the merits of the appeal in point of fact, the court refused to grant a mandamus to them to hear the ground that their decision was contrary to the local act. *Rez v. Yorkshire, W. R. (Justices)*, 5 B. & Ad. 1003.

### 2. TRUSTEES AND COMMISSIONERS.

#### a. General Powers and Duties.

**Necessary Oath.**—If a person is named in a turnpike act as one of the trustees of a turnpike road, and has acted as such, and been recognized as a trustee by the plaintiff in an action for the balance of his salary against one of the trustees, the judge will take him to be a good trustee, and will not allow evidence to be given on the part of the plaintiff to shew that such person has not taken the oath prescribed to be taken by trustees of roads before they act as such. *Pritchard v. Walker*, 3 C. & P. 212.

**Power to Divert Roads.**—Under a turnpike act, the trustees had power to turn roads through private grounds, making satisfaction to the owners; and if they could not agree, they were enabled, on giving notice to the owners, to summon a jury to ascertain the damage, and to order such sum, so ascertained, to be paid to the owners; the court quashed an inquisition of the jury and an order of the trustees because it did not appear on the face of the proceedings that any notice had been given to the owners of the land. *Rez v. Bagshaw*, 7 T. R. 363.

**Power to Stop Roads.**—The exception in the General Turnpike Act, 3 Geo. 4, c. 126, s. 86, does not take away from the trustees of a road the power of stopping up the roads therein mentioned, but leaves them at their discretion to do so or not:—Held, therefore, that the trustees were justified in stopping up and giving to the owner of the adjoining land an old road leading to a church, &c., to which the new road was a longer way. *De Beauvoir v. Welch*, 7 B. & C. 266; 1 M. & R. 81.

**Necessary Conveyance of Land.**—An order for stopping up a road under 3 Geo. 4, c. 126, where the site of the old road was taken in exchange for that of the new, was valid; although no conveyance to the trustees was executed. *Allout v. Pott*, 3 M. & R. 439, n.; 1 B. & Ad. 302.

The clause in s. 84, directing a conveyance to the trustees where lands are purchased by them, does not apply where the vendors were sui juris, and acting in their own right. *Id.*

**Taking of Buildings—Compensation.**—By a

turnpike act trustees were authorized to enter upon and take lands, and to pull down certain houses, buildings, &c., "making or tendering satisfaction to the owners or proprietors of all private lands, houses, buildings, &c., so taken, for any loss or damage they may sustain thereby;" and it was also provided, that they should not be authorized to take other buildings, without the consent "of the owners or proprietors thereof, or other persons interested therein:"—Held, first, that compensation was to be made in the case of premises taken under the former clause, not only to the owners of the fee-simple in the lands and buildings, but also the lessees of the same for terms of years. *Lister v. Lobley*, 7 A. & E. 124; 6 N. & M. 340; 2 H. & W. 12.

Held, secondly, that the trustees were not bound by the above clause to make or tender compensation before or at the time of entering upon or taking the lands, or pulling down the houses. *Id.*

**Contracts—Intra Vires—Sinking of Well.]**—Where any five or more trustees under a turnpike act were authorized to make turnpikes, with such suitable outbuildings and conveniences as they should think necessary on the intended line of road, and the owner of the soil next adjoining a toll-house (erected in pursuance of the act) contracted with one of the trustees, on behalf of the rest, to sink a well for the convenience of the toll-house, the expense to be borne by each party equally:—Held, that the sinking the well was within the authority of the trustees; that the contract entered into by one of them on behalf of the rest was valid; that the action to recover a moiety of the expense of the well was rightly brought in the name of the clerk of the trustees; and that the consent of the trustees, through the medium of one, that the well should be sunk, was a good consideration to support the action. *Newman v. Fletcher*, 1 D. & R. 202.

**—When Interested in—Penalty.]**—A trustee who holds the office of treasurer, which may be made an office of profit, is within the penalty of the act, though he makes no profit of it in his own person. *Delane v. Hillecoat*, 4 M. & R. 175; 9 B. & C. 810.

A. having contracted with the trustees of a turnpike road to repair the road for a specific sum, B., one of the trustees, let out to A. his horse and cart for 5s. a day, and they were used in the repair of the road. In an action against B. for the penalties:—Held, first, that B. was liable to the penalty imposed by 3 Geo. 4, c. 126, s. 65. *Towsey v. White*, 7 D. & R. 810; 5 B. & C. 125.

Held, secondly, that the notice of action, not stating that B., when he let out his horse and cart, was acting as a trustee, was bad. *Id.*

Held, thirdly, that the notice being bad, the plaintiff was barred, not only of his right to costs, but of his right to sue. *Id.*

The proviso in a. 143 of the 3 Geo. 4, c. 126, is not confined to that part of the section which immediately precedes it, but extends to the whole matter in the section; and, therefore, if a party seeking to recover the penalties imposed by that act omits to give the requisite notice, or to commence his action, within the prescribed time, he is not merely barred of his right to costs, but of his right of action altogether. *Cobbett v. Warner*, 1 H. & N. 388; 26 L. J., Ex. 11—Ex. Ch.

**Removal of Clerks.]**—The 4 Geo. 4, c. 95, s. 42, empowering commissioners of turnpike roads to remove their clerks, &c., must be taken in conjunction with s. 39, which requires certain notices to be given when it is intended to revoke any order of the commissioners. And, therefore, where commissioners had discharged a clerk by a resolution made without such notice, a mandamus was granted to restore him, although at a former meeting the commissioners had ordered proper notices to be given of a meeting for the purpose of such discharge, and the notices had not been given, nor the meeting held, owing to the misconduct, as was alleged, of the clerk himself. *Rees v. Wrexham and Denbigh Roads (Trustees)*, 5 A. & E. 581.

**Accounts—Power to Inspect.]**—A turnpike act directed that the trustees should keep books, in which they should enter their accounts, and also their orders and proceedings, and that all persons should have access to such entries. By a subsequent local act it was directed, that the trustees should keep a book, in which they should enter their accounts, which book should be open to the inspection of the trustees, or of any creditor on the tolls. The 3 Geo. 4, c. 126, s. 73, re-enacted the latter provision as to all turnpike road accounts; and s. 72 directed, that all trustees of turnpike roads should keep a book of their orders and proceedings, which should be open to the inspection of any of the trustees, and should be read as evidence in courts, as there directed. That act also provided, that the enactments therein contained should extend to all other turnpike acts, except where by that act it was otherwise ordered:—Held, that these clauses of the general and of the second local act superseded the provisions of the original act, and limited the power of inspection at first given to the whole public, confining it to trustees, and to trustees and creditors in the respective cases of orders and accounts. *Rea v. Northleach and Witney Roads (Trustees)*, 5 B. & Ad. 978.

**—Signature of—Admissibility.]**—Printed copies of the annual accounts of a turnpike trust, made up from the original statements, signed by the chairman of the trustees, and returned pursuant to 3 Geo. 4, c. 126, s. 78, were produced from the office of the clerk of the peace and tendered in evidence. They were not signed by the chairman:—Held, inadmissible, either as primary or secondary evidence. *Pardoe v. Price*, 13 M. & W. 267; 14 L. J., Ex. 212.

**In respect of Repairs.]**—See *infra*, col. 732.

#### b. Proceedings by and against.

**Parties—Liability of Treasurer.]**—Where a turnpike act directed that if any person had a cause of action against the trustees, he should sue the treasurer:—Held, that the action against the treasurer was substituted only for such action as might be maintained against the whole body of trustees, and that an action would not lie against him for the act of five trustees, though they formed a quorum. *Everett v. Cooch*, 7 Taunt. 1.

Where the trustees under a road act are sued in the name of their clerk, in pursuance of 3 Geo. 4, c. 126, s. 74, the property of the clerk is not

liable to be taken in execution to satisfy the judgment. *Wormwell v. Hailstone*, 4 M. & P. 512; 6 Bing. 668.

A clerk to turnpike trustees is not personally liable under a clause, by which they may sue and be sued in his name. *Emery v. Day*, 4 Tyr. 695; 1 C., M. & R. 245.

**Recovery of Costs in Actions.**—The 4 Jac. 1, c. 3, enacts, that in any action of trespass, or ejectione firmæ, or any action whatsoever, wherein the plaintiff might have costs in case judgment should be given for him, if the plaintiff be nonsuited, the defendant shall have judgment to recover his costs. A mortgagee of turnpike tolls brought ejectment to recover the toll-gates, &c., and one of the trustees of the road was admitted to defend as landlord. The plaintiff having been nonsuited, the defendant signed judgment for costs.—Held, that the judgment was right, for that, assuming the statute to make it a condition to the defendant's right to costs that the plaintiff would have had his costs if he had succeeded in the particular action, still the case was within the statute, inasmuch as the plaintiff might have had his costs, even if the defendant, as a trustee of the road, was protected from personal liability by 3 Geo. 4, c. 126, s. 74. *Cobbett v. Wheeler*, 3 El. & El. 358; 30 L. J., Q. B. 64; 9 W. R. 140.

**Action by Trustees—Claim for Calls—Validity of Agreement.**—In order to proceed for calls under 9 Geo. 4, c. 77, against parties who have agreed to subscribe money for the making or repairing a highway, the agreement must be in writing, and must be substantially the same as the form given in the schedule of 3 Geo. 4, c. 126. *Meigh v. Clinton*, 3 P. & D. 211; 11 A. & E. 418.

The 3 Geo. 4, c. 126, s. 82, is only repealed by 9 Geo. 4, c. 77, ss. 6, 7, as to so much as relates to the payment and recovery of the sum subscribed for the making of a turnpike road. *Id.*

**Evidence of being a Trustee.**—By 3 Geo. 4, c. 126, s. 134, where any action shall be brought by or against any trustee of a road, evidence of the trustee having acted as such, together with the act of parliament by which he was appointed, or the order, or a copy of the order for his appointment or election, in case he was appointed or elected by the trustees, shall be sufficient proof of his being a trustee.—Held, that the words, "in case he was appointed or elected by the trustees," applied to cases where there was an appointment or election de facto by the trustees, in contradistinction to an appointment by the road act; and, therefore, proof of a party having acted as trustee, and of an order made by the trustees for his appointment or election, was sufficient, even under a local act, whereby the appointment of new trustees, on death or removal, was required to be under the hands and seals of five of the old trustees, and although it was shewn that the order for such appointment was not so made. *Doe d. Baggeley v. Hares*, 4 B. & Ad. 435; 1 N. & M. 237.

**Action against Trustees—Liability for Negligence.**—The trustees appointed under a public road act are not responsible for an injury occasioned by the negligence of the men employed in making or repairing the road. *Duncan v. Findlater*, 6 C. & F. 894; 1 Rob. 911.

The funds raised by such act cannot be charged with compensation for such an injury, the persons employed on the road being in the situation of servants to the trustees. *Id.*

The trustees of a turnpike road converted an open ditch, which used to carry off the water from the road, into a covered drain, placing catchpits, with gratings thereon, to enable the water to enter the drain. Owing to the insufficiency of such gratings and catchpits, the water, in very wet seasons, instead of running down the ditch as it formerly did before the alterations by the trustees, overflowed the road and made its way into the adjoining land and injured a colliery.—Held, that the trustees were liable for such injury, if they were guilty of negligence in respect of such gratings and catchpits. *Whitehouse v. Fellowes*, 10 C. B., N. S. 765; 30 L. J., C. P. 306; 4 L. T. 177; 9 W. R. 557.

Held, also, that a fresh damage to the owner's colliery, occasioned by the trustees continuing such insufficient gratings and catchpits, was a distinct cause of action. *Id.*

**Time for bringing Action.**—Therefore, an action brought in respect of it within three months from the time of such fresh damage, although more than three months from the first damage, was not defeated by 3 Geo. 4, c. 126, s. 147, which limits the action against such trustees to "three months after the fact committed." *Id.*

### 3. REPAIR OF ROADS.

**Mandamus to Compel.**—A mandamus does not lie to compel the repair of a turnpike road. *Reg. v. Oatford and Witney Roads (Trustees)*, 4 P. & D. 154; 12 A. & E. 427.

**Liability of Treasurer or Surveyor.**—When a turnpike road is out of repair, the proper person to be summoned and proceeded against, in the first instance before justices at special sessions, under 5 & 6 Will. 4, c. 50, s. 94, is the treasurer or surveyor, or other officer of the turnpike road. *Gorton (Surveyors), In re*, 25 L. J., M. C. 70; *S. C.*, nom. *Reg. v. Trafford*, 5 El. & Bl. 967; 2 Jur., N. S. 399.

**Jurisdiction to Summon.**—A single justice has no authority, under 5 & 6 Will. 4, c. 50, s. 94, to summon the surveyor of turnpike roads for non-repair. *George v. Chambers*, 11 M. & W. 149; 2 D. N. S. 783; 12 L. J., M. C. 94; 7 Jur. 836; *S. C.*, *Reg. v. St. Albans (Justices)*, 1 C. L. R. 536; 22 L. J., M. C. 142; 17 Jur. 531.

**Liability of Trustees.**—If trustees under a road act turn a road through an inclosure, and make the fences at their own expense, and repair them for several years, they cannot be compelled to continue such repairs unless there is a special provision in the act to that effect. *Rea v. Llandillo (Commissioners)*, 2 T. R. 232.

Where the trustees of a turnpike road have formed a new road through private grounds, but have neglected to make proper fences, as required by 4 Geo. 4, c. 95, s. 66, the want of the necessary funds for that purpose is not a sufficient answer to a mandamus commanding them to make the fences. *Reg. v. Luton Roads (Trustees)*, 1 G. & D. 428; 1 Q. B. 860.

— **Cleansing of Ditches and Drains.**—Under 3 Geo. 4, c. 126, s. 113, the obligation to make, scour, cleanse and keep open the ditches, drains and watercourses for keeping turnpike roads dry, and conveying the water from them, is on the trustees, and not on the occupiers of adjoining lands. *Merivale v. Exeter Turnpike Road (Trustees)*, 3 L. R., Q. B. 149; 37 L. J., M. C. 40; 18 L. T. 83; 16 W. R. 702; 9 B. & S. 70.

— **Agreement for—Liability of Successors.**—The respective trustees of two different turnpike roads, agreed, that the main street of a borough through which street the two roads passed, and which had been treated as common to the two trusts, should in future be repaired by one trust alone, and that the other trust should contribute, annually, a certain sum towards those repairs, as long as the said portion of road should remain common to both trusts, and be repaired as aforesaid. In an action by the repairing trustees to recover from the contributing trustees their share due under the agreement in respect of the repairs:—Held, that the trustees had power to make such an agreement, under 4 Geo. 4, c. 95, s. 78; and that the succeeding trustees were bound by the agreement until it was determined by notice from either side. *Swinburne v. Robinson*, 1 El. & El. 80; 28 L. J., Q. B. 4; 5 Jur., N. S. 462.

— **Effect of Local Act.**—A local act for repairing a road under the trust of the contributing trustees, passed after the making of the agreement, provided that it should not be lawful for the trustees to apply the tolls or moneys coming to their hands under the act "in repairing or amending any part of the turnpike roads in any town or place which is or shall be paved or repaired by any commissioners or trustees for executing any local act of parliament":—Held, that the fact that the borough had been brought within the provisions of the 11 & 12 Vict. c. 63, Public Health Act, did not render the agreement void under the local act. *Id.*

**Liability of Parish—Tolls an Auxiliary Fund.**—Where a turnpike act, after empowering the trustees under it to take tolls, directed that the roads should from time to time be repaired by the trustees out of the money arising by virtue of the act:—Held, that this only made the tolls an auxiliary fund in the hands of the trustees, and that the inhabitants of the township where the road was situate, who by prescription were bound to repair all roads within it, were nevertheless liable to be indicted for non-repair of the road. *Re v. Netherthong*, 2 B. & A. 179.

Held, also, that such inhabitants might, after conviction, apply by motion for relief against the trustees under 13 Geo. 3, c. 84, s. 33. *Id.*

If a turnpike road is out of repair, the inhabitants are liable to be indicted, although the tolls are appropriated by act of parliament to the repairs thereof. In such case they must seek relief from the trustees under 3 Geo. 4, c. 126. *Reg. v. Preston*, 2 Lewin, C. C. 193.

The 4 Geo. 4, c. 95, s. 68, which recites, that doubts have arisen whether any body politic or corporate, or any particular person or persons liable to repair, by tenure or otherwise, any old turnpike road, ought to repair any new road set

out in lieu of the old road, and then enacts, that every body politic or corporate, and person or persons liable to repair any old turnpike road, shall be liable to repair any new road set out in lieu thereof, includes parishes. *Reg. v. Barton*, 3 P. & D. 190; 11 A. & E. 343.

**Obtaining Materials for—"Inclosed Lands."**—The words "inclosed lands," in 3 Geo. 4, c. 126, ss. 97 and 98, meant lands which were actually inclosed and surrounded with fences; and, therefore, where (before 4 & 5 Vict. c. 51) lands on downs were not fenced off, although private property, a surveyor might take materials for the repairs of a turnpike road, without the order of the justices mentioned in s. 98. But it was otherwise where the land was surrounded by a fence, though out of repair. *Tapsell v. Crosskey*, 7 M. & W. 441.

— **Gardens.**—Where there was a power for trustees of a turnpike road to dig for gravel, except in gardens:—Held, that the exception extended to fields planted with garden stuff. *Hughes v. Brand*, Amb. 105.

— **Order of Sessions—Validity of.**—An order of sessions for digging materials in private soil, by virtue of 29 Geo. 2, c. 67, quashed, because it shewed no notice to the occupier, nor what kind of material for repair was wanted, nor in what fields it was intended to search, and did not award a satisfaction to the owner and occupier. *Re v. Manning*, 1 Burr. 377; 2 Ld. Ken. 561.

**Expenses of.**—*See infra*, cols. 759 and 761.

#### 4. TOLLS.

##### a. Toll Bars and Houses.

**Power to Erect.**—The 9 Geo. 4, c. 77, s. 5, authorizes turnpike trustees to build toll-houses, and inclose gardens for them on the sides of the turnpike roads:—Held, that this power is limited to the inclosure of land on the side of the road over which the public has an easement for passage, and does not extend to land adjacent to the road over which the public has no easement, though the land is uninclosed. *Beckett v. Upton*, 5 El. & Bl. 629; 25 L. J., Q. B. 70; 1 Jur., N. S. 1136.

— **Within what Distance.**—By a turnpike act, the trustees were authorized to erect toll-bars, but not within three miles of B.:—Held, that the distance from B. must be measured on the straight line on the horizontal plane; the circumstance that the act was a turnpike act not being sufficient to indicate an intention that it should be measured along the road. *Jewel v. Stead*, 6 El. & Bl. 350; 25 L. J., Q. B. 294; 2 Jur., N. S. 783.

— **Under a Local Act—Construction.**—By a local act, which was to continue in force for thirty-one years, it was enacted, that it shall not be lawful for the trustees of the turnpike-roads to continue or erect any turnpike or toll-gate across the roads, in the towns of T. and W., or in any other town through or into which the roads might pass or be made in pursuance of

the act, within the thirty-one years:—Held, that the act was prospective, so as to prohibit as well the continuance of any turnpike-gate in the town of T., as it might be at any time during the thirty-one years for which the act was to be in force, as the erection of one in the town, as it was when the act passed. *Reg. v. Cottle*, 16 Q. B. 412; 20 L. J., M. C. 162; 15 Jur. 721.

**Within a Town—Right to Demand Tolls—Jurisdiction of Magistrates.**—A turnpike act, passed in 1815, forbade the demanding or taking toll from any of the inhabitants of S, at any toll-gate "to be erected in the said town." In 1838 a toll-gate, which had stood in the town since 1815, was moved (about 1,200 yards) to a site outside the town. For several years there was no house between the new site of the gate and the town, but subsequently several houses were built on both sides of the road, though not forming a continuous street. Between 1838 and 1878, no toll was demanded from any inhabitant of S, but in the latter year A., an inhabitant of the town, was called upon to pay toll on driving through the gate. He then summoned the toll-collector for unlawfully demanding toll. The magistrates found as a fact that the toll-gate did not, either when erected or at the date of the complaint, stand within the town, and they dismissed the summons:—Held, (1) that the question whether the toll-gate was within the town was a question of fact for the magistrates, and the court could not go behind their finding; (2) that the finding was right in point of fact; and (3) that the omission to demand toll for forty years gave the public no right to exemption. *Deards v. Goldsmith*, 40 L. T. 328.

**Near a Bridge—Rules for.**—By a local act a person was empowered to make a bridge over a river, and to set up gates and take tolls upon or near to the bridge, or at or upon any of its approaches or communications belonging to him, and from time to time to remove such gates to any part of the bridge or approaches. He moved a toll-gate from near the bridge to a point in a private road (which was his property, and let to the bridge) half a mile distant from the bridge:—Held, that, as the toll to be taken was pontage and not toll traverse, the gate must be so approximate to the bridge that the gate-keeper could see if a person passing through it was really going over the bridge, and that therefore toll could not be legally payable at the gate half a mile from the bridge. *Royal v. Yarley*, 20 W. R. 908.

**Compelling Trustees to Pull Down.**—A toll-house erected by turnpike trustees on a highway was for some years used for the collection of tolls. The toll-bar attached to the house was then taken down, and for twelve years subsequently no toll had been collected at the house, which had been in the occupation of a man employed by the road surveyors for the repair of the road. It was stated by the trustees that they might at some future period again require to use the house on the collection of tolls:—Held, that the owner of the land adjoining was entitled to a mandamus to compel the trustees to pull down the toll-house and remove the materials, for it must be taken to have become useless and no longer required for the purposes

of the road within the meaning of 4 Geo. 4, c. 95, s. 57. *Reg. v. Greenlaw Road (Trustees)*, 4 Q. B. D. 447; 48 L. J., Q. B. 409; 40 L. T. 555.

**Sale of Toll-Houses by Trustees.**—A person was indicted for obstructing a highway, having purchased and kept standing a toll-house, not required for the purposes of the road, from the trustees of the turnpike, under 29 & 30 Vict. c. 105, s. 2. This toll-house was situated in the middle of a wide part of the road at the junction with another road. The addition of the site would have been a slight improvement to the road for the purpose of persons driving a particular way, but it would have been of no material benefit or advantage for the chief part of the traffic; and the price paid for the house was 120*l*.:—Held, that assuming the court to have jurisdiction to review the propriety of the sale, the trustees must have a practical discretion under the 29 & 30 Vict. c. 105, s. 2; and that, the price of the house being far beyond the value of the improvement, the trustees were justified in selling the house instead of adding the site to the road. *Reg. v. Fox*, 35 L. T. 249.

## b. Nature and Amount of Tolls.

### i. On what Payable.

**Generally.**—Toll is not payable for passengers' luggage in an omnibus, or for a sheep and lamb in a basket on the omnibus, or for a man riding a horse, under an act imposing toll separately on carriages, on portmanteaus, trunks, &c., on passengers and travellers, or sheep, lambs, &c., and on horses ridden or not ridden. *Portsmouth Floating Bridge Company v. Nance*, 6 M. & G. 222; 6 Scott, N. R. 823.

**Taxed Cart.**—A local act provided that upon a turnpike road certain tolls should be chargeable "for every horse or other beast drawing any other chaise, chair or caleche, or any taxed cart, a sum not exceeding 3*d*."—Held, that a cart upon which a tax had been imposed and paid in the previous year was within the enactment, and that no larger toll than 3*d*. could be charged for passing through the toll-gate. *Purdy v. Smith*, 1 El. & El. 511; 28 L. J., M. C. 150; 5 Jur., N. S. 912.

By a local act of 1852 the trustees of a turnpike road were empowered to take a certain toll "for every horse or other beast drawing any car or chair or other such like carriage with double seats (except a dog cart), or any phaeton, caravan, or taxed cart, or any four-wheeled light carriage, if drawn by one horse or other beast only."—Held, that the words "taxed cart" mean such a cart as comes within the designation of taxed cart in 43 Geo. 3, c. 161, and do not apply to any cart, simply because it is a cart in respect of which a tax is paid. *Williams v. Lear*, 7 L. R., Q. B. 285; 41 L. J., M. C. 76; 25 L. T. 906.

**Locomotive Steam Ploughs.**—A steam engine, which, in being taken along a turnpike road for the purpose of working a plough for hire, and on its way to take up a plough to be driven on a farm not occupied by the owner of the engine, having on it the necessary plough gear, passes through a turnpike gate more than three miles

distant from where the plough was, is liable to toll under 24 & 25 Vict. c. 7, s. 1, and is not within the exemption arising from 24 & 25 Vict. c. 70, s. 12, and 3 Geo. 4, c. 126, s. 32, inasmuch as it is not a horse or a carriage conveying a plough, or a plough itself. *Skinner v. Visger*, 9 L. R., Q. B. 199; 43 L. J., M. C. 49.

**Bicycle.**—A local turnpike act, 3 Will. 4, c. 4, imposed the following tolls:—For every horse, mule, or other beast drawing any coach, sociable, chariot, berlin, landau, vis-à-vis, phaeton, curricule, &c., 6d. For every carriage of whatever description, and for whatever purpose, which shall be drawn or impelled, or set or kept in motion by steam or other power or agency, than being drawn by any horse or horses, or other beast or beasts of draught, 5s.:—Held, that a bicycle was not a carriage liable to toll under the act. *Williams v. Ellis*, 5 Q. B. D. 175; 49 L. J., M. C. 47; 42 L. T. 249; 28 W. R. 416; 44 J. P. 394.

**According to Size of Wheels.**—Amount of tolls payable on breadth of felloes of wheels. *Beerling v. Terry*, 6 L. T. 186.

A turnpike act of 1861 comprised within the trusts eighteen several roads. It empowered the trustees to demand and take "at the several and respective toll-gates which shall be upon or on the sides of the roads, such tolls as the trustees shall direct, not exceeding for every horse drawing any cart, waggon, &c., with wheels of a less breadth than four and a half inches, 6d.," and "for every horse or mule, laden or unladen, and not drawing, 1½d.":—Held, that the local act specifically providing for progressive charges in respect of the diminished breadth of waggon wheels, virtually repeals 3 Geo. 4, c. 126, s. 7, and, consequently, that the toll was limited to the sums mentioned in the local act. *James v. Dickenson*, 14 C. B., N. S. 416.

The additional toll to be paid by waggons which are overweight must be according to the progressive proportions named in 12 Geo. 3, c. 82, s. 2; not a gross charge at the highest additional toll incurred upon the gross overweight. *Chamberlain v. Longhurst*, Cowp. 365.

Where a turnpike act imposed a toll of 1s. 6d. on every four-wheeled waggon with wheels of a less breadth than six inches, and drawn by four horses; 1s. on every such waggon drawn by three horses; 9d. by two; and 4½d. by one; and so in like proportion on waggons with two wheels drawn by four, three, two, or one horse or horses:—Held, that only those respective sums could be demanded for toll, and that the 13 Geo. 3, c. 84, s. 23, by which one-half more than the tolls payable for waggons with wheels of a less breadth than six inches might be taken, was virtually repealed by the other act. *Ridge v. Garlick*, 2 Moore, 481.

By a local act, a scale of tolls was prescribed, by which a toll of 4½d. was imposed for each horse drawing any waggon drawn by four horses, whether the felloes of the wheels were of the breadth of six inches and upwards, or less. The trustees under this act had, previously to the passing of the 3 Geo. 4, c. 126, taken and collected the additional toll directed to be taken by 13 Geo. 3, c. 84:—Held, that such increased toll (6½d.) was properly demanded; the case not falling within the exemption contained in 4 Geo.

4, c. 95, ss. 5, 6. *Pickford v. Davis*, 4 M. & Scott, 683; 1 Bing. N. C. 141.

Where a turnpike act authorized the trustees to take at each and every toll-bar on the whole line of road a certain scale of tolls; and by another section they were authorized at a meeting, upon notice thereof to be affixed on all the gates, to reduce or advance all or any of the tolls granted by the act:—Held, that the trustees had no authority to reduce or advance the tolls at some gates and not at others. *Rea v. Bury and Stratton Roads*, 6 D. & R. 369; 4 B. & C. 361.

## ii. Exemptions.

**The Sovereign.**—A carriage and horses belonging to the Queen, driven by her coachman, and used by a member of her household, or his family, with the Queen's permission, though not upon her service, are exempt from turnpike tolls. *Westover v. Perkins*, 2 El. & El. 57; 28 L. J., M. C. 227; 5 Jur., N. S. 1352.

**Commissariat Stores.**—The exemption from toll in 3 Geo. 4, c. 126, s. 32, in favour of carts conveying stores for the use of her Majesty's forces, applies, although the cart conveying such stores is the cart of a common carrier hired for that purpose by the contractor for such stores, and although the contract contains a power to the officer in command at the dépôt to which they are being conveyed of rejecting them, if they should not be of a certain quality. *London and South-Western Railway Company v. Reeves*, 1 L. R., C. P. 580; 35 L. J., M. C. 239; 12 Jur., N. S. 786; 14 L. T. 662; 14 W. R. 967; 1 H. & R. 845.

By 3 Geo. 4, c. 126, s. 32, any waggon conveying commissariat stores for the use of her Majesty's forces is exempt from toll. A contractor for the supply of forage for the use of her Majesty's forces at A. was bound by his agreement to keep at A. a supply of forage sufficient for at least fourteen days' consumption. The deputy commissary-general had a right to inspect the forage at the store, and reject all that was of inferior quality. A waggon belonging to the contractor was conveying forage to the store at A., bona fide intended to be there delivered in performance of the agreement, and for the use of her Majesty's forces:—Held, that the waggon was exempt from toll. *Toomer v. Reeves*, 3 L. R., C. P. 62; 37 L. J., M. C. 49; 18 L. T. 123; 16 W. R. 896.

**Officers and Soldiers on Duty.**—By 27 & 28 Vict. c. 3 (Mutiny Act, 1864), s. 72, her Majesty's officers and soldiers on duty are exempt from payment of any duties and tolls in passing along or over any turnpike or other roads or bridges:—Held, that this exemption did not apply to a floating bridge propelled from one side of a river to the other by steam power, and kept in its course by parallel chains laid across the bed of the river. *Ward v. Gray*, 6 B. & S. 345; 34 L. J., M. C. 164; 12 L. T. 305; B. W. R. 653.

**Volunteers.**—A captain of volunteer infantry dressed in his uniform, and having his arms and accoutrements, according to the regulations of his corps, passing through a turnpike gate in a carriage hired for the purpose of returning from drill, is exempt from toll by 3 Geo. 4, c. 126, s.

32. *Stephenson v. Taylor*, 1 B. & S. 95; 30 L. J., M. C. 145; 7 Jur., N. S. 602; 4 L. T. 243; 9 W. R. 600.

An omnibus hired by volunteers especially to carry them to a place of exercise is exempt from toll by 3 Geo. 4, c. 126, s. 32, though some of them are not in uniform, or though a person not a volunteer is allowed to sit in it, not paying for his seat. *Id.*

Volunteers in uniform, going to attend a voluntary rifle match, at a duly appointed place of rifle practice, but open to all the world, were not entitled to exemption from toll, under 24 & 25 Vict. c. 126. *Teather v. Turner*, 7 L. T. 785; 11 W. R. 425.

The exemption of volunteers from toll contained in 26 & 27 Vict. c. 65, s. 45, does not extend to members of the yeomanry cavalry, and therefore such members are not exempt if they drive instead of ride to the place of meeting of their corps. *Humphrey v. Bethel*, 1 L. R., O. P. 215; 35 L. J., M. C. 150; 12 Jur., N. S. 212; 13 L. T. 797; 14 W. R. 457; 1 H. & R. 221.

**Clergymen.**—By 3 Geo. 4, c. 126, s. 32, no toll shall be taken from any rector, vicar or curate going to or returning from visiting any sick parishioner or on other his parochial duty within his parish:—Held, that a clergyman acting as curate of a parish with the permission of the bishop, though without his licence, was within the exemption, and that the exemption extended to a turnpike not in the parish to which he was going on parochial duty. *Temple v. Dickinson*, 1 El. & El. 34; 28 L. J., M. C. 10; 5 Jur., N. S. 363.

The curate of a parish was engaged by the rector of a neighbouring parish to discharge his clerical duties during his temporary absence from illness. There was no licence from the bishop or other authority by which the curate was empowered to perform the duties. He rode through a turnpike-gate on his way to the parish church to perform the ceremony of marriage:—Held, that he was not entitled to the exemption from toll given by 3 Geo. 4, c. 126, s. 32, to the curate of a parish on parochial duty within his parish. *Brunskill v. Watson*, 3 L. R., Q. B. 418; 37 L. J., M. C. 103; 18 L. T. 432; 16 W. R. 1009.

A clergyman driving out to visit a sick parishioner is exempted from paying toll in respect of his carriage and horse, although accompanied by his wife and family. *Layard v. Overy*, 3 L. R., Q. B. 415; 37 L. J., M. C. 148; 18 L. T. 123; 16 W. R. 896.

**Minister of Primitive Methodists.**—A minister of the Primitive Methodists had assigned to him, by persons having authority amongst the Primitive Methodists, the Sunday and other services in a district comprising thirteen parishes, of which the parish of F. was one. The days on which and the places at which he was to attend were fixed at regular quarterly meetings of the Primitive Methodists, and were printed on a "plan." The minister, according to this plan, had to preach at F. on three Sundays in one quarter of a year, and on the other Sundays during the quarter at some of the other parishes in his district:—Held, that in going to F. on the Sundays indicated in the plan to conduct the services there, the minister was going to "his usual place of religious worship," within

3 Geo. 4, c. 126, s. 32, and was therefore exempt from liability to pay tolls. *Smith v. Barnett*, 6 L. R., Q. B. 34; 40 L. J., M. C. 15; 23 L. T. 746.

**Persons attending Places of Worship.**—"Parochial."—A turnpike act exempted persons from toll "in going to and returning from their proper parochial church, chapel or other place of religious worship on Sundays:"—Held, that the word "parochial" extended over the whole clause; and, therefore, that a dissenter was not within the exemption in going to and returning from his proper place of religious worship, situate out of the parish in which he resided. *Lewis v. Hammond*, 2 B. & A. 206.

**Police Constables.**—The exemption from toll, granted by 3 & 4 Vict. c. 88, s. 1, to police constables passing with horses along any turnpike road or bridge, extends to a road or bridge made and erected by a company under an act of parliament. *Longland v. Andrews*, 3 H. & C. 564; 34 L. J., Ex. 90; 11 Jur., N. S. 412; 12 L. T. 233; 13 W. R. 784.

**Seafaring Persons.**—By a local act, passed in 1834, the company of proprietors of the Southampton and Itchen Floating Bridge and Roads was incorporated, and tolls were payable for passing over such bridge, there being an exemption from toll in favour of any fisherman or seafaring person being an inhabitant of the parish of St. Mary Extra. By a section in a subsequent act it is enacted that the words "fishermen, seafaring men, and seafaring persons" in the recited acts, or any of them, shall not be deemed or construed to extend to or include any person who shall not be bona fide a fisherman, seaman, mariner, sailor or pilot. A. had for many years been engaged upon one of the Peninsular and Oriental Company's steamships trading between Southampton and Alexandria, and was an inhabitant of the parish of St. Mary Extra. He signed articles like all other seamen employed on board, and was bed-cabin steward. He was liable to do what the captain ordered him to do either above or below deck, but, without special orders, his duties were confined to the bed-cabins. He had occasionally lent a hand in making and shortening sail, and in heaving the capstan when weighing anchor; but he never kept watch on board and never steered:—Held, that he was a seafaring person within the statute, and so entitled to exemption from toll. *Sharp v. Fields*, 10 L. T. 338.

**"Fodder for Cattle."**—Barley grown on a farm, which was being conveyed to a mill to be ground into meal for feeding pigs upon the farm, and barley meal ground at the mill from barley grown on the farm, which was being conveyed back to be consumed by pigs on the farm, are within the exemption as "fodder for cattle" in 3 Geo. 4, c. 126, s. 32. *Clements v. Smith*, 3 El. & El. 238; 30 L. J., M. C. 16; 6 Jur., N. S. 1149; 3 L. T. 295; 9 W. R. 53.

**Milk.**—Milk does not come within the meaning of the words "or other agricultural produce" in 3 Geo. 4, c. 126, s. 32, so as to be exempt from toll. *Oran v. Gait*, 1 L. T. 326.

**Cattle going to or returning from Pasture.**—In a turnpike act, imposing tolls on horses, &c., "cattle going to or returning from pasture," and

"horses attending cattle returning from pasture," were exempted:—Held, that a horse ridden by the owner of the cattle at pasture, in order to fetch them from pasture, did not come within either of the exemptions. *Harrison v. Brough*, 6 T. R. 706.

**Farmers.**—The exemption from toll on a turnpike road, contained in 1 & 2 Will. 4, c. 26, s. 1, in respect of sheep or cattle going to pasture, is not confined to farmers occupying farms in the locality of a toll-gate. *Warmby v. Deakin*, 14 C. B., N. S. 124; 32 L. J., M. C. 201; 10 Jur., N. S. 98; 8 L. T. 319; 11 W. R. 669.

A., who carried on the business of a farmer and cattle dealer, had two pasture fields, one on each side of a toll-bar. Having purchased beasts and sheep at a market, he drove them to the one pasture, and, after keeping them there a day, drove them through the toll-bar to the other pasture, intending the next day to send them to another market on that side of the bar, for sale. The distance between the two pastures along the turnpike road was less than two miles:—Held, that the animals were exempt. *Id.*

**Manure.**—The provision of 3 Geo. 4, c. 126, ss. 28, 32, which exempts from toll on turnpike roads carriages employed only in carrying manure, and exacts that toll shall not be demanded for them "by reason only of any basket or baskets, empty sack or sacks, or spade, shovel, or fork, necessary for loading or unloading such manure, being in or upon any such carriage," is not repealed by 5 & 6 Will. 4, c. 18, s. 1. *Richens v. Wiggins*, 3 B. & S. 963; 32 L. J., M. C. 144; 9 Jur., N. S. 1055; 8 L. T. 384; 11 W. R. 617.

A person drove through a turnpike gate a cart laden with garden produce, packed in baskets, paying the toll, and returned the next morning with the cart laden with manure for land, on the top of which were the baskets empty:—Held, that no toll was demandable on account of these baskets being on the cart. *Id.*

A turnpike act for repairing roads exempted carts employed in carrying "mould, dung, soil, marl, manure, or compost employed in husbandry for manuring or improving land":—Held, that this exemption included soil carried by the owner to be deposited in a place belonging to himself, and there sold for the purpose of its being employed as manure by others. *Reg. v. Froke*, 5 El. & Bl. 944; 26 L. J., M. C. 64; 2 Jur., N. S. 162.

The same construction is applicable to a similar exemption contained in 5 & 6 Will. 4, c. 18, s. 1. *Id.*

Under 5 & 6 Will. 4, c. 18, s. 1, which provides that no turnpike toll shall be demanded in respect of any horse or carriage conveying manure for land, artificial manure carried by the dealer to the farmer in the dealer's cart is exempt from toll. *Foster v. Tucker*, 5 L. R., Q. B. 224; 39 L. J., M. C. 72; 22 L. T. 124.

A cart drawn by horses laden with manure for the manuring of land is exempt from toll. *Row v. Adams*, 6 M. & S. 52.

An act exempting carts and waggons, loaded with manure, from toll, exempts them from toll if they are going empty to fetch manure. *Harrison v. James*, 2 Chit. 547. But see 52 Geo. 3, c. 145.

Uncrushed bones, which are taken through a turnpike to be there crushed and part of them used as manure, and the residue to be afterwards sold and to be used as manure at other places, are exempt from toll under 3 Geo. 4, c. 126, s. 32, and 5 & 6 Will. 4, c. 18, s. 1. *Pratt v. Brown*, 8 C. & P. 244.

**Lime.**—Under an exemption from toll, in an act of parliament, for carts carrying compost, or any thing whatever used in the manuring of land, the carriage of lime is not exempt; the words, "or any thing whatsoever used in the manuring of land," being considered as only applying to the carriage of ploughs, harrows, and such like instruments. *King v. Gough*, 2 Chit. 655.

A clause in a turnpike act exempted from toll all carriages employed in the conveyance of materials for repairing the road, or any of the highways, in the parishes in which any part of the road lay; and in a subsequent part exempted generally carriages employed in conveying implements of husbandry or manure. In the following clause, the trustees were empowered to compound with persons who resided in one parish, and occupied lands in an adjoining parish. A waggon was passing on the road, laden with lime, from one parish to another, for the purpose of the cultivation of owner's farm, situate in the latter, neither of which was situate in any of those parishes through which the road passed:—Held, that this, being an exemption in the former clause in favour of husbandry, was to be beneficially construed, and that it was not restrained by the subsequent one; and that, consequently, the owner of the waggon was not liable to the payment of toll. *Hickinbotham v. Perkins*, 3 Moore, 185.

**Implements of Husbandry—Engines.**—A steam-engine used exclusively for working a threshing-machine belonging to the same owner, and passing a turnpike gate at the same time with the threshing-machine, but in a separate cart, is exempted from toll as an implement of husbandry, although the steam-engine is capable of being applied to other purposes. *Reg. v. Matty*, 8 El. & Bl. 712; 27 L. J., M. C. 59; 4 Jur., N. S. 238.

**Threshing-Machines.**—Where a local act engrafted on the exemption of agricultural machines contained in 3 Geo. 4, c. 126, s. 32, an exception of machines, "let to hire, or travelling for the purpose of being used by any person other than the owner thereof":—Held, that a threshing-machine, owned by a person who was taking it along the road for the purpose of threshing for hire the corn of a farmer, was within the exception. *Rapley v. Richards*, 12 W. R. 864.

A turnpike act imposed certain tolls on waggons and carts, and by the interpretation clause included in these words threshing-machines. By 3 Geo. 4, c. 126, s. 4, all the enactments, provisions, matters, and things contained in the act are to extend to existing and future turnpike acts, unless expressly referred to and varied, altered, or repealed; and by s. 32, implements of husbandry are exempted from toll. By 9 Geo. 4, c. 77, s. 19, the powers, &c., in the former act are to extend to every local turnpike act as if repeated in it. By 14 & 15

Vict. c. 38, s. 4, and 16 & 17 Vict. c. 135, s. 6, implements of husbandry in 3 Geo. 4, c. 126, are to include threshing-machines:—Held, that within the area of the local act, the provisions of the general acts as to threshing-machines were superseded, and that such machines within such area were liable to pay toll. *Ablet v. Pritchard*, 1 L. R., C. P. 210; 35 L. J., M. C. 101; 12 Jur., N. S. 211; 14 L. T. 16; 14 W. R. 331; 1 H. & R. 274.

**Road Materials.**—A bridge was not a highway within 13 Geo. 3, c. 84, s. 60, by which carriages employed in carrying materials for the repair of any turnpike road or public highway were exempted from toll; and, therefore, toll was payable for a carriage employed in carrying materials for the repair of a bridge along a turnpike road. *Osmond v. Widdicombe*, 2 B. & A. 49.

**Merely Crossing.**—The act of 4 & 5 Vict. c. 33, is merely a declaratory act, and does not create any new exemption from toll. *Harris v. Morrice*, 10 M. & W. 260; 12 L. J., Ex. 43.

**Passing for Less Distance than One Hundred Yards.**—The 13 Geo. 3, c. 84, s. 34, exempted from toll carriages passing on a turnpike road for a less distance than one hundred yards, whether they quitted the road on the same side on which they entered it, or on the opposite side. *Major v. Owenham*, 5 Taunt. 340.

Under 3 Geo. 4, c. 126, s. 32, a carriage is not exempt from toll which passes along one hundred yards of a road from A. to B., for repairing which trustees have been appointed under a local act, although a part of the one hundred yards be a street which, by a subsequent act, the trustees are forbidden to repair. *Pope v. Langworthy*, 1 N. & M. 647, n.; 5 B. & Ad. 464.

Where a turnpike act imposes toll on carriages passing one hundred yards upon a turnpike road, from A. to B., but throws upon the county the repairs of the bridges and approaches to bridges on that line of road, such toll is incurred by a carriage passing one hundred yards along the road, although part of that distance be made up of the approaches to one of the bridges repaired by the county. *Bussey v. Storey*, 1 N. & M. 639; 4 B. & Ad. 98.

By 3 Geo. 4, c. 126, s. 32, no toll shall be taken on any turnpike road for any horses or carriages which shall not pass above one hundred yards thereon:—Held, that a person who, after crossing a turnpike road from P. to W. at a toll-bar, travelled along a parish road into a turnpike road from P. to C., which was under the same trust, and passed more than one hundred yards thereon, was exempt from toll, inasmuch as the road from P. to C. was not identical with the road from P. to W. *Reg. v. Gerard*, 3 Jur., N. S. 741; 26 L. J., M. C. 148; 8 C., nom. *Gerard v. Parker*, 7 Bl. & Bl. 498.

The user at different times of portions of the turnpike road, each less than one hundred yards, but, taken together, more than one hundred yards, does not deprive a party of the benefit of the exemption in 3 Geo. 4, c. 126, s. 32. *Veitch v. Beeter Turnpike Roads (Trustees)*, 8 Bl. & Bl. 986; 27 L. J., M. C. 116; 4 Jur., N. S. 584.

An act empowered trustees of a turnpike road leading into a town to collect tolls from persons

passing more than a hundred yards along it, and to borrow money on the credit of the tolls. By an act for improving the town, the road trustees were prohibited from repairing a certain portion of it nearest the town, and the town commissioners were to maintain it in future:—Held, that the road trustees might still take the same tolls for passing over that part, and that it still continued part of the same turnpike road for all purposes but that of repair. *Phipson v. Harcourt*, 1 C., M. & R. 473; 5 Tyr. 54.

A person is liable to pay toll at a toll gate on a turnpike road, though he has not travelled one hundred yards on the road before coming to the gate, if, after passing through the gate, he uses the road for a space which, together with that he has passed over previously, exceeds in all the distance of one hundred yards. *Horwood v. Powell*, 30 L. J., M. C. 203; 4 L. T. 372; 9 W. R. 659.

**Nature of Exemption.**—The exemption in 13 Geo. 3, c. 84, from payment of toll by a passenger crossing a road, and not going one hundred yards thereon, was confined to carriages, &c., merely crossing the road. *Phillips v. Harper*, 2 Chit. 412.

**"Pass" and "Repass."**—By a turnpike act tolls were authorized to be taken for horses, carts, &c., with a proviso that if the tolls shall have been paid for the passing of any horse, &c., through a toll gate, such horse, &c., should be permitted to repass during the same day toll free:—Held, that this proviso did not extend to exempt from toll a horse, &c., which had once passed and repassed—the words "pass" and "repass" meaning "going" and "returning." *Hill v. Browning*, 22 L. T. 712.

**Passing Several Times in One Day—Exemption from Second Toll—In what Cases.**—Where a turnpike act imposed a scale of tolls upon horses only, drawing or not drawing carriages, respectively, as the case might be, and by a clause of exemption it was provided that no person should be liable to pay toll more than once for passing and repassing the gates on the same trust at any time in any one day, with the same horses and carriages, through the same toll-gate; but that every person having paid toll once should afterwards pass and repass with the same horses and carriages toll-free during the same day, through the same gate where such toll was paid; and a stage-coach drawn by four horses having passed through a gate on trust, and paid the toll in the morning, and in the evening of the same day the same horses drawing a different coach of the same name, belonging to the same proprietors, driven by the same coachman, but carrying different passengers and parcels for hire, attempted to repass through the gate, and a second toll being demanded and refused, the collector seized one of the horses until it was paid:—Held, in an action for seizing and detaining the horse, that the action could not be sustained, the carriage and horses not being exempted from a second toll. *Loaring v. Stone*, 3 D. & R. 797; 2 B. & C. 515. See next case.

By a turnpike act, a toll of sixpence should be demanded and taken for every horse drawing any stage-coach, from the person or persons attending the same. A subsequent clause pro-

vided, that if any person or persons should have paid the toll for any cattle or carriage passing through the gate, the same person or persons on producing a ticket should be permitted to pass and re-pass through the same gate with the same cattle or carriage, toll free at any time during the same day. A stage-coach, drawn by four horses, passed through and paid the toll; in the evening of the same day, a different coach, called by the same name, belonging to the same proprietors, and drawn by the same four horses, but driven by a different coachman, and carrying different passengers and parcels for hire, passed through the same gate:—Held, that a second toll was not payable in respect thereof. *Norris v. Poate*, 10 Moore, 293; 3 Bing. 41. See preceding case.

A turnpike act imposed a toll, first, upon every carriage drawn by horses; then upon every horse not drawing; and then upon every drove of oxen or cattle: with a proviso "that no more than one toll should be taken from any person re-passing on the same day with the same horses, cattle, beasts and carriages." Where a stage-coach, drawn by four horses, paid the toll in the morning, and in the evening of the same day re-passed with the same driver, but with different horses and passengers:—Held, that a second toll was not payable. *Waterhouse v. Keen*, 6 D. & R. 257; 4 B. & C. 200.

A turnpike act imposed tolls, first, upon carriages drawn by horses; second, upon horses not drawing; third, upon oxen, &c.; provided, that all persons having paid once for their carriages, horses and cattle returning the same day with the same carriages, horses and cattle, should pass toll free. A subsequent act recited, that it was expedient to increase the existing tolls, and re-enacted the provisions of the former act, subject to some alterations, one of which was, that the former tolls should cease, and that instead there should be paid a certain toll for every horse drawing a carriage. Four horses passed a toll-gate in the morning, drawing a carriage, and re-passed the same gate in the evening, drawing a different carriage:—Held, that, being the same horses, they were not liable to a second toll. *Fearnley v. Morley*, 7 D. & R. 832; 5 B. & C. 25.

A turnpike act imposed tolls for every horse drawing any coach, and other tolls upon every horse not drawing; it provided, generally, that if the tolls had in any one day been paid for the passing of any horse, such horse should on that day be permitted to re-pass once toll free; but enacted, that the toll for horses drawing any stage-coach should be payable every time of passing. The trustees let the tolls, with power to collect them according to the act, and subject to such rules and restrictions as should be made by the trustees; and the lessee covenanted with the trustees to permit the owners of stage-coaches, waggons, &c., to pass in the following manner, viz. horses drawing any such carriage as therein-before mentioned, to be respectively allowed to pass along the road on payment of full toll going and quarter toll returning at any time during the same day. Horses passed through a gate, drawing a stage-coach, and full toll was paid for them; they returned the same day, drawing another stage-coach, and the lessee exacted full toll:—Held, that the lessee ought, by his covenant, to have demanded quarter toll only. *Penton v. Swallow*, 1 A. & E. 723.

A turnpike act imposed toll, first, upon every horse, &c. drawing any carriage; second, upon every horse, &c. not drawing; and third, upon every score of oxen, &c.: provided that no collector should take from any person more than one toll for the same carriage, horses, beasts or cattle, passing once, and re-passing once in the same day, through the same or any of the gates on the roads, such person producing a ticket denoting that such toll had been paid on that day for such horses, beasts or cattle. Where the same horses passed and re-passed once in the same day, drawing different carriages belonging to the same person:—Held, that only one toll was payable. *Jackson v. Curwen*, 7 D. & R. 838; 5 B. & C. 31.

Where, by a turnpike act, a certain toll was imposed on carriages, and not on the horses drawing them, with a provision that no persons having paid such tolls and producing a ticket should be again liable on the same day; and by a subsequent act, reciting the former one, the old tolls were repealed, and others imposed in respect of the horses drawing, and not on the carriages; but all the provisions of the former act were to be continued as fully as if they had been re-enacted:—Held, that toll having been paid on horses passing with a carriage, no new toll was demandable on the same horses returning the same day, although drawing a different carriage. *Gray v. Shilling*, 4 Moore, 371; 2 B. & B. 30.

A turnpike act imposed tolls, first, on horses drawing carriages; second, on carriages fixed to waggons; third, on horses not drawing; and fourth, on oxen; provided that every person having paid the toll, on producing a ticket denoting such payment should be permitted to pass and re-pass once, in the same day, the gates mentioned in such ticket, with the same horses, or other beasts, coach, or other carriages, without being liable to any additional toll. Where the same horses passed and re-passed once in the same day, drawing different carriages belonging to the same person:—Held, that only one toll was payable. *Chambers v. Williams*, 7 D. & R. 842.

A turnpike act imposing a toll on every carriage and on every horse passing through the gate, and exempting any person from paying more than once in a day for passing or re-passing with the same carriage or horse, exempts the traveller from paying a second time in the day for the passage of the same carriage, though drawn by different horses, being the same in number. And another clause providing, that, in all cases of carriages travelling for hire, the traveller or passenger therein shall be considered as the person paying the toll, and that such payment shall not exempt such carriages re-passing with a different traveller or passenger, does not extend to stage-coaches, the carriage itself not being there hired by the respective passengers, but only a conveyance by it; and therefore such stage-coaches are freed from toll under the former clause by one payment in the day, although returning with different passengers and different horses, the horses being the same in number. *Williams v. Sanger*, 10 East, 66.

By a turnpike act a certain toll was to be taken at every turnpike on the road from W. to O. for four horses drawing any carriage. A subsequent section provided, that no person should pay toll more than once on the same day for passing or re-passing with the same horses or

carriages, through any of the turnpikes, but that every person, after having paid toll once, and producing a ticket, should pass with the same horses and carriages toll-free during such day :—Held, that a second toll was payable for passing on the same day two toll-gates on the road, with the same carriage, but drawn by different horses; for that the clause imposing the toll was clear, and the exempting clause either meant that the horses should be the same, or was too ambiguous to control the previous enactment. *Hopkins v. Thorogood*, 2 B. & Ad. 916.

By a local act a toll was imposed on horses drawing carriages; for default of payment the collector was authorized to distrain any horse or carriage upon which toll was imposed by that act. No person was to pay more than once a day in respect of any carriage or any horse, and no toll was to be taken in respect of any carriage, horse or beast conveying materials for the road :—Held, that the toll was imposed on the horse only, and not on the combination of horse and carriage; and that the same horse passing a second time the same day, with a different carriage and passengers, was exempt from toll. *Niblett v. Pottow*, 1 Bing. N. C. 81; 4 M. & Scott, 595.

By a turnpike act, tolls were made payable on horses. By s. 11, it was provided, "except as hereinafter provided to the contrary," only one full toll shall be payable for horses passing and repassing once in the same day. By s. 12, all horses except horses or cattle drawing any stage-coach, waggon, or other stage-carriage, returning the same day, shall, on the production of a ticket denoting payment, pass toll-free. By s. 13, no horse which shall have paid the toll once shall be permitted to return toll-free when drawing "another or different waggon, wain, cart, or other such carriage." By s. 14, horses drawing any postchaise or other carriage travelling for hire, shall pay as often as a new hiring takes place. Sect. 15 provided that no additional toll shall be payable in respect of any stage-coach, which shall be freed by such ticket on account only of their conveying other passengers or of the horses or cattle drawing the same having been changed :—Held, that, in respect of the same horses passing through the toll-gate with a stage-coach, and returning the same day with a different stage-coach and passengers, only a single toll for each horse was payable, the horses and both coaches belonging to the same proprietor. *Skin v. Flay*, 1 New Sess. Cas. 561.

By a local act, the trustees of a road were authorized to take tolls at the toll-gates. It was enacted, that if any person should have paid the toll authorized to be taken for the passing of any horse through any of the turnpikes, the same horse should, upon a ticket denoting the payment on that day being produced, be permitted to pass and repass toll free through the same toll-gate, and also through such other gates, if any, as a ticket for such payment should free, at any time during the same day. It also enacted, that no more than one full toll should be taken in respect of the same horse, for passing on the same day through all or any of the toll-gates along the whole line of the road :—Held, that, after payment of one maximum toll, no toll was payable for passing once on the same day with the same horse through any other toll-gate on the whole line of

the road. *Johnson v. Cockledge*, 5 C. B., N. S. 286; 27 L. J., M. C. 314.

A turnpike act of 1861 comprised within the trusts eighteen several roads. It empowered the trustees to demand and take "at the several and respective toll-gates which shall be upon or on the sides of the roads, such tolls as the trustees shall direct, not exceeding, for every horse drawing any cart, waggon, &c., with wheels of a less breadth than four and a half inches, 6d.;" and "for every horse or mule, laden or unladen, and not drawing, 1½d." "For passing and repassing any number of times on the same day with the same horses, beasts or carriages liable to toll through any of the toll-gates to be continued or erected by virtue of this act upon any road hereinafter particularly mentioned," it enacted that no "more than the number of tolls hereinafter limited with reference to such road shall be taken—that is to say, two full tolls, and no more, upon the road from A. to B.; two full tolls, and no more, upon the road from C. to D.; two full tolls, and no more, upon the road from E. to F.; one full toll, and no more, upon all the other roads comprised in this act." "And all horses, beasts, and cattle in respect whereof the tolls hereby authorized to be taken shall have been paid at any toll-gate on the roads or on the sides thereof, shall, upon a ticket being produced denoting such payment, be permitted, in returning through the same toll-gate, and in going and returning through such other toll-gate (if any) as the ticket for such payment shall free, to pass toll-free at all times on the same day :—Held, that the act did not authorize the trustees to demand two full tolls from a traveller passing through only one gate on a line of road upon which two full tolls were chargeable. *James v. Dickenson*, 14 C. B., N. S. 416.

Held, also, that where a party had paid one full toll on passing a gate, he was not chargeable with two full tolls on passing on the same day through another gate on another of the roads on which two full tolls were demandable; but that he was liable to a second single toll, there being nothing on the ticket to indicate that it frees any other gate. *Id.*

Held, also, that a traveller who had paid one full toll on passing through a gate on one of the roads on which one full toll was payable, was not entitled to pass toll-free on the same day through a gate on another of the roads upon which one full toll was payable, the one full toll being payable upon "each" of the roads comprised in the act. *Id.*

— **Waggons—Wharfingers.**—Where a turnpike act imposed a toll on every horse, &c., drawing a carriage of any description, but contained an exception for every person who had paid toll on any carriage, &c., once on that day; and the act contained a further proviso that every stage-coach, diligence, van, caravan, or stage-waggon, or other stage-carriage, conveying passengers or goods for pay or reward, should pay toll every time of passing :—Held, that the waggons of a wharfinger, carrying out the goods brought by a canal to the different consignees, and collecting the goods from persons in the neighbourhood to carry to his wharf, were not stage-waggons within the meaning of the act. *Reg. v. Ruess*, 8 A. & E. 386; 3 N. & P. 428; 1 W., W. & H. 435; 2 Jur. 888.

— **Carriage Let to Hire.**—By 10 Geo. 4, c. 59, s. 28, the tolls hereby made payable shall be paid in each of the districts for every horse or beast drawing any stage-coach, van, caravan, waggon or other carriage, conveying passengers or goods for pay, hire or reward for each time of passing along any of the roads in that district:—Held, that this section only applies where a carriage conveys passengers or goods and a charge is made in respect of the passengers or goods, and not where the carriage itself is let to hire; and that, therefore, where a van was hired to fetch furniture from H. to L., and toll was paid as the van went out, a second toll was not payable as the van returned loaded. *Short v. Hudson*, 5 H. & N. 559; 29 L. J., M. C. 208; 8 W. R. 439.

— **Common Carriers.**—An act, after imposing tolls, exempted any horse, cart, &c., from toll on re-passing a gate on the same day if the toll had been once paid; with the proviso, "that the tolls by the act made payable for or in respect of horses or beasts drawing any stage-coach, diligence, van, caravan or stage-waggon or other stage-carriage, conveying passengers or goods for pay or reward, should be payable and paid every time of passing or re-passing along the road." C. travelled with a caravan, sometimes conveying goods and sometimes passengers; he was not licensed under 16 & 17 Vict. c. 90, but paid the duty on a carriage used by a common carrier:—Held, that he was liable to toll every time of passing and re-passing the toll-gate. *Comley v. Carpenter*, 18 C. B., N. S. 378; 11 Jur., N. S. 712; 12 L. T. 453; 13 W. R. 812.

A turnpike act provided that no person should be liable to pay toll more than once in a day for passing through the same turnpike with the same horses, but that the tolls should be payable "for or in respect of all stage-coaches and other such public carriages, licensed or not licensed, for every time of passing." A common carrier was travelling from A. to B. and back, three times a week, with a light tilted van on four wheels drawn by one horse, and which was chiefly and *bonâ fide* used in the carriage of goods; but was also occasionally used to carry passengers for hire. He did not travel more than four miles an hour, and paid a duty of 2l. 6s. 8d., under 16 & 17 Vict. c. 90, but had no stage-coach licence:—Held, that his van, being principally used in the conveyance of goods, was not "such" a public carriage as a stage-coach, and therefore that he was not liable to pay toll for it for every time of passing the same turnpike. *Pearson v. Tuzewell*, 19 C. B., N. S. 384; 13 L. T. 158; 14 W. R. 39.

A carrier was the owner of a four-wheeled van in which he journeyed on certain days and at stated times between Bath and Chippenham, carrying goods occasionally, and passengers, and sometimes both, for payment. He paid the annual duty of 2l. 6s. 8d., imposed by 16 & 17 Vict. c. 90:—Held, that he was not chargeable with return toll, as the proprietor of a stage-carriage under a local act, which provided that for or in respect of the horses drawing any stage-coach, stage-waggon, van, caravan, cart or other stage-carriage for the conveyance of passengers, for payment, hire or reward, for which toll should have been paid, and which should return on the same day through the same turnpike-gate or bar, the tolls thereby made payable should be

paid every time of passing and re-passing through every such gate or bar in like manner as if no toll had been before paid therat. *Eatwell v. Richard or Richmond*, 18 C. B., N. S. 364; 12 L. T. 52; 13 W. R. 429.

#### c. Evading Payment.

**By Misrepresentation—Action for Tolls.**—An action for turnpike tolls lies where a party has frequently passed through the gate, misrepresenting facts which led the collector to believe he was not entitled to receive toll, and consequently demanded no toll at the times he passed through. *Maurice v. Marsden*, 19 L. J., C. P. 152.

**Forfeiture for — When done *bonâ fide*.**—Quære, whether 3 Geo. 4, c. 126, s. 139, which imposes a forfeiture not exceeding 10l. upon any person who "shall pass through any turnpike gate," "without paying the toll appointed to be paid at such gate," is applicable to a party passing without violence through a gate and not paying (the toll though demanded, under an erroneous impression that he is exempt from toll. Per Lord Denman, C. J., and Erle, J., it is not. Per Patteson and Coleridge, JJ., it is. *Reg. v. Irving*, 11 Q. B. 429.

**Successful Arrangement to avoid Liability.**—A person going in a carriage from his own house to a town, drove along a parish road; he then used a private road, without any express licence from the owner, and by that way entered the turnpike road; he then used the turnpike road for eighty-six yards, and then by parish roads reached the town, and returned the same route. He could not, by any other route, have gone to the town without becoming liable to pay turnpike tolls:—Held, that assuming that he used this route because, by using any other, he would become liable to pay toll, this was not an evasion of payment of toll, but a successful arrangement to avoid becoming liable to payment. *Veitch v. Eaeter Turnpike Roads (Trustees)*, 8 El. & Bl. 986; 27 L. J., M. C. 116; 4 Jur., N. S. 584.

**Leaving Carriage on Road.**—By 3 Geo. 4, c. 126, s. 41, if any person shall leave upon a turnpike road any horse, cattle, beast, or carriage whatsoever, by reason whereof the payment of any toll, or duties shall be avoided or lessened, he shall forfeit any sum not exceeding 5l. A gentleman was driven by his coachman from his house along a turnpike road up to but not through a turnpike gate. He then got out and walked through the gate to a railway station beyond it, and went away by a train, and his coachman drove the carriage back to his house:—Held, that he had not left his carriage upon the road within the meaning of the act, and had not therefore incurred the penalty imposed. *Stanley v. Mortlock*, 5 L. R., C. P. 497; 39 L. J., M. C. 150; 22 L. T. 758; 18 W. R. 1139.

**Connecting Two Openings in Fence by a Road.**—The occupier of land adjoining a turnpike road made an opening through the fence which separated his land from the turnpike road, and another opening through the same fence at a few yards' distance. He also made a road over the land in his occupation, connecting

the two openings in the fence, between which was a toll-gate, at which the trustees of the turnpike road were authorized to take tolls. By means of the two openings in the fence, and the road connecting them, he was able to use the turnpike road without passing through the gate:—Held, that in doing so with intent to evade the payment of toll he did not incur any liability to the penalty imposed by 3 Geo. 4, c. 126, s. 41. *Harding v. Headington*, 9 L. R., Q. B. 157; 43 L. J., M. C. 59; 29 L. T. 833; 22 W. R. 262.

**Evidence of Evasion.**—Two one-horsed carts went through a turnpike-gate and returned. The horses were then unyoked and put to another vehicle of the same owner, from which the horses that had drawn it some distance on the turnpike road were removed before reaching the gate. The driver on passing the gate with the second vehicle, paid only a smaller toll, contending that he was not liable to pay in respect of the two horses so yoked to the second vehicle, as they had paid toll and were allowed to pass through the gate four times per day, on the payment of one toll, under a local turnpike act:—Held, that there was evidence on which a justice might find that this was done to evade the payment of toll, and on which he might convict under 3 Geo. 4, c. 126, s. 41. *Hartley v. Boulzer*, 11 L. T. 767.

**Admissibility of.**—A person having been convicted of forcibly passing a turnpike-gate without paying toll:—Held, that the sessions properly rejected evidence that the gate had been unlawfully erected, the admissibility of such evidence being a question expressly within the discretion of the justices at sessions. *Rea v. Cambridge (Justices)*, 1 D. & R. 325.

**Conviction for—Warrant of Distress.**—A local act gave power "to take toll at each and every of the several turnpikes or toll-gates (before mentioned), or turnpike, or toll-gate, or toll-house which shall be erected in, upon, across or on the sides of the roads, or any of them, by virtue of the act." A warrant of distress issuing upon a conviction under this statute and 3 Geo. 4, c. 126, s. 41, stated, that "J. B., at the parish of C., in the Isle of Wight, &c., with a carriage, did, unlawfully, &c., pass through a toll-gate then and there situate, by means whereof a payment of a toll, to wit, &c., then and there legally due and payable by J. B., in respect of carriage, was avoided, contrary to the statute in such case made and provided:—"Held, that the warrant sufficiently described the offence. *Barnes v. White*, 1 New Sess. Cas. 504; 1 C. B. 192; 9 Jur. 182.

The warrant went on to state, "that by reason thereof J. B. should forfeit 2l. 2s." The warrant then went on to order a distress to be made, and directed that one-half of the fine should be paid to the informer, and the other moiety to the treasurer of the commissioners for amending the roads and highways:—Held, first, that a demand of the fine was not necessary to be made upon J. B., to authorize the issuing of the warrant. *Id.*

Held, secondly, that the appropriation of the second moiety of the fine was rightly made. *Id.*

**Appeal against Convictions—Time for.]—**

Under 4 Geo. 4, c. 95, s. 87, notice of appeal is to be served within six days after the cause of complaint. A conviction having taken place on Monday, the 2nd May, a notice of appeal served on the following Monday, the 9th May, held too late. *Reg. v. Middlesex (Justices)*, 2 D., N. S. 719; 7 Jur. 396.

#### d. Composition for Tolls.

**Legality of Agreement.]—**A lessee of turnpike tolls compounded with a person using the road for tolls for three years:—Held, that such an agreement was not prohibited by 3 Geo. 4, c. 126, s. 55. *Stott v. Clegg*, 13 C. B., N. S. 619; 32 L. J., C. P. 102; 9 Jur., N. S. 945; 7 L. T. 714; 11 W. R. 366.

#### e. Toll Collectors.

**Action against—Notice of.]—**A notice of action under an act against a toll-gate keeper, "for demanding and taking of the plaintiff, toll for and in respect of certain matters and things particularly mentioned and exempted from the payment of toll, in and by a certain act of parliament, entitled," &c., is uncertain and bad. *Freeman v. Line*, 2 Chit. 673.

**Venue.]—**A turnpike act enacted, that no action should be commenced against any person for anything done in pursuance of the act, until twenty-one days' notice should be given to the clerks of the trustees, or after sufficient satisfaction or tender thereof made to the party aggrieved, or after six calendar months next after the fact committed; and that every such action should be brought in the county or place where the matter should arise, and not elsewhere; and the defendant should and might at his election plead specially, on the general issue, not guilty, and give evidence that the same was done in pursuance and by the authority of that act. In an action against a toll collector to recover the amount of tolls improperly collected by him:—Held, that the venue should have been laid in the county where the tolls were collected, and that he was entitled to twenty-one days' notice of action. *Waterhouse v. Keen*, 6 D. & R. 257; 4 B. & C. 200.

**Indictment for taking Tolls Unlawfully—Evidence of Exemption.]—**Before 4 Geo. 4, c. 95, s. 50, which abolishes the proceedings by indictment, the question of exemption from toll could not be tried on an indictment against the turnpike-keeper for extortion in taking the toll, unless the ground of exemption was specified to him at the time when the toll was taken. *Rea v. Hamlyn*, 4 Camp. 379.

**Sufficiency of Conviction.]—**A conviction stated, that "a collector did demand and take from J. L., at a gate on a turnpike road, a toll, to wit, the toll or sum of 4d. as and for a toll payable by J. L. at such gate, for a horse drawing a cart upon two wheels only, and which cart was drawn by such one horse only, and driven by him, in, along and over the turnpike road, and for which horse drawing such cart a certain toll, to wit, the sum of 6d., was payable by J. L., the toll or sum of 4d., so demanded and taken by the collector, being a less toll than he

was authorized to take for the cause aforesaid by virtue of the powers of any act, or of the orders and resolutions of the trustees or commissioners of the turnpike road, made in pursuance thereof, contrary to the form of the statute:—Held, a sufficient conviction, though no provisions of any particular turnpike act, or orders or resolutions of trustees or commissioners, were set forth or referred to. *Stamp v. Sweetland*, 2 New Sess. Cas. 90; 8 Q. B. 13; 14 L. J., M. C. 184; 9 Jur. 939.

. **Appeal.**—A party convicted under 4 Geo. 4, c. 95, s. 87, of having taken too large a toll, and adjudged to pay a penalty of 41s., may appeal to the quarter sessions. *Rea v. Hants (Justices)*, 1 B. & Ad. 654.

— **Costs Payable by Informer.**—On appeal by a party convicted under this section, the informer is the party appealed against, within the meaning of the statute; and the justices having ordered him to pay 10*l.* for costs, the court granted a mandamus to them to issue a warrant for levying the same on the goods of the informer. *Id.*

**Right of Action—Illegally Appointed.**—A collector or a renter of turnpike tolls, though illegally appointed without the forms prescribed by the act of parliament, may still recover, upon a count for an account stated, the amount of the tolls for which he has credited the defendant passing through the gate; no objection being made to the plaintiff's title by the trustees or creditors of the turnpike. And the plaintiff having sent to the defendant an account of the tolls due, who not long after sent 5*l.* inclosed in a letter to the plaintiff, in which he stated that she should have the remainder next week, is evidence of such an account stated, and a recognition of the intestate's title to be accounted with for the tolls. *Peacock v. Harris*, 10 East, 104.

**Prosecution by—For Burglary.**—If a person employed by the trustees of turnpike tolls to collect them, lives in the toll-house rent free, the property in the house in an indictment for burglary may be laid in the person so employed. *Rea v. Camfield*, 1 M. C. C. 42.

## f. Letting Toll.

**Mode of—To Highest Bidder.**—By 3 Geo. 4, c. 126, s. 55, the trustees are empowered to let the tolls by auction; but to prevent undue preference, a minute-glass is to be turned thrice after each bidding; and it declares, that, if no other person bids, the last bidder is to be the farmer or renter. Trustees put up tolls subject to other conditions, one of which was, that unless there should be three biddings there should be no letting, unless the trustees thought proper to take less than three biddings; and that the trustees should have a reserved bidding. There was one bidding only, which was made by the plaintiff; whereupon the trustees declared, that if there was no advance, they should be obliged to make a reserved bidding. The minute-glass was turned thrice, and there was no further bidding. The plaintiff insisted that, under the express terms of the act, he was the purchaser, and he filed a bill for a specific performance:—Held, that he was

not entitled to relief, and the bill was dismissed, but without costs. *Levy v. Pendergrass*, 2 Beav. 415.

— **Notice of Amount Realized.**—Trustees of a turnpike road were authorized to let the tolls, upon giving notice of their intention to do so, and the notice was to state the amount which the tolls produced during the preceding year, clear of the expenses of collecting:—Held, that this direction was sufficiently complied with, where the notice merely stated the amount received by the trustees during the preceding year, although during part of that time the tolls were let for a greater sum than they had actually produced, and no expenses were allowed for collecting during that part of the year. *Newman v. Ring*, 15 L. J., Ch. 865.

## Agreements for—By whom made—Validity.]

—An agreement for the letting of tolls, signed by the clerk of the trustees, and by the lessee or farmer of the tolls, is valid under 3 Geo. 4, c. 126, s. 57, and therefore can be enforced by the trustees notwithstanding it has not been signed by the sureties; their execution of the agreement being a formality for the benefit of the trustees, which they may waive without prejudice to their rights against the lessee or farmer of the tolls. *Markham v. Stanford*, 14 C. B., N. S. 376; 8 L. T. 277.

A. agreed in writing to pay the rent of tolls which he had hired "to the treasurer of the commissioners:"—Held, that no action for rent could be maintained in the name of the treasurer. *Pigott v. Thompson*, 3 B. & P. 147.

By 3 Geo. 4, c. 126, s. 57, all contracts signed by the trustees for letting of tolls, or by their clerk or treasurer, shall be valid, although not by deed or under seal, and, by s. 74, the trustees may sue and be sued in the name of their clerk or clerks for the time being. The trustees of a turnpike road having appointed two persons to act as their clerks:—Held, that a contract for letting tolls signed by one was not sufficient, as both filled the office jointly. *Bell v. Nixon*, 2 M. & Scott, 534; 9 Bing. 393.

In an action by the clerk of the trustees of a turnpike road against a surety for a lessee of the tolls, the declaration stated, that, at a public meeting of the trustees for letting the tolls, the lessee was the best bidder, and that the trustees declared that he should become tenant of the tolls on the terms and conditions mentioned in an agreement; and that, by an agreement made by and between the trustees and the lessee and his sureties, which agreement was in writing, and was duly signed by D., treasurer to the trustees, and by the lessee and his sureties, the lessee and his sureties severally and jointly agreed with D., that they or one of them should and would pay to D., his successors and executors, or to whom any five of the trustees should direct, the instalments of money therein mentioned; and that, on failure of payment, the trustees might enter into the toll-houses and take the tolls. The declaration stated that the lessee entered into the receipt of the tolls, and paid certain instalments; but that the residue was not paid to D. and the trustees:—Held, that the agreement, as stated, was an agreement by the lessee with D. in his individual capacity, on which the trustees could not sue. *Hellings v. Pratt*, 6 Jur. 914.

By an agreement, reciting that at a meeting of

the trustees for letting by auction the tolls of a turnpike road, N. was the highest bidder, the clerk, on behalf of the trustees, agreed to let, and N. agreed to take, the tolls. The agreement was signed by the clerk to the trustees:—Held, first, that the agreement, though made by the clerk, and not by the trustees, was a sufficient compliance with 3 Geo. 4, c. 126, ss. 55, 57. *Shepherd v. Hodsmen*, 18 Q. B. 316; 21 L. J., Q. B. 263; 16 Jur. 948.

Held, secondly, that s. 57 of the 3 Geo. 4, c. 126, was not affected by 8 & 9 Vict. c. 106, s. 3, by which a lease, required by law to be in writing, of any tenements or hereditaments, shall be void, unless made by deed. *Id.*

#### — Contract with Sureties—Joint or Several.]

—By a memorandum of an agreement between the trustees of a turnpike road and N., the trustees agreed to let and he to take the tolls for a year at a certain rent; and N., as renter of the tolls, and D. as his surety, severally promised the trustees that N. should pay the rent at the appointed times, and perform the conditions annexed to the agreement:—Held, that the contract was several and not joint, and that the trustees could not sue the parties jointly for arrears of the rent. *Lee v. Nixon*, 1 A. & E. 201; 3 N. & M. 441.

— **Actions upon—Pleadings.**—In an action for rent payable under an agreement with the trustees of turnpike roads, demising tolls and toll-houses, the declaration need not shew that the forms required by 3 Geo. 4, c. 126, s. 55, were observed in the letting. *Willington v. Browne*, 8 Q. B. 169; 15 L. J., Q. B. 23; 9 Jur. 271.

A declaration against the sureties of a farmer of tolls under 3 Geo. 4, c. 126, need not set forth a compliance with all the requisites contained in s. 55 as to the letting of such tolls. It is sufficient to state that they were duly let under the act. *Oldroyd v. Crampton*, 5 Scott, 256; 4 Bing. N. C. 24; 3 Hodges, 261.

In an action by a trustee of a turnpike road against a lessee of tolls for rent, he pleaded, that, after the demise to him, and before any rent became due, the 4 & 5 Vict. c. 33, passed, which took away certain of the tolls, and therefore the lease was void:—Held, bad, on general demurrer. *Harris v. Morrice*, 10 M. & W. 260; 12 L. J., Ex. 43.

Plea, to an action on a covenant for rent due for turnpike tolls, that, before it became due, the trustees entered into and upon a part of the tolls, and ejected, expelled, put out and removed the defendant from the possession thereof, and kept and continued him so ejected. Replication, that the trustees did not enter into or upon the said part of the tolls, or eject the defendant from the possession thereof, as alleged:—Held, that this replication was good on special demurrer, although it put in issue not only the expulsion but also the entry, the latter being immaterial and impossible; and that the defendant having mixed up the entry and expulsion as constituting the eviction, the plaintiff had a right to follow him, and to accept the issue as tendered. *Palmer v. Gooden or Goden*, 8 M. & W. 890; 1 D., N. S. 673.

#### g. Mortgage of Tolls.

By Trustees—Validity of.]—A mortgage exe-

cuted by A., B., C., D. and E., as trustees of a turnpike road, is not invalidated by shewing that A., who had acted as a trustee for many years, had not been appointed under seal, as required by the local act. *Doe d. Baggaley v. Hares*, 1 N. & M. 237; 4 B. & Ad. 435.

— **Statutory Authority to Make—Construction.**—Trustees of a turnpike road being desirous of obtaining an act authorizing the making a new road connected with the former, the plaintiff agreed to advance 2,000*l.* for the purpose of making the new road, upon having the payment secured by a mortgage of the tolls of both roads. The trustees obtained an act which authorized the making of the new road, repealed the act under which the old was made, and placed both roads under one system of management, treating them for most purposes as one road. By this act it was provided, that the tolls of the old road should be applied, first, in paying the expenses of obtaining the act; secondly, in paying the interest on mortgages of the tolls receivable under the old act; thirdly, in repairing the old road; and, fourthly, in paying the principal of the old mortgages. And that the tolls of the new road should be applied, first, in paying the expenses of obtaining the act; secondly, in making and repairing the new road; thirdly, in paying the interest of money borrowed on the tolls of the new road; and, fourthly, in paying the principal of moneys borrowed under the repealed act, or borrowed on the tolls of the new road. A party advanced 2,000*l.*, and a mortgage was made to him of the tolls, toll-houses, &c., in such a form that it was doubtful whether it extended to the tolls of the new road:—Held, in the context of the act, that it did not take away the power of mortgaging given by 3 Geo. 4, c. 126, s. 81; that the trustees, therefore, had power to mortgage the tolls of the old road as well as the new road, for moneys borrowed for the purposes of the new road, and that the party, having advanced his money on the faith of having a security on both roads, was entitled in equity, if not at law, to a security on the tolls of the old road as well as of the new. *Crewe (Lord) v. Edleston*, 1 De G. & J. 93; 3 Jur., N. S. 1061.

— **Of Toll-houses.**—The trustees of a public turnpike act, which empowers them to erect toll-houses and mortgage the tolls, and which declares that there shall be no priority among the creditors, have no power to mortgage the toll-houses or gates. *Fairtitle d. Mytton v. Gilbert*, 2 T. R. 169.

If in fact they have made such a mortgage, and an ejectment is brought against them by the mortgagee, they are not estopped by their deed from insisting that the act gives them no such power. *Id.*

— **Money "Borrowed and Taken up at Interest."**—The trustees of a turnpike being indebted to their clerk in 81*l.*, for business done as a solicitor, gave him a mortgage for 80*l.*, which recited the consideration to be money advanced by him to them:—Held, that the mortgage was valid under 3 Geo. 4, c. 126, s. 81, the transaction being equivalent to money "borrowed and taken up at interest" by the trustees. *Doe d. Jones v. Jones*, 5 Ex. 16; 19 L. J., Ex. 284.

**Secured Creditor—Priority.]**—Trustees under a turnpike act having demised to one of several mortgagees such proportion of the tolls arising from the road and of the toll-houses and toll-gates for collecting the same, as the sum advanced by him bore to the whole sum raised on the credit of the tolls, the mortgagee brought ejectment for the toll-houses and toll-gates, in order to repay himself the interest due to him:—Held, that he might well maintain his action, notwithstanding a clause in the act that all the mortgagees should be creditors upon the tolls in equal degree. *Doe d. Banks v. Booth*, 2 B. & P. 219.

**"Priority of Charge."]**—By a turnpike act the tolls were subject to the payment of moneys borrowed and to be borrowed thereupon. The trustees granted mortgages of such tolls, in the form given by 3 Geo. 4, c. 126, s. 81, conveying to each creditor such proportion of the tolls, and the toll-gates and toll-houses, as the money advanced by him bore, or should bear, to the whole sum due or to become due on that security. By a subsequent act for making a new branch road, the former act was continued, and tolls were granted in respect of the new branch, to be applied like the former, and to be subject to the debts incurred on the credit of the former tolls; and it was enacted that all moneys due on such credit should be entitled to "a preference and priority of charge and payment" before any moneys advanced under this act for making the new branch.—Held, that the words "priority of charge" did not prevent this mortgagee from acquiring a legal estate in the subjects mortgaged, and that he might recover the toll-houses and gates in ejectment, only remaining accountable to the other mortgagees for such portion of the tolls as they were entitled to in respect of their advances. *Doe d. Thompson v. Lediard*, 4 B. & Ad. 137; 1 N. & M. 683.

**Rights of Mortgagees.]**—The 3 Geo. 4, c. 126, s. 49, enables a mortgagee, whose mortgage is under s. 81, to recover, on his own demise only, the toll-gates and toll-houses in ejectment, although there are prior unsatisfied mortgages at the same time upon the tolls, toll-gates and toll-houses. The first mortgagee under this statute is in a different situation from an ordinary mortgagee, as he does not take the whole legal estate; and, therefore, the objection, that at law a subsequent mortgagee has no estate, cannot prevail. *Doe d. Watton v. Penfold*, 3 Q. B. 757; 3 G. & D. 235; 12 L. J., Q. B. 70; 6 Jur. 948. See *Doe d. Levi v. Horn*, 3 Q. B. 757; 3 G. & D. 239; 12 L. J., Q. B. 72; 7 Jur. 38.

Ejectment by a mortgagee to recover possession of the toll-gates. After the commencement of the ejectment, another ejectment on the demise (laid earlier than in the first action) of another mortgagee was commenced. Judgment went by default in the second ejectment; and before trial the sheriff gave the plaintiff in the second ejectment possession under a habere facias possessionem:—Held, that the plaintiff who had commenced his ejectment first was entitled to the verdict. *Doe d. Burt v. Rous*, 1 El. & Bl. 419; 22 L. J., Q. B. 111; 17 Jur. 502.

**Claims on Toll Fund.]**—See *infra*, APPLICATION OF FUNDS.

**Assignment of—Validity.]**—An assignment of a mortgage of tolls according to the form prescribed by 3 Geo. 4, c. 126, s. 81, has no validity unless produced and notified to the proper clerk or treasurer, and by him entered in the book kept for that purpose within two months from its date. *Doe d. Jones v. Jones*, 5 Ex. 16; 19 L. J., Ex. 284.

The fact of the clerk having prepared or attested the execution of the transfer is evidence from which a jury may infer a notification to him. *Id.*

Where the trustees held meetings, and had separate clerks at several places within their district:—Held, that the clerk of the place in which the mortgage was made and entered was the proper clerk to receive the notification, although the mortgage included the tolls of the whole district and the clerk was himself the mortgagee. *Id.*

A. made a voluntary assignment of turnpike bonds to B., in trust for himself for life, and after his death for his nephew. He delivered the bonds to B., but did not observe the formalities required by 3 Geo. 4, c. 126, s. 81, to make the assignment effectual:—Held, on his death, that no interest in the bonds passed by the assignment, and that B. ought to deliver them to his executors. *Searle v. Law*, 15 Sim. 95.

#### —Secondary Evidence of—When Allowed.]

—Where an assignment of turnpike tolls had been executed by way of mortgage to A.:—Held, in an action by his personal representative after his death against the trustees for arrears of interest, that a search for the security in the office of A.'s solicitor, where his papers had been deposited, except some deposited in a suit against A.'s representative in the office of one of the masters in chancery and also in the latter office, without finding the security among any of such papers, was sufficient evidence of its loss to let in secondary evidence, and that entries in a book of the trustees, indorsed "Mortgage Book," containing an abstract of the names of the creditors, the amounts of their securities and the interest due upon them, was good secondary evidence of such security. *Pardoe v. Price*, 13 M. & W. 267; 14 L. J., Ex. 212.

**Nature of Security—Mortmain Act.]**—A mortgage of turnpike tolls is an interest in land within the Mortmain Act (9 Geo. 2, c. 36). *Ashton v. Langdale (Lord)*, 4 De G. & S. 402; 20 L. J., Ch. 234; 15 Jur. 868.

**Statute of Limitations.]**—Turnpike tolls are within the Statute of Limitations (3 & 4 Will. 4, c. 27), and consequently more than six years' arrears of interest are recoverable on a mortgage of them. *Mellish v. Brooks*, 3 Beav. 22.

**Bonum notabile.]**—By 3 Geo. 4, c. 126, s. 81, the trustees of a turnpike may borrow money upon mortgage. The form of mortgage, given in the act, assigns the tolls, toll-gates and toll-houses to the mortgagee, to hold for the residue of the term for which the tolls are granted, unless the mortgage money with interest be sooner repaid:—Held, first, that such a mortgage is bonum notabile where the road and toll-houses are, and not where the deed is at the time of the mortgagee's death. *Reg. v. Balby and Workshop*

(Trustees), 1 B. C. C. 134; 22 L. J., Q. B. 164; 17 Jur. 734.

Held, secondly, that the deed conferred no legal right on the mortgagee to the payment of the principal or interest; and consequently that a mandamus to pay the money did not lie against the trustees. *Ib.*

**Personal Liability of Trustees.**—The chairman of the trustees of a turnpike road applied to the treasurer of the road to advance to the trust 2,000*l.* as a temporary loan; the treasurer placed the sum required to the credit of the trustees, but he received no such security as is provided by 3 Geo. 4, c. 126, s. 81:—Held, that the chairman was not exempted from personal liability by 7 & 8 Geo. 4, c. 24, s. 3, the money not having been borrowed on the credit of the tolls in the manner prescribed by the statutes. *Parrott v. Eyre*, 3 M. & Scott, 857; 10 Bing. 283.

#### 5. APPLICATION OF FUNDS.

**Arrears of Interest—Order on Parish—Priority of Repairs.**—By a local act the moneys received under the act were to be applied in repairing the roads, and then in paying the interest of the moneys advanced on the credit of the act. After 4 & 5 Vict. c. 59, the trustees applied a sum towards payment of former arrears of interest, and the trust funds became thereby insufficient for the repair of the roads:—Held, first, that 4 & 5 Vict. c. 59, did not give the trustees a right to apply their funds otherwise than as directed by the local act, and therefore the payment of arrears of interest by the trustees was improper. *Reg. v. South Shields Turnpike Roads (Trustees)*, 3 El. & Bl. 599; 23 L. J., M. C. 134; 18 Jur. 1115.

Held, secondly, that the justices had power to make the order on the parish notwithstanding the improper application of the funds; but the court concurred with the quarter sessions that it was not necessary nor expedient to cast on the present occupiers in the parish the burden of payment of former arrears of interest, and therefore affirmed their order. *Ib.*

The trustees of a turnpike road have no power to apply their funds in payment of arrears of interest upon moneys secured upon the tolls in priority to the necessary repair of the roads. *Ib.*

Trustees of a turnpike road who, by their local act, are to apply the tolls in keeping down the interest of the principal sum borrowed on the credit of the act, and then in keeping the road in repair, are not justified in paying off old arrears of interest when the road is out of repair, before defraying the expense of the repairs, but only the interest periodically falling due. *Reg. v. Hutchinson*, 4 El. & Bl. 200; 3 O. L. R. 104; 24 L. J., M. C. 25; 18 Jur. 1116.

By a turnpike act the trustees were to apply all moneys received by them by virtue of the act upon the roads included in the act; first, in paying the expenses of and incident to the obtaining of the act; secondly, in paying and discharging any interest which might from time to time be owing in respect of money which might have been borrowed on credit of the tolls authorized to be taken by former acts thereby repealed; thirdly, in keeping the roads in repair; fourthly, in paying and discharging any interest on money which might be borrowed on the credit of the

tolls; fifthly, in reducing and discharging the principal moneys borrowed on the credit of the tolls authorized to be taken by former acts; and, lastly, in reducing and discharging the principal moneys which should thereafter be borrowed:—Held, that a mortgagee of the tolls authorized to be taken by the former acts had no right of action against the trustees whatever for the arrears of interest due to him, whether the expenses of obtaining the act had been paid or not, or whether the trustees had or had not in their hands sufficient money for the payment of such arrears of interest. *Pardoe v. Price*, 16 M. & W. 451; 16 L. J., Ex. 192.

**When Priority Allowed—Special Provisions.**—By a turnpike act the tolls were to be applied, in the first place, in payment of the costs of the act; in the next place, in paying and discharging all interest now due and owing, and which shall hereafter become due, upon any mortgage or securities of the tolls, and in defraying the expenses of erecting toll-houses, &c., and of widening, repairing, &c., the roads; and, lastly, in reducing, paying off and discharging the several sums of money due on any mortgage or securities, and also other debts now due or hereafter to become due:—Held, that the trustees were at liberty to apply the tolls in payment of arrears of interest in priority to the repairs of the road, and that the funds not being sufficient for both, no order could be made upon them by justices to contribute towards the repairs, under 5 & 6 Will. 4, c. 50, s. 94. *Burton Turnpike Trustees v. Wincanton Highway Board*, 5 L. R., Q. B. 437; 39 L. J., M. C. 155; 22 L. T. 605; 18 W. R. 1027.

A turnpike act (4 Vict. c. xxxv.), after reciting that the principal sum borrowed on the credit of the tolls under former acts still remained unpaid, together with arrears of interest thereon, and that such sums could not be paid, nor the interest thereon discharged, nor the road kept in repair, without further powers, enacted that all moneys received by the trustees should be applied in the first place in paying and discharging any interest which might from time to time be owing in respect of any money borrowed on the credit of the tolls; secondly, in maintaining and keeping the roads in repair; and thirdly, in reducing and paying off the principal sums borrowed. On an application under 4 & 5 Vict. c. 59, for an order for contribution from the highway rates:—Held, that the act did not authorize the payment of arrears of interest before repairing the road. *Market Harborough and Brampton Turnpike Trustees v. Kettering Highway Board*, 8 L. R., Q. B. 308; 42 L. J., M. C. 137; 28 L. T. 446; 21 W. R. 737.

**Money Borrowed—Sinking Fund.**—Money borrowed by the commissioners of a turnpike road, on the security of the tolls, after 12 & 13 Vict. c. 87, to pay off a debt contracted before that act, is not money borrowed after the passing of the act, within the meaning of the act; and therefore the sinking fund, directed by that act to be set aside out of the tolls to pay off such money, comes within 13 & 14 Vict. c. 79, and will not have priority over all other payments out of the tolls. *Chatham Board of Health v. Rochester Pavement and Road Commissioners*, 1 L. R., Q. B. 24; 35 L. J., M. C. 81; 12 Jur., N. S. 47; 13 L. T. 273; 14 W. R. 51.

**Insufficiency of Fund — Apportionment.]**—When the roads of a turnpike trust pass through several parishes, and the funds of the trusts applicable to the repairs of the roads are insufficient, the funds ought to be apportioned to the roads in each parish according to the amount of repairs in each parish, and not according to the mileage in each; and the deficiency thus left in each parish may be supplied by contribution out of the highway rates, under 4 & 5 Vict. c. 59, s. 1. *Brighton, Cuckfield and West Grinstead Turnpike Roads (Trustees) v. Preston (Surveyors, &c.)*, 5 L. R., Q. B. 146; 39 L. J., M. C. 33; 22 L. T. 92; 18 W. R. 574.

#### 6. APPLICATION OF HIGHWAY RATES TO REPAIRS.

**Under 4 & 5 Vict. c. 59.]**—The 4 & 5 Vict. c. 59, which provided for the application of highway rates to the repairs of turnpike roads when the revenues of the turnpike trusts were insufficient, applies to turnpike roads not in existence at the time when it was passed. *Sunk Island Turnpike Road (Trustees) v. Patrington*, 1 B. & S. 747; 31 L. J., M. C. 18.

**— Turnpike Trust, what is.]**—A turnpike trust is not the less a turnpike trust within 4 & 5 Vict. c. 59, because the funds of it are derived from other sources than from tolls taken on the road. *Id.*

A turnpike trust may be within the provisions of 4 & 5 Vict. c. 59, although the road was made and the tolls are taken under a public general statute. *Id.*

**— Jurisdiction of Justices.]**—Justices can make an order for a portion of the highway rate to be applied to a turnpike road authorized to be made, where part only has been completed and opened to the public. *Roberts v. Roberts*, 3 B. & S. 183; 7 L. T. 320; 11 W. R. 35.

By a local act, subsequent to 4 & 5 Vict. c. 59, the trustees of a turnpike trust were directed to apply the trust funds (after discharging the expenses of the obtaining the act), first, in the management of the roads, salaries of officers, &c., but not exceeding in any year 800l.; secondly, in the maintenance and reparation of the roads, but so that the amount expended for these purposes should not exceed yearly 1,600l.; and, lastly, in paying off a debt due from the trust. The revenue of the trust was in excess of the expenditure, so that there was a small sum applicable to the reduction of the debt; but desirous to apply a larger sum to this purpose, the trustees obtained an order of justices under 4 & 5 Vict. c. 59, s. 1, on the grounds that the funds of the trust, although sufficient for the repair of the roads, if applied as directed by the local act, would be insufficient if the sum proposed to be applied to the liquidation of the debt were paid:—Held, that the justices had no jurisdiction to make the order. *Weardale District Highway Board v. Alston Turnpike Trust (Trustees)*, 1 L. R., Q. B. 396; 35 L. J., M. C. 173; 12 Jur., N. S. 563; 14 L. T. 546; 14 W. R. 988.

**Contribution Order—When Trustees Entitled to.]**—A private act (5 Geo. 4, c. xciv.), after authorizing trustees to establish a ferry across the River Arun at Littlehampton, in Sussex, and make roads in communication therewith, pro-

vided that the roads when made, as well as the ferry, should be maintained and repaired out of the tolls thereby authorized to be taken. The act specified no limit of time for the expiration of the trust, but it was provided that if the execution of the authorized works should not be completed within the space of ten years, all the powers and authorities given should cease and determine, save only as to so much of the work as should have been completed within that time. The ferry was established, and all the roads made with one exception; but the funds derived from the tolls being insufficient to keep one of the roads so made in repair, an order was made by justices in special sessions, under the provisions of 4 & 5 Vict. c. 59, s. 1, for contribution out of the highway rates towards the repair of such road:—Held, that the road in question was a turnpike road within 4 & 5 Vict. c. 59, and that as the funds of the trust were inadequate to keep it in repair the justices had a discretion to appropriate a portion of the highway rate towards its maintenance. *Reg. v. French*, 3 Q. B. D. 187; 47 L. J., M. C. 74; 38 L. T. 385; 26 W. R. 437. Affirmed, 4 Q. B. D. 507; 48 L. J., M. C. 175; 41 L. T. 63—O. A.

Held, also, that the completion by the trustees of the whole system of roads specified in 5 Geo. 4, c. xciv., was not a condition precedent to the right to call upon the parish to contribute towards the repair of the roads that had been made. *Id.*

A turnpike act (5 Vict. c. lxxix., s. 1) prohibited the trustees from taking any toll on a certain part of their roads, between a town and a bridge; but enacted, by s. 2, that in case the trustees keep and continue in good repair that part of the road, then it shall be lawful for them to take on such part of the road the tolls specified. The trustees kept this part of the road in repair and took thereon the tolls specified, which were sufficient to pay for the repairs of that part of the road. But the tolls taken throughout the trust being insufficient to meet the repairs of the road within it, the trustees, under 4 & 5 Vict. c. 59, s. 1, applied for a contribution order upon the parish in which the above part of the road was situate:—Held, that the trustees were not entitled to an order. *Market Harborough Trustees v. Market Harborough Highway Board*, 8 L. R., Q. B. 327; 42 L. J., M. C. 139; 28 L. T. 600.

The hamlet of W., within and part of a parish, was, by a local act, constituted the town of W., and placed under the management of commissioners, and the surveyor of the highways was required to pay a proportion of the highway rates to the commissioners, W. continuing liable to contribute to the parish rates. By another local act, for maintaining a turnpike road from W. to L., and sea defences for protecting such road and the lands adjoining from the future encroachments of the sea, trustees were appointed to carry the act into effect, with power to levy and assess rates upon the owners of the land; and the powers conferred by the former local act were not to be affected, except that the commissioners were to be relieved from maintaining and protecting so much of the road as was within W. The Public Health Act (11 & 12 Vict. c. 63), was afterwards applied to W., and a local board was appointed which was to execute the office, and have all the powers of surveyors of highways, except where such powers might be inconsistent, and the inhabitants of

any district were not to be liable to highway rate or other payment, not being toll, in respect of making or repairing roads or highways within any parish, township or place, situate beyond the limits of such district. Portions of the turnpike road being out of repair, and the revenues accruing to the trustees under the local act being insufficient to keep it in repair, and preserve the embankments, an order was made upon the surveyor of the highways of the parish for payment of a portion of the highway rates to the trustees, to be laid out in the repair of the portion of the turnpike road within the parish, and this order being appealed against:—Held, first, that the road in question was a turnpike road within 4 & 5 Vict. c. 59. *Reg. v. Worthing and Lancing Turnpike Road*, 3 El. & Bl. 989; 2 C. L. R. 1678; 25 L. J., M. C. 187; 18 Jur. 907.

Held, secondly, that by the local act the management of the road was transferred from the commissioners to the turnpike trustees, the latter having the ordinary right to seek relief from the parish in case of the deficiency of the funds, and the parish being liable to an indictment for non-repair of the road. *Id.*

Held, also, that the local board of health was made the surveyors of the highways within the district, and empowered to make a highway rate for the purpose of contributing towards the deficiency of the turnpike funds, and that the order appealed against was therefore invalid. *Id.*

A turnpike act provided for the application of the tolls to payment of the expenses of the act, salaries, interest of debt, repairs of road not exceeding 800*l.*, reduction of principal debt, and repairs of road. The estimated revenue of the trust was 1,087*l.*, and expenditure 1,017*l.*; and after allowing for salaries, interest, and 800*l.* towards repairs, the surplus, 83*l.*, was applied towards reduction of principal debt. That left a deficiency of 217*l.*, to be raised by parochial contributions, and the sum of 22*l.* 3*s.* 11*d.* was the contribution claimed from a parish:—Held, that the justices might make an order for payment of such contribution from the parish. *Mawby v. Hopkinson*, 10 L. T. 27.

An order for the payment of a portion of the parish highway rate, to cover the repairs of a turnpike road, and including expenses which had been already, and before information, incurred, is bad. *Brown v. Evans*, 34 L. J., M. C. 101; 11 Jur., N. S. 541; 13 W. R. 680.

— **When Fund Misapplied.**—Trustees of turnpike roads have no right to pay off arrears of interest of money borrowed on security of the tolls before providing for the repair of the road, contrary to their local act; and where they had done so:—Held, that an order of special sessions for payment of a contribution out of the highway rate was properly quashed by the quarter sessions. *Reg. v. South Shields Turnpike Roads (Trustees)*, 3 El. & Bl. 599; 2 C. L. R. 1506; 23 L. J., M. C. 134; 18 Jur. 1115.

**Repairs of Disturnpiked Roads—Main Roads—Liability of County Authority for Half Cost.**—The Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), by s. 13, enacts that any road which has "between the 31st of December, 1870, and the date of this act ceased to be a turnpike road" . . . "shall be deemed to be a main road, and one half of the expenses

incurred from and after the 29th of September, 1878, by the highway authority in the maintenance of such road, shall, as to every part thereof which is within the limits of any highway area, be paid to the highway authority of such area by the county authority of the county in which such road is situate, out of the county rate." The corporation of the town and borough of R. was the highway authority of the R. highway area. Under ss. 47—50 of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), such portions of the turnpike roads entering R. as came within the area of the "town" were taken out of the turnpike trusts, and the obligation to repair the same was imposed upon the corporation. By a local act in 1872, the boundaries of the borough were enlarged and all the provisions of the acts relating to the "town" were made applicable to the enlarged area of the borough. The effect was that the further portions of the turnpike roads, thus for the first time brought within the area of the borough, were taken out of the turnpike trusts by the operation of the Towns Improvement Clauses Act, 1847, and ceased to be turnpike roads:—Held, that these portions, being only parts of turnpike roads, had not ceased to be "turnpike roads," and were not to be deemed to be main roads within s. 13 of the Highways and Locomotives (Amendment) Act, 1878, and that consequently the county authority was not liable to pay half the expenses of their maintenance. *Rochdale Corporation v. Lancaster (Justices)*, 8 App. Cas. 494; 53 L. J., M. C. 5; 49 L. T. 368; 32 W. R. 65; 48 J. P. 20—H. L. (E.). Reversing 8 Q. B. D. 12; 51 L. J., M. C. 1; 45 L. T. 425; 30 W. R. 130; 46 J. P. 485—C. A.

**Notice of Application for an Order.**—The notice of an intended information before a special sessions to obtain an order for payment of a portion of a highway rate to the trustees of a turnpike road under 4 & 5 Vict. c. 59, s. 1, need not state what portion of the road is out of repair, or to what purpose the money is to be applied, or that the road is within the division for which the sessions are held. *Reg. v. Preston*, 3 New Sess. Cas. 333; 12 Q. B. 816; 18 L. J., M. C. 4; 12 Jur. 1068.

**Order for Payment of Rate.**—An order of special sessions, directing the payment of a portion of the highway rate to the surveyor, for the purpose of repair of a turnpike road, under 4 & 5 Vict. c. 59, s. 1, must appear on the face of it to be made at a special sessions holden in and for the division of the county in which the turnpike is situate. *Reg. v. Hertfordshire (Justices)*, or *Reg. v. Morice or Morrice*, 2 D. & L. 952; 1 New Sess. Cas. 585; 14 L. J., M. C. 75; 9 Jur. 731.

An order directed the payment of 9*l.* 5*s.* to the surveyor for the purpose of repairs, being a portion of the rate or assessment levied or to be levied by virtue of 5 & 6 Will. 4, c. 50:—Held, that it was not essential to specify in the order what proportion of the rate was to be paid. *Id.*

An order made in pursuance of an information need not adjudicate that the information is true, or that notice was, in fact, given; it is sufficient if it shews that an information has been exhibited, and that the justices proceeded to act upon it. *Reg. v. Preston, supra.*

Where the order recited an application to the

justices to order a portion of the rates "to be levied by virtue of the statutes in that case made and provided, for the repair of the highways within," &c., to be paid, &c.; and the order directed a sum to be paid "out of the rate which shall next be made for the repair of the highways within," &c.:—Held, that the order must be taken to refer to the application, and was therefore warranted by the statute. *Id.*

When such order is made on the surveyor of the highways of a hamlet, it is to be considered as stated by reasonable intendment that the hamlet is one maintaining its own highways. *Id.*

The order need not set out the state of the revenues of the trust, the length of the roads, or the other particulars into which justices are to inquire by the statute. *Id.*

Where an order recited that the surveyors appeared, in pursuance of a notice from the clerk of the turnpike trust, given pursuant to the statute, and there was an affidavit, stating that though such notice was, in fact, given, the surveyors did not appear, but purposely absented themselves, there being no reason to suppose that the order was intentionally false, and the variance being immaterial to the validity of the proceedings:—Held, no objection to the order. *Id.*

An order on the parish surveyor, for the repairs of a turnpike road, can only be made under 4 & 5 Vict. c. 59, s. 1, upon its appearing to the justices that the turnpike trust funds are insufficient. *Gorton (Surveyors), In re*, 25 L. J., M. C. 70; *S. C.*, nom. *Reg. v. Trafford*, 5 El. & Bl. 967; 2 Jur., N. S. 399.

**Order on Officer of Turnpike—Authority of Justices.**—Justices at special sessions have no authority to make an order on the treasurer or other officer of a turnpike road to repair the road, or to pay money to be applied to the repairs of it, without having first examined the sufficiency of the funds, nor without giving such officer an opportunity of shewing the condition of the funds. *Reg. v. St. Albans (Justices)*, 1 C. L. R. 536; 22 L. J., M. C. 142; 17 Jur. 531.

Where the clerk of the trustees of a turnpike road which was out of repair had been summoned by a single justice, and two justices at a special sessions for the highways, without allowing the clerk to shew cause that the turnpike funds were insufficient, made an order convicting him in a penalty, and ordering him to repair the road:—Held, that though the certiorari was taken away, the order was so entirely without jurisdiction that a certiorari might issue to bring up the order to quash it. *Id.*

—Under 2 & 3 Vict. c. 81.]—Under 2 & 3 Vict. c. 81 (which act has expired), justices might make an order that the parish surveyor shall pay a portion of the rate levied under 5 & 6 Will. 4, c. 50, to the trustees of a turnpike road for its repair, when it appeared that the income arising from the tolls was insufficient to defray both the expenses of repair and the interest on money advanced on mortgage of the tolls, although, under the local act constituting the trust, the income arising from the tolls was directed to be expended first in repairs, and afterwards in payment of interest; and although it appeared to them that the income would be sufficient for the purpose of repairs alone. *Reg. v. White*, 3 G. & D. 284; 4 Q. B. 101; 12 L. J., M. C. 31; 7 Jur. 106.

—Jurisdiction of Special Sessions.]—Under 2 & 3 Vict. c. 81, s. 1, a special sessions had jurisdiction to make an order on the parish surveyor of the highway to pay a certain sum to the trustees of a turnpike road, although the funds of the turnpike trustees were not exhausted. *Reg. v. Berks (Justices)*, 8 D. P. C. 727.

**Appeal against Order—Notice.**—By 4 & 5 Vict. c. 59, s. 3, a right of appeal is given against an order of justices made at special sessions for highways in pursuance of that act, the appellant first giving to the justices ten days' notice "within six days after such order, judgment or determination shall be so made or given:"—Held, that notice of appeal must be given within six days after the decision of the justices at special sessions, and not within six days after the service of the order upon the surveyors of highways. *Reg. v. Derbyshire (Justices)*, 1 New Sess. Cas. 645; 7 Q. B. 193; 14 L. J., M. C. 84; 9 Jur. 551.

—Interested Justices.]—Where, upon a trial of an appeal to quarter sessions against an order of two justices, directing a sum of money to be paid by the surveyor of highways to the commissioners of a turnpike trust, two justices were present, one of whom was a respondent in the appeal, being one of the justices making the order, and the other was a creditor of the turnpike trust, and one of them voted, the court quashed the order, upon the ground that the justices were interested. *Reg. v. Hertfordshire (Justices)*, 1 New Sess. Cas. 490; 6 Q. B. 753; 14 L. J., M. C. 73; 9 Jur. 424.

## 7. OFFENCES UPON.

**Permitting Cattle to Wander.**—Horses grazing on the side of a turnpike road, with a man in charge of them, they being under his control, are not liable to be impounded, under 4 Geo. 4, c. 95, s. 75, as "wandering, straying, or lying" about the road. *Morris v. Jeffries*, 1 L. R., Q. B. 261; 35 L. J., M. C. 143; 13 L. T. 629; 14 W. R. 310.

**Drawing Timber otherwise than upon Wheeled Carriages.**—A vehicle composed of a rough skeleton of woodwork, fifteen feet long, having two wheels placed behind the centre, the forepart being shod with iron, which in going down hill comes in contact with the ground, retarding its descent, is not a wheeled carriage within 3 Geo. 4, c. 126, s. 121. *Radnorshire County Roads Board v. Evans*, 3 B. & S. 400; 32 L. J., M. C. 100; 9 Jur., N. S. 890; 7 L. T. 677.

A person using such a vehicle for the carriage of straw, cannot be convicted under that portion of the section which imposes a penalty for "hauling or drawing upon any part of a turnpike road any timber, stone or other thing, otherwise than upon a wheeled carriage;" straw not being of ejusdem generis with timber or stone. *Id.*

## III. TRAMWAYS.

### 1. REGULATION OF COMPANIES.

**Parliamentary Deposits—Application of, to Payment of Debts.**—A private act incorporating a tramway company provided that, if

within a certain time the undertaking should not be completed or half the capital paid up and expended on the works, the parliamentary deposit, which had been paid into court in pursuance of the standing orders of the Houses of Parliament, should either be forfeited to the crown, or in the discretion of the court, if the company was insolvent and had been ordered to be wound up, should wholly or in part be applied as part of the assets of the company for the benefit of the creditors. The works were never begun, a small portion of the capital only having been subscribed for, and the company was ordered to be wound up on the ground that it was unable to pay its debts:—Held, that the court could not order the deposited fund to be applied as part of the assets of the company for the payment of its debts, until it was proved that there were debts which could not be paid by means of calls on the shareholders. *Bradford Tramways Company, In re*, 4 Ch. D. 18; 46 L. J., Ch. 89; 35 L. T. 827; 25 W. R. 88—C. A. Reversing 34 L. T. 478.

The intention of the Board of Trade regulations under the Tramways Act, 1870, relative to the ultimate disposal of the deposit made by a tramway company on obtaining a provisional order authorizing the construction of their tramway, is, first, that the promoters of the company are not, by any subterfuge or device, to get back the deposit, either directly or indirectly, if the tramway is not completed; secondly, that on an application under the 28th rule for application of the deposit, the creditors only are to be considered, and not the shareholders; and, thirdly, that the only creditors to be considered are meritorious creditors, coming with a bona fide case. Otherwise the deposit will be forfeited to the crown. *Lowestoft, Yarmouth and Southwold Tramways Company, In re*, 6 Ch. D. 484; 46 L. J., Ch. 393; 36 L. T. 578; 25 W. R. 525.

— **Order for Payment.**—A company, incorporated under the Companies Acts, obtained a provisional order to construct a tramway. No tramway was ever commenced, and the company was ordered to be wound up. The only shareholders were the subscribers to the memorandum of association; the only debt due from the company was less than the amount of the deposit fund. The court, on the petition of the official liquidator, under the discretion given by the Tramways Act, 1870, r. 26, ordered the deposit fund to be paid out to the petitioner, to be applied by him for the benefit of the company's creditors, and refused to consider it forfeited to the crown. *Tynemouth Borough Tramway Company, In re*, 33 L. T. 8.

— **Costs of Provisional Order—Taxation.**—The costs of applications to the Board of Trade for provisional orders under the Tramways Act, 1870, are to be taxed on the chancery and not on the parliamentary scale. *Morley, In re*, 20 L. R., Eq. 17; 32 L. T. 524; 23 W. R. 532.

— **Dividends Paid "out of Profits"—Maintenance of Works—Profits of Particular Year.**—The articles of association of a limited tramway company provided that no dividend should be declared except "out of profits;" that the directors should, with the sanction of the company, declare annual dividends "out of profits;" and

that the directors should, before recommending a dividend, set aside "out of profits," subject to the sanction of the company, "a reserve fund for maintenance, repairs, depreciation, and renewals." The company had for several years carried on their business, paying a dividend half-yearly on their ordinary shares; but they failed to set apart a reserve fund adequate for the maintenance of their tramway, which eventually became worn out. The company having again declared a half-yearly dividend on their ordinary shares, and the total sum appropriated for the dividend being, as it appeared, much less than the sum required to reinstate the tramway:—Held, that the company could only declare a dividend out of the net profits, and that the net profits could not be ascertained without first restoring the tramway to an efficient condition, or making due provision for that purpose out of the company's assets. An injunction was accordingly granted restraining the company from paying the half-yearly dividend they had declared, but leave was given them to move to dissolve the injunction, in the event of their being able to satisfy the court that there were profits available for the dividend. *Dent v. London Tramways Company*, 16 Ch. D. 344; 50 L. J., Ch. 190; 44 L. T. 91; *Davidson v. Gillies*, 16 Ch. D. 347, n.; 50 L. J., Ch. 192, n.; 44 L. T. 92, n.

— **Preference Shareholders.**—Held, however, that the holders of preference shares, the dividend on which was "dependent upon the profits of the particular year only," were entitled to a dividend out of the profits of any year after setting aside a proportionate amount sufficient for the maintenance of the tramway for that year only; and were not to be deprived of that dividend in order to make good the sums which in previous years should have been set aside by the company for maintenance, but which had been improperly applied by them in paying dividends. *Ib.*

## 2. CONSTRUCTION AND MANAGEMENT OF TRAMWAYS.

— **Without Parliamentary Authority—Nuisance.**—A person, without the authority of parliament, but with the concurrence of and by virtue of a contract with the vestry of the parish, laid down in one of the streets of the metropolis a double line of tramways on which omnibuses of a peculiar construction plied for hire. These tramways were dangerous and inconvenient to many of the public, as the wheels of vehicles skidded when crossing the tramway, and horses which put their feet upon it were startled:—Held, that this was a public nuisance, even though those tramways might be for the conveyance of the public generally. *Reg. v. Train*, 2 B. & S. 640; 9 Cox, C. C. 180; 31 L. J., M. C. 169; 10 W. R. 539; *S. C.*, at nisi prius, 3 F. & F. 22.

— **Distance between Rail and Footpath.**—Case in which the rule that 9 ft. 6 in. shall intervene between the tramway-rail and nearest footpath was departed from by statutory authority. *Edinburgh Street Tramways Company v. Black*, 2 L. R., H. L. (Sc.) 336.

Relying on certain preliminary agreements, the frontagers of a narrow thoroughfare ab-

stained from opposing the Edinburgh Tramways Bill; but as it turned out that the act, when passed, allowed the very thing which the frontagers had been most anxious to prevent, they asked and obtained from the Court of Session an interdict against its execution. But the House of Lords recalled the interdict, holding that the question was determined by the statute, which the tramways company was not only entitled to carry out, but bound to obey. *Ib.*

Held, also, that the same consequences would have arisen in the case of a provisional order from the Board of Trade, when confirmed by Parliament. *Ib.*

When the act directs compliance with deposited plans and sections, they are regarded as embodied in the statute. *Ib.*

**User of Wheels flanged so as to Run on Tramway.]**—Sect. 54 of the Tramways Act, 1870 (33 & 34 Vict. c. 78), prohibits the user of a tramway by unlicensed persons with carriages "having flange-wheels or other wheels suitable only to run on the rail of such tramway." The appellant, an omnibus proprietor, attached to his vehicle a lever with arms having a small revolving disc or roller which the driver might drop into the groove of the rail at the lower side of each forewheel when on the tramway, such discs operating when down as a flange at the point of contact with the rails, but when withdrawn by means of the lever leaving the vehicle free to travel over any part of the road:—Held, that this contrivance (though no obstruction to the tramway) was within the prohibition of the statute. *Cuttam v. Guest*, 6 Q. B. D. 70; 50 L. J., Q. B. 174; 29 W. R. 305; 45 J. P. 95.

**Fares — Bye-Laws of Company.]**—P. was charged by the conductor of a tramway company, under a bye-law, which says, "Every passenger shall upon demand pay the fare legally demandable for the journey," with not paying upon demand made. The fare was demanded during the journey, and P. objected that it was not legally demandable until the completion of the journey. The company was authorized by act of parliament to "make regulations for regulating the travelling in or upon any carriage belonging to them," and their act also provided that "the tolls, &c., shall be paid to such persons and at such places upon or near to the tramways, and in such manner and under such regulations as the company shall by notice appoint:—Held, that the bye-law was authorized by the act, that it was reasonable, and that, as P. had become a passenger and was travelling upon the tramway, he was liable to pay the fare whenever it was demanded of him by the conductor. *Egginton v. Pearl*, 33 L. T. 428.

**— Amount of.]**—A tramway company scheduled to their act of parliament distinct agreements with municipal authorities not to charge tramway passengers above a fixed fare; but they afterwards obtained legislative authority to substitute omnibuses on certain routes in lieu of the tramways, and to charge a higher fare on these routes:—Held, that the company had no power to increase the fare of passengers using the tramways only. *Edinburgh Street Tramways Company v. Torbain*, 3 App. Cas. 58; 37 L. T. 288—H. L. (Sc.).

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**Validity of Agreements Regulating Services of Conductors.]**—A conductor, at the time of entering the employ of a tramways company, deposited with them the sum of 5*l.*, which, together with any wages due was agreed to be forfeited in case of any breach by him of the company's rules. It was further agreed that the company's manager was to be the sole judge of whether the company was entitled to retain the whole of the deposit-money and wages due, and that his certificate of the cause of retention should be binding and conclusive evidence between the parties in all courts of justice and before all stipendiary magistrates, and should bar the conductor of all right to recover under any circumstances the moneys so certified to be retained. After three months' service the conductor was discharged from his employ, and the deposit-money as well as wages due were certified by the manager to be forfeited for non-observance of certain rules:—Held, that, in the absence of fraud, such certificate was binding, there being nothing in the agreement that was illegal or void. *London Tramways Company v. Bailey*, 3 Q. B. D. 217; 47 L. J., M. C. 3; 37 L. T. 499; 26 W. R. 494.

**Under an Agreement — Right of Way.]**—Tenants of quarries situated about three miles from their works, who were accustomed to convey the stones from the quarries to the works by carts, entered into an agreement with their landlord to construct a tramway from the quarry to the works, to run, *inter alia*, "by the end of the policy" of the landlord; and they further agreed to compensate the farm tenants along the line for any damage done to their farms during the currency of their leases. The landlord agreed, *inter alia*, to give gratuitously the land required for the tramway. Outside the policy ground there was a private road, the property of the landlord, which, before it reached the tenants' works, ran through another tenant's stone pavement yard. This was the only practical route outside the policy for the tramway; and it was alleged that the only obstacle to laying it along that road was, that the other tenant might refuse to allow it being laid on that part passing through his yard, but for this there were no *termini habiles*. The tenants claimed that the landlord was bound to give them the use and possession of land for the purpose of the tramway, and that, either (1) "within and by the end of the policy," or (2) "in any other place as suitable and convenient for them in every respect:—Held, that under the agreement the stipulation was that the tramway should pass outside the walls which inclose the policy of the landlord; and that, by agreeing to give gratuitously the lands required, the landlord merely undertook to give the tenants such rights as were vested in him, leaving them (with the power to use his name) to settle with any persons who might have a right or interest entitling them to object to the formation of the tramway. *Sinclair v. Caithness Flagstone Quarrying Company*, 6 App. Cas. 340—H. L. (Sc.).

**Repairs of Road.]**—A vestry, as the road authority under the Tramways Act, 1870 (33 & 34 Vict. c. 78), claimed against a tramway company the expenses of superintending their opening and breaking up of roads under s. 26, for

C C

the maintenance and renewal of their tramway:—Held, that so far as the company merely raised the sleepers and rails to the level of the road, or raised the stone packing of the road to the level of the surface of the rails, they were maintaining and keeping the road in good condition and repair under s. 28, and were not liable to the superintendence of the road authority under s. 26. *St. Luke's Vestry v. North Metropolitan Tramways Company*, 1 Q. B. D. 760; 35 L. T. 329.

#### IV. BRIDGES.

##### 1. LIABILITY TO REPAIR.

###### a. Public User.

**Who Liable.**—Bridges must be repaired by the county when it does not appear who else ought to repair them. *Rez v. Yorkshire W. R.*, 5 Burr. 2594; 2 W. Bl. 685; Lofft, 238; 2 East, 342.

**Built by Private Person.**—The county is bound to repair a bridge built by a private person, if it is of public utility. *Ib.*

But, if he has the benefit of it, he must repair. *Ib.*

Where an individual builds a bridge which he dedicates to the public, by whom it is used, the county is bound to repair it. *Ib.*

As a general rule, the county is liable to repair bridges built by private individuals before 43 Geo. 3, c. 59, if the public use such bridges. *Reg. v. Ely*, 4 New Sess. Cas. 222; 15 Q. B. 827; 19 L. J., M. C. 223; 14 Jur. 956.

The county may be compelled to repair a bridge built in the highway, and used by the public above forty years, though originally erected by a private individual for his own convenience. *Rez v. Glamorgan*, 2 East, 356, n.

Where a person, about forty-five years back, erected a mill and a dam thereto for his own profit, per quod he deepened the water of a ford through which there was a public highway, but the passage through which was before the deepening very inconvenient at times to the public, and the miller afterwards built a bridge over it, which the public had ever since used:—Held, that the county and not the miller was chargeable with the reparation. *Rez v. Kent*, 2 M. & S. 513.

**In Time of Floods.**—A bridge may be a public bridge which is used by the public at all such times as are dangerous to pass through the river. *Rez v. Northampton*, 2 M. & S. 262.

A bridge used only on occasion of floods, and lying out of and alongside the road commonly used, is a public bridge, and the county is liable to repair it. *Rez v. Devon*, B. & M. 144.

A bar across a public bridge kept locked, except in times of flood, is conclusive evidence that the public has only a limited right to use the bridge at such times. *Rez v. Buckingham (Marquis)*, 4 Camp. 189.

###### b. Description of Bridge.

**Flumen vel cursus aquæ.**—The inhabitants of a county are bound by common law to repair bridges erected over such water only as answers the description of flumen vel cursus aquæ; that

is, water flowing in a channel between banks more or less defined, although such channel may be occasionally dry. *Rez v. Oxfordshire*, 1 B. & Ad. 289.

Though there cannot be a bridge which the county is bound to repair, where there is no cursus aquæ, yet it is a question of fact in each case, whether an arch thrown over a cursus aquæ is such a bridge or not. *Rez v. Whitney*, 4 N. & M. 594; 3 A. & E. 69; 7 C. & P. 208; 1 H. & W. 147.

The fact of the arch or bridge having no parapets does not of itself prevent its being a county bridge. *Ib.*

It is not essential to a bridge, in the legal sense of the word, that it should be a structure over water which flows at all times. *Reg. v. Derbyshire*, 2 G. & D. 97; 2 Q. B. 745; 6 Jur. 483.

**Culvert only Necessary.**—Trustees under a turnpike act having built a bridge across a stream where a culvert would have been sufficient, but a bridge was better for the public, the county cannot refuse to repair such bridge on the ground that it was not absolutely necessary. *Rez v. Lancashire*, 2 B. & Ad. 813.

**Street.**—A bridge may be so situate as to be a street within the meaning of a statute. *Beaver v. Manchester (Mayor)*, 26 L. J., Q. B. 311.

**Foot Bridge.**—A foot bridge, formed of three planks, nine or ten feet long, and a handrail, and which carried a public footpath across a small stream, was held not to be repairable as a county bridge; that it had been repaired by the commissioners under the local act of parliament. *Reg. v. Southampton*, 18 Q. B. 841; 21 L. J., M. C. 201; 17 Jur. 254.

###### c. Ratione tenuræ.

**Owner or Occupier.**—At common law, the liability to repair bridges, ratione tenuræ, is thrown ultimately on the owner of the land, as between him and the occupier, though primarily, as far as the public are concerned, the occupier may be chargeable. *Baker v. Greenhill*, 3 Q. B. 148; 2 G. & D. 435; 6 Jur. 710.

**Infant.**—An infant seised of lands in the actual possession of his guardian in socage, is not indictable for the non-repair of a bridge ratione tenuræ. *Rez v. Sutton*, 5 N. & M. 353; 3 A. & E. 597; 1 H. & W. 428.

**Guardian in Socage.**—The guardian in socage, if in possession of the lands charged with the repairs, is indictable. *Ib.*

So, any occupier of the lands charged. *Ib.*

**Indictment.**—An indictment, charging an individual with the repair of a bridge by reason of his being owner and proprietor of a certain navigation, is not equivalent to charging him ratione tenuræ, but is erroneous; and, if judgment is given thereon, upon error, it will be reversed. *Rez v. Kerrison*, 1 M. & S. 435.

An indictment for not repairing an ancient bridge, describing it as being situate within the parish of P. & M., and averred that the inhabitants of P., and those of the township of M. aforesaid, were liable to repair such bridge, with-

out proceeding to state what part of it was situate in the township of M., and that the inhabitants thereof were liable to repair it:—Held, bad, as no special or sufficient consideration was shewn to render the inhabitants of the township liable to repair, as they could not hold land, and consequently could not be liable *ratione tenuræ*. *Reg. v. Penegoes and Machynlleth*, 3 D. & R. 388; 2 B. & C. 166.

**Evidence.**—To an indictment against the inhabitants of a county for the non-repair of a foot bridge, they pleaded that it was parcel of a carriage bridge, which A. was bound to repair *ratione tenuræ*. Replication admitted the liability of A. to repair the carriage bridge, but denied that the foot bridge was parcel of the same, whereupon issue was joined. The evidence was, that the carriage bridge mentioned in the pleadings had been built before 1119, and that certain abbey lands had been ordained for the repairs of the same, and the proprietors of those lands (of which those mentioned to be held by A. formed part) had always repaired the bridge so built. In 1736 the trustees of a turnpike road, with the consent of a certain number of the proprietors of the abbey lands, constructed a wooden foot bridge along the outside of the parapet of the carriage bridge, partly connected with it by brickwork and iron pins, and partly resting on the stonework of the bridge:—Held, that this (being the bridge mentioned in the indictment) was not parcel of the carriage bridge which A. was bound by tenure to repair; and, consequently, that the county was liable to repair the foot bridge. *Reg. v. Middlesex*, 3 B. & Ad. 201.

Indictment against a county for not repairing a bridge: plea, that S. was liable *ratione tenuræ*. The plea is not sustained by evidence that the estate of S. was part of a larger estate, which part he purchased of the former owner, who retained the rest in his own hands, and as well before the purchase as since had repaired the bridge: but where in such case the county was found guilty, the court gave leave to stay the judgment upon payment of costs until another indictment was preferred, in order to try the liability. *Reg. v. Oxfordshire*, 16 East, 223.

An indictment for non-repair of a bridge on a liability *ratione tenuræ* cannot be sustained, where it appears that the tenement on which the liability is charged originated within time of legal memory. *Reg. v. Hayman, M. & M.* 401.

On an indictment for the non-repair of a bridge *ratione tenuræ*:—Held, that a record of Edw. 3, setting out a presentment of the Bishop of Lincoln for non-repair of the bridge, and his acquittal by the jury, which was shortly afterwards followed by a grant of pontage from the crown, on the ground that it had been found by inquest that no one was liable to repair the bridge, is admissible to negative any immemorial liability *ratione tenuræ*. *Reg. v. Sutton*, 3 N. & P. 569; 8 A. & E. 516.

#### d. By Prescription.

**Corporation.**—As to the liability of a corporation by prescription to repair a bridge, see *Reg. v. Stratford-upon-Avon (Mayor)*, 14 East, 318.

**Hundred.**—A hundred may be charged by

prescription with the reparation of a bridge, and this, although it appears that by a statute within the time of legal memory, one of the townships, parcel of the hundred, was then annexed to it. *Reg. v. Oswestry*, 6 M. & S. 361. See also *Reg. v. Chart and Longbridge, infra*.

**Parish.**—A parish may be indicted for non-repair of a bridge without stating any other ground of liability than immemorial usage. *Reg. v. Hendon*, 4 B. & Ad. 628.

A public bridge, repairable by immemorial custom, by the inhabitants of a hundred, is not a highway within the meaning of that term in 5 & 6 Will. 4, c. 50, s. 5, and is not repairable under that act, by the parish in which it is situated. *Reg. v. Chart and Longbridge*, 1 L. R., C. C. 237; 39 L. J., M. C. 107; 22 L. T. 416; 18 W. R. 791; 11 Cox, C. C. 502.

By 5 & 6 Will. 4, c. 50, s. 5, it is enacted, that the word "highways" shall be understood to mean all roads, bridges (not being county bridges), carriage ways, &c.:—Held, that a bridge of the above description was a county bridge, and repairable by the hundred, within the exception of county bridges. *Id.*

**County Bridge—When within Municipal Boundary.**—Where a toll bridge has been built, and a turnpike road made in connexion with it under a local act, on the termination of the period of the trust, though the bridge is within the boundaries of a municipal borough, it becomes such a county bridge under 33 & 34 Vict. c. 73, s. 12, as to make it repairable by the inhabitants of the county, unless there is some immemorial usage imposing a liability on the inhabitants of the borough to repair all bridges within its boundaries. A toll bridge was made over the B. river at W. for the purpose of connecting the back streets of W. with the county districts on the other side of the river. A turnpike road was made in connexion with the bridge; both the road and the bridge were constructed under one act. There were separate trusts of the bridge and the road, but the trustees of the one were trustees of the other. This bridge was within the municipal boundaries of the borough of W. On the expiration of the trust the county repaired the road, but the bridge was allowed to fall into disrepair. The county of D., in which the bridge was situated, was thereupon indicted for its non-repair, and was found guilty:—Held, upon the argument for a new trial, that the county was rightly convicted; and that, as there was nothing shewn in the case to cast the liability to repair on the borough in which the bridge was situated, on the expiration of the period of the trust affecting the bridge, it became a county bridge repairable by the inhabitants of the county under 33 & 34 Vict. c. 73, s. 12. *Reg. v. Dorset Inhabitants*, 45 L. T. 308.

#### e. When Built under Special Authority.

**Canal Company—Deepening a Ford.**—A canal company, authorized by an act of parliament to make a river navigable, and to make and enlarge certain navigable cuts, and build bridges and other works connected with the navigation, having for their own benefit made a navigable cut and deepened a ford which crossed the highway, and thereby rendered a bridge necessary

for the passage of the public, which was accordingly built at the expense of the company in the first instance:—Held, that the company was bound to maintain it, and that the burden of repair was not to be thrown upon the inhabitants of the county. *Ree v. Lindsay*, 14 East, 317.

A company being empowered under a local act to make a river navigable, and to take tolls, and to amend or alter such bridges or highways as might hinder the passage or navigation, leaving them or others as convenient in their room, and they having forty years ago destroyed a ford across the river in the common highway by deepening its bed, and built a bridge over the same place, are bound to keep such bridge in repair, as under a continuing condition to preserve the new passage in lieu of the old one, which they destroyed for their own benefit. *Ree v. Kent*, 13 East, 220.

**Alteration of Bridge.**—By 43 Geo. 3, c. 59, s. 5, the inhabitants of a county were compelled to repair no bridge thereafter erected or built by a private person or body corporate, unless under the direction or to the satisfaction of the county surveyor or some person appointed by the justices. By a local act of 1827 a road passing over a bridge was made repairable by trustees; but at no time was the bridge or its approaches actually repaired by them. The road became an ordinary highway. By another local act of the same year a canal company was empowered to make, maintain, and support bridges across their navigation, provided no existing liability to repair a bridge not erected or altered by the company should be affected. The company raised the surface of this bridge, without altering the structure, in order to give the approach to another bridge over their navigation the incline required by their act. They did this without reference to the county surveyor or justices. By 33 & 34 Vict. c. 73, s. 12, where a turnpike road shall have become an ordinary highway, all bridges which were previously repaired by the trustees of such turnpike road shall become county bridges, and shall be kept in repair accordingly:—Held, that by this alteration this bridge had not become repairable by the canal company, and that this general provision of the last act was not limited to those bridges erected by private expense, which alone were repairable by a county under 43 Geo. 3, c. 59, s. 5; nor to bridges which had been actually repaired by trustees. *Reg. v. Somerset*, 38 L. T. 452.

— **Cutting through Highway.**—Where certain persons and their successors were authorized by act of parliament to make a river navigable, and to cut the soil of any persons for making any new channel, by virtue of which they cut through a highway, and rendered it impassable, and a bridge was built over the cut, over which the public passed, and which had been repaired by the proprietors of the navigation:—Held, that the proprietors, and not the county, were liable to repair. *Ree v. Kerrison*, 3 M. & S. 526.

**Indictment—Division of County.**—Indictment against the inhabitants of the Isle of Ely, for non-repair of a public bridge in the Isle of Ely and county of Cambridge, averring that they were liable, but stating no specific reason. Plea, that the bridge was in a public highway, over an

artificial cut made in the highway by the adventurers for draining the Bedford Level; that the bridge was rendered necessary by the cut for the purpose of the highway; that the cut was made for the benefit of the lands of the adventurers, and was maintained by the adventurers until a statute, when the property in the cut and its banks, and in the bridge, and in the lands benefited by the cut, which lands had been previously vested in the adventurers, became vested in the corporation of the conservators of the fens, and the cut was from that time maintained by the corporation for their own benefit; and they have repaired and been liable to repair the bridge:—Held, first, that the count was good, as the court must take judicial notice that the Isle of Ely was a division of a county in the nature of a riding, and, as such, *prima facie* liable to repair bridges within it. *Reg. v. Ely*, 4 New Sess. Cas. 222; 15 Q. B. 827; 19 L. J., M. C. 223; 14 Jur. 956.

Held, secondly, that the plea was good, as it sufficiently shewed that the corporation was bound to repair the bridge rendered necessary by the cut maintained for their benefit. *Id.*

**Turnpike Act—County Primarily Liable.**—Where turnpike trustees erected a bridge in pursuance of the power given them by the act, upon a road where there had been no bridge before:—Held, that the county was primarily liable to keep it in repair, even assuming that the trustees had funds in hand applicable to that purpose. *Ree v. Oxfordshire*, 6 D. & R. 231; 4 B. & C. 194.

The county or riding is liable to the repair of a bridge built by trustees under a turnpike act; there being no special provision for exonerating them from the common-law liability, or transferring it to others, though the trustees were enabled to raise tolls for the support of the roads. *Ree v. Yorkshire, W. R.*, 2 East, 342.

**Railways Clauses Act.**—A special act of a railway company (incorporated by the Railways Clauses Act, 1845, so far as it was not expressly varied or excepted) provided, that if after notice the company did, with reasonable expedition, repair a bridge over a turnpike road to the satisfaction of the surveyor of the trustees, the latter might repair and recover the costs; the Turnpike Act, however, was suffered to expire:—Held, that though the Railways Clauses Act, 1845, s. 65, was expressly varied by the special act, yet it revived on the cessation of the turnpike trust, and an order to repair the bridge might be made under it. *London, Chatham, and Dover Railway Company v. Wandsworth Board of Works*, 8 L. R., C. P. 8; 42 L. J., M. C. 70.

**During Erection.**—The 49 Geo. 3, c. 84, appointed trustees for taking down the old and building a new bridge over a river, and empowered them to take tolls, and that it should be lawful for them, out of the moneys received, to build a new bridge, and vested the property in the old and new bridge, during the continuance of the act, in the trustees; and that as soon as the purposes of the act should be executed, then and from thenceforth the tolls should cease, and the bridge should be repaired by such persons as were by law liable to repair the old bridge:—Held, that during the time the trustees were engaged in

executing the powers of the act, and before they had completed them, the county was not liable to repair the bridge. *Rea v. Somerset*, 16 East, 806.

**Proprietor—Taking Tolls.**—An act, after reciting that it would be for the convenience of the inhabitants of Surrey and Middlesex, that a bridge should be built across the Thames, from W. to S., enacted that it shall and may be lawful for D., his heirs and assigns, to build the bridge; and that for and in consideration of the great charges and expenses D., his heirs or assigns, would be at, not only in building the bridge, but also in erecting and maintaining other matters necessary to be erected, it shall and may be lawful for D., his heirs and assigns, from time to time, to take certain tolls by way of pontage for every person, carriage or horse passing the bridge. And after reciting that it might happen that the bridge might receive such damage as to be dangerous or impassable, it further enacted that in such case it shall and may be lawful, to D., his heirs and assigns, to set up a ferry across the river as near the bridge as conveniently may be, and take for the passage over the ferry the pontage granted by the act; provided that the ferry shall not continue longer than is necessary for repairing or rebuilding the bridge. The bridge was made extra-parochial, and was not to be deemed a county bridge, so as to make either Surrey or Middlesex liable to repair it. A subsequent act, after reciting that by the former act certain tolls and powers had been granted to D. to build the bridge, and that it had been accordingly built, and passable for many years, and that it was in a ruinous condition, and if not effectually repaired or rebuilt, would be manifestly to the inconvenience of the public; and that M. was the sole proprietor, and had proposed to effectually repair or rebuild it, and that the pontage granted under the former act had been found by experience greatly inadequate to the expense of building and keeping in repair the same, enacted that it should be lawful to M., his heirs and assigns, to take, under this and the former act, increased tolls. The bridge having been built under the first act, the public constantly used it, and the proprietors for the time being took the tolls and exercised the powers of the two acts, and did all the necessary repairs, until the principal arch fell in, and the bridge became impassable. On this the present proprietor of the bridge set up a ferry, and took, and continued to take, the tolls authorized by the two acts:—Held, that so long as he remained proprietor and took the tolls, he was bound to repair the bridge, and was liable to an action at the suit of a person who suffered special damage from the bridge being impassable; but the court refused to grant a mandamus to compel him to repair the bridge, and maintain it in a fit state for passage. *Nicholl v. Allen*, 1 B. & S. 934; 31 L. J., Q. B. 283; 6 L. T. 699; 10 W. R. 741—*Ex. Ch.*

**Isle of Wight.**—The Isle of Wight is a division of the county of Southampton, but has no separate commission of the peace. Before 1842, all public bridges in the island, not repairable by tenure, were repaired either by the tithings, parishes or townships in which they were situate, or from rates levied on all the parishes in the island under the following circumstances. The

island having been assessed to the general county rate, and appeals against such assessment having been entered, an arrangement was made, in 1774, by consent, under an order of quarter sessions, fixing certain proportions to be paid by the parishes towards the general county rate, but leaving the expense of bridges and the house of correction to be raised by a local rate, the island being adjudged and declared not to be liable to pay to the county rate or county house of correction, and the inhabitants agreeing to erect and maintain houses of correction and bridges within the island at their sole expense. After this arrangement, the practice was for the county quarter sessions, on application of the justices for the Isle of Wight division, to lay a rate, in the nature of a county rate, on every parish in the island, for the repair of the island bridges and bridewell. Till 1842, there had been no instance of the general county rate being applied to the repair of the island bridges. In 1813, a local act appointed commissioners for the repair of the highways in the island, with power to make assessments, and enacted that all bridges previously repaired by any parishes, tithings, divisions or townships should, for the future, be repaired "in such and the same manner, and by such and the same ways and means," as other bridges usually called county bridges, within the island had been accustomed to be repaired. In 1842, and since, the island was assessed generally with the county, and no separate island rate made. Application for the repair of bridges and bridewells in the island had been since that time made to the county quarter sessions:—Held, that all bridges which, at the time of the passing of the act, were repairable by the tithings, parishes or townships in which they were situate, were for the future repairable by the county generally, and that the arrangement of 1774 did not affect the legal liability of the county, and was no answer to an indictment against it for non-repair of such bridges. *Reg. v. Southampton*, 18 Q. B. 841; 21 L. J., M. C. 201; 17 Jur. 254.

**Sluice Bridge, Destruction of—Limitation of Duty to Rebuild.**—By a local act commissioners were constituted to protect the banks of the Ouse, and by another act commissioners were constituted, under the title of the Middle Level Commissioners, with powers over a large district of land, and who under such powers had built a sluice bridge from bank to bank over the Ouse. The tide having broken in and washed away such sluice bridge and 110 feet of the embankment adjoining, a local act was passed, enacting that the Middle Level Commissioners "shall, with all convenient dispatch after the passing of this act, at their own cost, erect a new bridge, or otherwise provide and make and for ever maintain a good and sufficient continuous road or haling path over and along or near to that part of the west bank of the River Ouse, where recently stood the sluice bridge and roadway made by the commissioners." These commissioners were ready to build a sluice bridge of the dimensions of the old one, if there were any embankments to which to attach it, but declined to make one to connect itself with the embankment in its present unrestored condition:—Held, that the words of the statute limited the duty of the commissioners to the making of a bridge of the limits of the former bridge. *Reg. v. Middle Level Commissioners*, 10 L. T. 375.

**Bridge Destroyed by Flood.**—On a covenant to build a bridge in a substantial manner, and to keep it in repair for a certain time, the party is bound to rebuild the bridge, though broken down by an extraordinary flood. *Brecknock Navigation v. Pritchard*, 6 T. R. 750.

#### f. Satisfaction of County Surveyor.

**Persons within the Act.**—Trustees appointed by a local turnpike act are individuals or private persons within the meaning of 43 Geo. 3, c. 59, s. 5, which renders it necessary to erect county bridges under the direction or to the satisfaction of the county surveyor. *Rex v. Derby*, 3 B. & Ad. 147.

**Newly-built Bridges.**—The statute applies only to bridges newly built, not to a bridge merely widened or repaired since its passing. *Rex v. Lancashire*, 2 B. & Ad. 813.

A county bridge having been washed away, was, after the passing of 43 Geo. 3, c. 59, rebuilt, wider than before, and, without notice to the county surveyor, by the parish, partly with the old materials, and in the same line of passage over the river:—Held, that the county was liable to repair, and that this was not a new bridge within the meaning of that act. *Rex v. Devonshire*, 2 N. & M. 412; 5 B. & Ad. 383.

A bridge in the Isle of Wight, originally repaired by the tithing in which it was situate, was, after the passing of a local act, wholly rebuilt by order of the justices for the island division. The new bridge was longer than the old, and different in form, and stood higher up the stream. The expense of the building, and of repairs, were defrayed out of the island rate imposed under an arrangement. The conditions, by 43 Geo. 3, c. 59, were not observed in building it:—Held, that the county was liable to repair the new bridge. *Reg. v. Southampton*, 18 Q. B. 841; 21 L. J., M. C. 201; 17 Jur. 254.

**Over Stream of Water.**—A bridge had been built before 43 Geo. 3, c. 59, over a stream of water. The stream was never known to be dry, but in the winter its depth only averaged two and a half feet. It was part of a sheet of water crossing low land, and at the place where the bridge crossed it, it was confined by embankments, to prevent it from overflowing the adjoining meadows. The judge left it to the jury, whether this structure was a bridge over a stream of water; for, if so, it was not necessary that it should be for the convenience of the public under 43 Geo. 3, c. 59, s. 5, but the county was liable to repair it. *Reg. v. Gloucester*, Car. & M. 506.

**Alteration of Bridge.**—By 43 Geo. 3, c. 59, s. 5, the inhabitants of a county were compelled to repair no bridge thereafter erected or built by a private person or body corporate, unless under the direction or to the satisfaction of the county surveyor or some person appointed by the justices. By a local act of 1827 a road passing over a bridge was made repairable by trustees; but at no time was the bridge or its approaches actually repaired by them. The road became an ordinary highway. By another local act of the same year a canal company was empowered to make, maintain, and support bridges across their navigation, provided no existing liability to

repair a bridge not erected or altered by the company should be affected. The company raised the surface of this bridge, without altering the structure, in order to give the approach to another bridge over their navigation the incline required by their act. They did this without reference to the county surveyor or justices. By 33 & 34 Vict. c. 73, s. 12, where a turnpike road shall have become an ordinary highway, all bridges which were previously repaired by the trustees of such turnpike road shall become county bridges, and shall be kept in repair accordingly:—Held, that by this alteration this bridge had not become repairable by the canal company, and that this general provision of the last act was not limited to those bridges erected by private expense, which alone were repairable by a county under 43 Geo. 3, c. 59, s. 5; nor to bridges which had been actually repaired by trustees. *Reg. v. Somerset*, 38 L. T. 452.

#### g. When Bridge Widened.

**Obligation to Repair—Evidence.**—A particular parish was bound by prescription to repair an old wooden foot bridge used by carriages only in times of flood; about forty years before the trustees of the turnpike road built on the same site a much wider bridge of brick, which had been constantly used every since by all carriages passing that way:—Held, that to an indictment against the county for not repairing this bridge, a plea that the parish had immemorially repaired and still ought to repair the bridge, was not supported by the above facts, and that the burden of repairing the new bridge must be borne by the county at large. *Rex v. Surrey*, 2 Camp. 455.

**Liability Pro rata.**—Where townships have so enlarged a bridge which they were before bound to repair as a foot bridge, they will still be liable pro rata. *Rex v. Yorkshire, W. R.*, 2 East, 353.

#### h. Approaches to Bridges.

**At Common Law.**—By the common law, declared by 22 Hen. 8, c. 5, and the subsequent bridge acts, where the inhabitants of a county are liable to the repair of a public bridge, they are liable also to the repair of the highway at the ends of such bridge to the extent of 300 feet; and if indicted for the non-repair thereof, they cannot exonerate themselves, except by pleading specially that some other is bound by prescription or tenure to repair the same. *Yorkshire, W. R. v. Rex (in error)*, 2 Dow, 1; 5 Taunt. 284; 7 East, 588; 3 Smith, 437.

**Prescriptive Liability—300 Feet.**—Where there is a prescriptive liability to repair a bridge, it is an intendment of law, in the absence of any evidence to the contrary, that the liability extends to 300 feet of the approaches at each end of the bridge. *Reg. v. Lincoln (Mayor)*, 3 N. & P. 273; 8 A. & E. 65; 1 W. & H. 260; 2 Jur., 615, 807.

The presumptive liability to repair the approaches to a bridge is not rebutted by proof that the party has been known only to repair the fabric of the bridge, and that the only repairs known to have been done to the highway have

been performed by commissioners under a turnpike road act. *Id.*

A new and substantive bridge of public utility, built within the limit of one county and adopted by the public, is repairable by the inhabitants of that county, although built within 300 feet of an old bridge repairable by the inhabitants of another county, who were bound of course under 22 Hen. 8, c. 5, to maintain such 300 feet of road, though lying in the other county. *Rea v. Devon*, 14 East, 477.

**Railway Bridge over Highway.**—When a railway is carried over a highway by means of a bridge, no liability to keep in repair the immediate approaches on each side of the bridge is cast upon the company by reason of any of the provisions in the Railway Clauses Act, 1845, even though the company has lowered the level of the old highway in making the approaches. *London and North-Western Railway Company v. Skerton (Surveyor of Highways)*, 5 B. & S. 559; 33 L. J., M. C. 158; 10 L. T. 648; 12 W. R. 1102.

And see further, RAILWAYS.

#### i. Part of Bridge in Different Counties.

**Effect of 5 & 6 Will. 4, s. 76.**—Indictment for the non-repair of a bridge. On a special verdict, it was found, that, until the passing of 2 & 3 Will. 4, c. 64, by which a borough was enlarged, the bridge was situated without the borough, in a county, and had always been repaired by that county; the metes and bounds so altered were adopted by 5 & 6 Will. 4, c. 76, for the purposes of that act:—Held, that the 5 & 6 Will. 4, c. 76, does not change the legal liability of the county; and that, though the bridge is now locally situate within the new limits of the borough, the county is still liable to repair it. *Reg. v. New Sarum*, 2 New Sess. Cas. 133; 7 Q. B. 241; 15 L. J., M. C. 15; 10 Jur. 176.

Indictment against the inhabitants of B. for non-repair of half of a county bridge. A special verdict found that the bridge was across the river W., in the parish of G.; that parish G. was partly on the right bank, and partly on the left bank of the river; that the whole of that part on the left bank always was in the county of R.; that until 2 & 3 Will. 4, c. 64, the boundary between the counties of B. and R. was the mid-channel of the river to a point in parish G., and thence inland to another point in the mid-channel; and that 470 acres of parish G., between the inland boundary and the river, and the part of the river from the one point to the other, always until 2 & 3 Will. 4, c. 64, were in the county of R.; that a portion of the bridge between the right bank and the centre of the river, and resting upon part of the 470 acres, was out of repair; and the doubt referred to the court was whether the defendants were guilty. By 2 & 3 Will. 4, c. 64, and 7 & 8 Vict. c. 61, the isolated portions of counties described in schedule (M.) to 2 & 3 Will. 4, c. 64, are annexed for all purposes to counties mentioned in the fourth column of the schedule. The schedule describes "part of point G." as being an isolated part of B., locally situate in B. or R., and to be annexed to B. The verdict stated that there was no part of parish G. to which this description could apply, if not to the

470 acres:—Held, first, that the description in the schedule must be understood to apply to the 470 acres, which had been part of the county of R., and that the statute made the part of the county of B. and the mid-channel the boundary between the counties. *Reg. v. Brecon or Brecknockshire*, 4 New Sess. Cas. 272; 15 Q. B. 813; 19 L. J., M. C. 203.

Held, secondly, that the liability to repair the bridge within part of G. was, as an incident to the change, transferred to the inhabitants of B. *Id.*

#### 2. PRESENTMENT FOR NON-REPAIR.

The 13 Geo. 3, c. 78, s. 24, empowers every justice of the peace, either upon his own view, or upon information upon oath, to make presentment of any highway not well and sufficiently repaired. By 43 Geo. 3, c. 59, s. 1, all matters and things in the former act contained, relating to highways, shall, so far as applicable, be extended and applied to county bridges, as fully and effectually as if the same, and every part thereof, were herein repeated and re-enacted:—Held, that the enactment, as to presentments of highways, in the former statute, was virtually re-written or re-enacted in 43 Geo. 3, c. 59, as to county bridges, and, therefore, is not repealed, as to county bridges by 5 & 6 Will. 4, c. 50, which repeals in terms 13 Geo. 3, c. 78. *Reg. v. Brecon*, 3 New Sess. Cas. 434; 15 Q. B. 813; 18 L. J., M. C. 123; 13 Jur. 422; *S. P.*, *Reg. v. Merionethshire*, 6 Q. B. 343.

Held, also, that 5 & 6 Will. 4, c. 50, s. 22, does not so far incorporate the provisions of s. 99, as to apply them to county bridges, and does not, therefore, shew that the legislature intended to repeal so much of the 43 Geo. 3, c. 59, as consists of clauses incorporated from 13 Geo. 3, c. 78. *Id.*

#### 3. INDICTMENT AND EVIDENCE.

**Liability—Immemorial Usage.**—A parish may be indicted for non-repair of a bridge, without stating any other ground of liability than immemorial usage. *Rea v. Hendon*, 4 B. & Ad. 628.

**Public Bridge.**—The inhabitants of a county are bound to repair every public bridge within it, unless, when indicted for the non-repair of it, they can shew by plea, that some other person, or body politic or corporate, is liable; and every bridge in a highway is by 22 Hen. 8, c. 5, taken to be a public bridge for this purpose. *Rea v. Bucks*, 12 East, 192.

**"Riding."**—The word "riding" in the Statute of Bridges (22 Hen. 8, c. 5, s. 3), is not confined to districts called by that name, but includes any division of a county which corresponds in its definition to a riding. *Reg. v. Isle of Ely*, 4 New Sess. Cas. 222; 15 Q. B. 827; 19 L. J., M. C. 223.

**Misdescription of Liability.**—An indictment stated, that, from time immemorial, there hath been and still is an ancient bridge; that one part of it was in township A., and the other in parish B.; that the part in A. was out of repair, and that A. was under a prescriptive liability to repair. The bridge consisted of four arches, part of the principal arch and the whole of the other arches being in A., and that in 1806 the principal

arch had been widened from nine to sixteen feet at the joint expense of A. and B. :—Held, that there was no misdescription of the township's liability; as, if the prescriptive liability to repair the ancient bridge was well described, it was no answer to shew that there was something else which A. was not bound to repair. *Reg. v. Adderbury East*, D. & M. 324; 5 Q. B. 187; 13 L. J., M. C. 91; 7 Jur. 1035.

**Parish or County Liable—Inspection of Parish Books.**—An indictment had been preferred against a county for not repairing a bridge at the instance of the inhabitants of a parish, and the question intended to be tried was, whether the inhabitants of the parish or of the county were liable to repair it. The court refused to compel the inhabitants of the parish to allow the parties indicted to inspect the parish books and documents relating to the bridge. *Reg. v. Buckingham (Justices)*, 8 B. & C. 375; 2 M. & R. 412.

**Evidence.**—Upon not guilty to an indictment against the inhabitants of a county for not repairing a public bridge, it is competent to the defendants to give evidence of the bridge having been repaired by private individuals. *Reg. v. Northampton*, 2 M. & S. 262.

**Evidence of Reputation Admissible.**—Indictment against the inhabitants of a county for the non-repair of a public bridge. Plea, that three persons were bound respectively to repair the three northern arches of the bridge, *ratione tenuræ*. On the trial a witness, who as well as his father and grandfather had been employed in doing repairs to the county parts of the bridge, was asked, "Have you heard them say who was liable to repair the three northern arches?"—Held, first, that evidence of reputation was admissible upon this issue, because, though it involved matter of private right, it also related to matters of public and general interest. *Reg. v. Bedfordshire*, 4 El. & Bl. 535; 3 C. L. R. 442; 24 L. J., Q. B. 81; 1 Jur., N. S. 208.

Held, secondly, that the answer to the question was admissible, because it was not necessarily evidence of reputation of a particular fact; but it might proceed upon a distinct reputation prevailing in the neighbourhood, or upon an admission by the owners of the lands in question that they were liable respectively to repair that part of the bridge *ratione tenuræ*. *Id.*

**Judgment by Default.**—Semble, that a judgment by default, upon an indictment for non-repair of a highway, is not conclusive evidence against the parish, of a liability on their part to repair such highway. *Reg. v. Whitney*, 4 N. & M. 594; 3 A. & E. 69; 7 C. & P. 208.

**Stay of Judgment.**—The court is reluctant to stay judgment on an indictment for not repairing a bridge, and will not stay it generally, but only till further order; and, if the trial of another indictment is not proceeded in with all dispatch, judgment will be given. *Reg. v. Southampton*, 2 Chit. 215.

**Costs—Where Defence Frivolous.**—The 13 Geo.

3, c. 78, s. 64, empowered the court trying an indictment for non-repair of a highway, to award costs if the defence was frivolous. The 43 Geo. 3, c. 59, s. 1, enacts, that all matters and things in the act contained relating to highways shall, so far as applicable, be extended and applied to county bridges, as fully and effectually as if the same were repeated and re-enacted:—Held, that the clause as to costs in 13 Geo. 3, c. 78, was substantively re-enacted in 43 Geo. 3, c. 59, with reference to county bridges, and, therefore, was not repealed when the 5 & 6 Will. 4, c. 50, repealed in general terms the 13 Geo. 3, c. 78. *Reg. v. Merionethshire*, 1 New Sess. Cas. 316; 6 Q. B. 343; 13 L. J., M. C. 158; 8 Jur. 778.

The judge who tries an indictment for non-repair of a bridge, removed by certiorari, may certify, after the assizes, that the defence was frivolous, and, by such certificate, award payment of costs to the prosecutor, which will be enforced by the court in banc. *Id.*

#### 4. FINES FOR NON-REPAIR.

The court cannot impose more than one fine for the non-repair of a bridge. *Reg. v. Machynlleth*, 4 B. & A. 469.

#### 5. LIABILITY FOR INJURIES OR NUISANCE.

**Injury due to Want of Repair—Action for.**—No action will lie by an individual against the inhabitants of a county, for an injury sustained in consequence of a county bridge being out of repair. *Russell v. Decon*, 2 T. R. 667.

The inhabitants of a county are not liable to be sued, through their surveyor, by an individual for damages in respect of injuries to his person or property, occasioned by a bridge, repairable by the inhabitants of the county, being out of repair. *Makinnon v. Penon*, 8 Ex. 319; 22 L. J., M. C. 57. Affirmed in error, 9 Ex. 609; 23 L. J., M. C. 97.

**Damage by Locomotives.**—The Locomotive Act, 24 & 25 Vict. c. 70, s. 7, enacts that where any bridge on a turnpike or other road, carried across any stream, watercourse, or navigable river, canal, or railway, shall be damaged by reason of any locomotive passing over the same, or coming into contact therewith, none of the proprietors, undertakers, directors, conservators, trustees, commissioners or other persons interested in, or having charge of, such navigable river, canal or railway, or of such bridge shall be liable to repair the damage, &c., but the same shall be repaired to the satisfaction of such proprietors, &c., by the owners or persons having charge of the locomotive at the time of the happening of the damage:—Held, that this provision does not apply to bridges repairable by the inhabitants of a county. *Reg. v. Kitchener*, 2 L. R., C. C. 88; 43 L. J., M. C. 9; 29 L. T. 697; 22 W. R. 134; 12 Cox, C. C. 522.

**Use of Swing Bridges—Obstruction.**—A dock company having a swing bridge on a public highway is bound, on the passing of vessels, to use all reasonable means (both as to the number of men employed, and number of ships passed at a time) to prevent unnecessary delay; and if

they do not do all which can be expected of reasonable men, and if any one is obstructed in consequence, such obstruction will render them liable for the injury sustained. *Wiggins v. Bod-dington*, 3 C. & P. 544.

**Neglect to Fence Dangerous Place.]**—Where a canal company was empowered by a private act of parliament to intersect highways, and to construct bridges to connect the intercepted portions, and the canal and bridges were vested in them as proprietors, and they were enabled to take tolls from boats passing the bridges, and they erected swing bridges, which the boatmen were entitled to open for the purpose of passing, and which, when opened, left the edge of the canal unprotected, and there was not sufficient light or other means of preventing accidents, and the consequence was that while the bridge was lawfully opened at night-time a person fell into the canal and was injured, without any fault on his part:—Held, that the company was liable to an action for the injury. *Munley v. St. Helen's Canal and Railway Company*, 2 H. & N. 840; 27 L. J., Ex. 159.

See also NEGLIGENCE.

**Nuisance—Pulling Down Old Bridge—Prevention of.]**—Justices having, under 43 Geo. 3. c. 59, contracted for the building of a new bridge in a different site, in lieu of the old one, which was ruinous; and having directed the old bridge to be taken down before the new one was passable, for the benefit of the old materials to be used by the contractor in finishing the new bridge; the court refused a writ of prohibition to them to restrain them from pulling down the old before the new bridge was passable, though there were strong affidavits of the inconvenience and loss to be sustained by the neighbourhood, in being obliged to use a roundabout way in the interval, referring the complainant to the ordinary remedy by indictment, if the pulling down the old bridge, under these circumstances, was a nuisance, and seeing no occasion to interfere by applying a prompt remedy of a novel kind in modern practice. *Rea v. Dorset (Justices)*, 15 East, 594.

**— Bridge in a Public Way—Indictment.]**—A bridge built in a public way, without public utility, is indictable as a nuisance; and so it is if built colourably in an imperfect or inconvenient manner, with a view to throw the onus of rebuilding or repairing it immediately on the county. *Rea v. Yorkshire, W. R.*, 2 East, 342. And see *Rea v. Glamorgan*, 2 East, 356, n.

## 6. OTHER MATTERS.

**Liability to Widen.]**—The inhabitants of a county are not liable to widen a public bridge by force of their obligation to repair it. *Rea v. Devon*, 7 D. & R. 147; 4 B. & C. 670. Overruling *Rea v. Cumberland*, 6 T. R. 194; 3 B. & P. 354.

**Order of Justices for Widening—Discretion.]**—By 43 Geo. 3, c. 59, s. 2, where any county bridge shall be narrow and inconvenient it shall and may be lawful to and for the justices at quarter sessions to order such bridge to be widened, improved and made commodious for

the public; provided that no money shall be applied to the amendment or alteration of any such bridge until presentment shall have been made of the insufficiency, inconvenience or want of reparation of such bridge, in pursuance of the statutes in force concerning public bridges. On an application for a mandamus to justices to order a bridge to be widened, on the ground that it was too narrow for the traffic over it:—Held, that the enactment was discretionary. *Newport Bridge, In re*, 2 El. & El. 377; 29 L. J., M. C. 52; 6 Jur., N. S. 97; 1 L. T. 131.

Held, also, that by the proviso a presentment was a condition precedent to making such an order. *Id.*

**Property in Materials.]**—If A. grants liberty, licence, power, and authority to B. and his heirs to build a bridge on his land, and B. covenants to build the bridge for public use, and to repair it, and not to demand toll; the property in the materials of the bridge when built and dedicated to the public still continues in B., subject to the right of passage by the public; and when severed and taken away by a wrong-doer, he may maintain trespass for the asportation. *Harrison v. Parker*, 6 East, 154; 2 Smith, 262.

**Fees to Clerk of the Peace.]**—The sessions are not authorized to order the payment by the bridgmaster to the clerk of the peace, of a percentage on all money raised for the repair of bridges in a particular district, in lieu of all his fees for indictments, presentments, &c., for bridges within it, although such percentage was claimed as an ancient fee, and had been paid without dispute for a long period of time. *Rea v. Houldgrace*, 1 B. & A. 312. And see *Rea v. Bird*, 2 B. & A. 522.

**Tolls—Ferry or Bridge.]**—A floating bridge, which consists of a vessel propelled by steam from one side of the river to the other, and kept in its course by chains laid down across the bed of one stream, is in substance a ferry, and is not a bridge within the meaning of s. 72 of the Mutiny Act of 1864. *Ward v. Gray*, 6 B. & S. 345; 34 L. J., M. C. 146; 11 Jur., N. S. 738; 12 L. T. 305; 13 W. R. 653.

## V. FERRIES.

### 1. RIGHTS AND OBLIGATIONS OF OWNERS AND LESSEES.

**Rights—Ownership of Land.]**—The owner of a ferry need not have the property in the soil on either side of the river. *Peter v. Kendal*, 6 B. & C. 703.

A ferry is the exclusive right to carry passengers across a river or an arm of the sea, from one vill to another, or to connect a continuous line of road leading from one township or vill to another, and not a servitude imposed upon a district or large area of land; and is wholly unconnected with the ownership or occupation of land. *Newton v. Cubitt*, 12 C. B., N. S. 32; 31 L. J., C. P. 246; 6 L. T. 860. See *S. C.*, in Ex. Ch., *infra*.

**— Injunction to Prevent Interference.]**—A right of ferry (being in derogation of the common rights of the public) rests upon the corresponding obligation on the part of the grantee of

the right to maintain the ferry at all times for the use of the public, this obligation being enforceable by indictment and fine. But an act of parliament empowering a company to ply on Sundays from certain points on the south bank of the Thames, but imposing no obligation to provide means of transport or to maintain their plying places, does not confer an exclusive right against the rest of the world, such as the Court of Chancery will interfere to protect. *Letton v. Goodden*, 1 L. R., Eq. 123; 35 L. J., Ch. 427; 14 L. T. 296; 14 W. R. 554.

— **Watermen's Act—Licence.**—The 7 & 8 Geo. 4, c. lxxv. (Watermen's Act), s. 38, imposed a penalty upon owners of boats working boats within the limits of the act without a licence. By s. 99, nothing in the act contained shall extend to prejudice or affect the rights and privileges to which the owners of any ferries are entitled:—Held, that the owner of a ferry within the limits of the act might exercise the right of ferry without a licence. *Matthews v. Peache*, 5 El. & Bl. 546; 25 L. J., M. C. 7; 1 Jur., N. S. 1204.

But, where the ferry appeared to have been always exercised from a given landing-place in Middlesex to given landing-places in Kent:—Held, that the privilege did not protect the owner of such ferry in working a boat from another landing-place in Middlesex, distant 800 yards from the ancient landing-place in Middlesex. *Ib.*

**Obligation.**—An owner of a ferry for carriages is bound to convey carriages and their contents. *Walker v. Jackson*, 10 M. & W. 161; 12 L. J., Ex. 165.

**Liability for Injuries.**—The lessees of a ferry provided steamboats for the conveyance of goods and cattle from A. to B., and also ships for landing and embarking, which were generally sufficient for the purpose:—Held, that they were liable for an injury sustained by the horse of a passenger, in consequence of the side rail of the landing slip (of the dangerous state of which they had been forewarned) giving way, although the horse was at the time under the control and management of its owner. *Willoughby v. Willoughby*, 12 C. B. 742.

## 2. GRANT AND CONVEYANCE.

**Nature of Grant.**—Under a lease of a ferry, describing it as a ferry across the river both ways, a ferry across the river one way only will pass. *Pim v. Cruel*, 6 M. & W. 234.

**Effect of User.**—From a user of thirty-five years, the jury may presume that a ferry had a legal origin. *Trotter v. Harris*, 2 Y. & J. 285.

A variation in the amount of ferryage will not avoid the franchise. *Ib.*

**Ancient Ferry—Limits Ascertained by User.**—The plaintiffs, claiming to be owners of an ancient ferry, sued the defendants for carrying passengers within the line and termini of their ancient ferry, and also for carrying near such line with the intention of evading the ferry. The termini were the Isle of Dogs and Green-

wich. On this isle there had formerly been little population, and only one highway, viz., from Poplar to Potter's Ferry; but since 1800 the isle had been thickly populated, and several new roads had been made, some of them in communication with the highway. The new ferry which had been set up by the defendants, and was complained of, was situate 1280 yards from the old ferry:—Held, that the limits of the old ferry must be ascertained by user; that by the user the old ferry was limited to the line between Potter's Ferry stairs and Greenwich, and did not extend to all parts of the coast of the Isle of Dogs; and that, therefore, the defendants had not carried in the line of the plaintiffs' ferry. *Newton v. Cubitt*, 9 Jur., N. S. 544; 13 C. B., N. S. 864; 11 W. R. 468—Ex. Ch.

Held, also, that the defendants had not carried so near the line of the plaintiffs' ferry as to have infringed any right of the plaintiffs. *Ib.*

**Proper Mode of Grant.**—The proper mode of a grant for a ferry is to make it lie between the point where a highway comes down to the water's edge to a point on the opposite side, or to a vill. *Ib.*

**Private Right—Compensation.**—C. claimed compensation against a railway company in respect of injury to land held by him in fee in a city. The injury was occasioned by the works of the company, on the other side of a river, which was the boundary between the city and the county, by cutting off communication on the county side with a ferry appurtenant to the land of C. The land belonged to a corporation till 1844, when it was sold to A., who had a lease of it from the corporation. Neither the lease nor the conveyance expressly mentioned the ferry, but leased and conveyed the land with the profits and commodities thereto belonging. There was no evidence as to the original grant of the ferry by the crown, nor as to any conveyance of it by name. The lessees of the land had always, as far as living memory went, kept a boat and taken toll. The landing-place was not shewn to belong to the corporation:—Held, that the ferry, if attached to the land of C. was a private right in respect of which compensation might be awarded; and that the jury was warranted in concluding that the ferry passed to C. by the conveyance of the land, with its profits and commodities. *Cooling, In re, or Reg. v. Great Northern Railway Company*, 6 Railw. Cas. 246; 14 Q. B. 25; 19 L. J., Q. B. 25; 14 Jur. 128.

## 3. DISTURBANCE.

**Proof of Possession.**—It is sufficient for the plaintiff to prove that he was in possession of a ferry at the time the cause of action arose, to entitle him to maintain an action for the disturbance of it. *Trotter v. Harris*, 2 Y. & J. 285.

In an action for disturbance of a ferry, the payment of any specific sum for passage money need not be proved, although unnecessarily stated. *Peter v. Kendal*, 6 B. & C. 703.

An action for disturbing a ferry, being a possessory action, evidence that the plaintiff is in possession is sufficient, and that the ferry had existed for a long time, without proving it to have a legal origin, either by grant or prescription. *Ib.*

**Obstruction after Suit.]**—Evidence of an obstruction after the suit, and before the declaration, is sufficient to maintain an action for obstructing a ferry. *Foster v. Bonner*, Cowp. 454.

**Exclusive Ferry—Fraudulent Intent.]**—If there is an exclusive ferry from A. to B., it does not prevent persons from going by any other boat from A. directly to C., though it lies near B., provided it is not done fraudulently, and as a pretence for avoiding the regular ferry. *Tripp v. Frank*, 4 T. R. 666.

Where there is an ancient ferry from A. to B., which leads to a public highway, and another constructs a landing-place in C., a short distance from B., and carries passengers over from A. to C., whence they pass to the same highway upon which the ancient ferry is established, before it reaches any town or village, it is an injury to the ancient ferry, for which an action will lie. *Huzzey v. Field*, 2 C., M. & R. 432; 1 Gale, 166; 5 Tyr. 855.

But where there is a river passing by several towns or places, the existence of an ancient ferry over such river from a particular point on one side to a particular point on the other does not preclude persons from using the river as a public highway from or to all the towns or places on its banks, which are not in a line leading from one terminus of the ferry to the other. *Id.*

Where the owner of a boat which was accustomed to ply for hire, and to carry passengers across a haven, employed a servant for that purpose, and the servant on one occasion received a passenger on board, and carried him across the haven, near the line of an ancient ferry, and paid the fare over to his master:—Held, that the servant was acting at the time in the course of his master's service, and for his master's benefit, and that the master was answerable for his act, and would have been liable for such act, if it had been distinctly proved to have amounted to an evasion of the ferry. *Id.*

**Declaration—No Averment of Fraud.]**—A count alleged that the defendant, contriving to disturb the plaintiff in the enjoyment of his ferry, injuriously, and against his will, carried passengers across the river, near the plaintiff's ferry, per quod he was deprived of profits of his ferry, and disturbed in the possession of it:—Held, that the count disclosed a good cause of action and was not bad, for omitting to aver that the defendant, in carrying near the plaintiff's ferry, either intended to defraud the plaintiff, or to set up a new ferry. *Blacketer v. Gillett*, 9 C. B. 26; 1 L., M. & P. 88; 19 L. J., C. P. 307; 14 Jur. 814.

**Plea—Public Convenience.]**—In an action for an evasion of an ancient ferry, by carrying passengers across the river near thereto; the court refused to allow the defendant to add a plea alleging a variety of circumstances to shew, that, from the altered state of the neighborhood, public convenience required that which the defendant had done, holding that the plea was clearly bad, and at the most amounting to not guilty. *Newton v. Cubitt*, 5 C. B., N. S. 627; 28 L. J., C. P. 176; 5 Jur., N. S. 847.

**Neglect of Duty.]**—Neglect of duty in the owner of a ferry is no answer to an action

for disturbance. *Peter v. Kendal*, 6 B. & C. 703.

**Ancient Ferry—Use of Boat of less than Four Tons Burthen.]**—In an action for the disturbance of a ferry, the first count stated, that the plaintiffs were possessed of a ferry across the river Tyne, between North Shields and South Shields, for the conveyance of carriages and passengers; and that the defendant disturbed this ferry by carrying passengers. The second count stated a right to an ancient ferry. The defendant pleaded not guilty, not possessed, and also that the boat used by the defendant was of less than four tons burthen. The plaintiffs were a company incorporated by statute for establishing a ferry across the river Tyne, within the limits of Tynemouth and the townships of South Shields and Westhoe. S. 85 enacted, that, after the ferry shall be established, no other ferry shall be set up and used by any persons across the river Tyne, within the limits; and if any person (except the company or persons acting under their authority) shall use any boat or other vessel of the burthen of four tons or upwards in ferrying for hire across the river within the limits, every person offending shall forfeit 5*l.* At the time the statute passed, there was an ancient ferry across the river, within the limits, which the company, under the power of their act, had purchased of the owners:—Held, first, that the word "burthen" in s. 85 did not mean registered admeasurement, but capacity of carrying. *North and South Shields Ferry Company v. Barker*, 2 Ex. 136.

Held, secondly, that the latter part of s. 85 did not limit the general right of ferry, but only added a cumulative remedy by way of penalty. *Id.*

Held, thirdly, that there was no variance by reason of the first count describing the ferry generally from North Shields to South Shields, and not from one particular terminus to another. *Id.*

Held, fourthly, that the mere act of ferrying passengers was a disturbance of the franchise, although the franchise was not of a prescriptive ferry to the exclusion of all private boats, but simply of a ferry. *Id.*

Held, fifthly, that, on the purchase of the ancient ferry, and completion of the new ferry, the former became extinct by operation of the statute. *Id.*

**Divisible Rights.]**—In an action for disturbing the enjoyment of an ancient ferry, the declaration stated that the plaintiff was possessed of an ancient ferry across the Thames, to and from the Isle of Dogs, from and to Greenwich. The pleas were: not possessed, and that there was no such ancient ferry. The only right proved was an ancient right of ferry from the Isle of Dogs to Greenwich:—Held, that the right alleged was divisible, and that the plaintiff was entitled to have the verdict entered for so much of the right as was proved. *Giles v. Groves*, 12 Q. B. 721; 6 D. & L. 146; 17 L. J., Q. B. 328; 12 Jur. 1084.

**Compensation for.]**—See LANDS CLAUSES ACT.

## WEIGHTS AND MEASURES.

1. *Regulation of, in Contracts and Payments.*
2. *Creation by Custom, 794.*
3. *False Weights or Weighing Machines, 794.*
4. *Inspectors, 796.*
5. *Leet Jury, 798.*

### 1. REGULATION OF, IN CONTRACTS AND PAYMENTS.

**Effect of Particular Statutes — Contracts Generally.]**—The 5 & 6 Will. 4, c. 63, s. 6, which abolishes the use of certain weights and measures, and s. 21, which enacts that any contract, bargain or sale made by any such weights or measures shall be wholly null and void, do not render void a contract entered into in the United Kingdom for the sale of goods to be weighed or measured by the weights and measures mentioned in s. 6, unless such goods are also weighed or measured in this country. *Rosseter v. Cuhlmann*, 8 Ex. 361; 22 L. J., Ex. 128.

Semble, that 5 Geo. 4, c. 74, s. 15, is not repealed by 5 & 6 Will. 4 c. 63, and consequently that contracts by local weights may be lawfully made, if the proportion to the standard is expressed, though it is otherwise with respect to measures, all local measures being abolished by 5 & 6 Will. 4 c. 63, s. 6. *Gilce v. Jones (in error)*, 11 Ex. 393; 24 L. J., Ex. 259; 1 Jur., N. S. 982.

**Corn—Sale of.]**—The buyer of corn by any other than the Winchester measure was subject to the penalty of 40s., in addition to the value of the corn so bought, by 22 & 23 Car. 2, c. 12. *Rex v. Arnold*, 5 T. R. 353.

A contract for the sale of corn by the hobbet was in contravention of 22 Car. 2, c. 8, s. 2, and therefore an action would not lie for the breach of it. *Tyson v. Thomas, McClel. & Y.* 119.

A sale of wheat by hobbet, which is the denomination of a measure in Wales, if the quantity delivered is to be determined by the weight, is a sale by weight, and not by measure; and therefore not contrary to 5 & 6 Will. 4, c. 63, s. 6, which applies to sales by measure, and not to sales by weight. *Hughes v. Humphreys*, 3 El. & Bl. 954; 23 L. J., Q. B. 360; 1 Jur., N. S. 42.

Where malt was sold by the defendant to the plaintiff by a measure called a hobbet, being a measure established by local custom, without specifying the proportion which that measure bore to the standard, as directed by 5 Geo. 4, c. 74, s. 15, and the parties afterwards settled their accounts inter alia as to the malt:—Held, that, in an action by the plaintiff against the defendant for wages, he might prove the settlement of accounts as a payment of the demand. *Owens v. Denton*, 1 C., M. & R. 711; 5 Tyr. 359.

**—Quarters.]**—If the reddendum in a hospital renewed lease is so many quarters of corn, it will be understood to mean legal quarters, reckoning the bushel at eight gallons; although the old leases before 22 & 23 Car. 2, c. 12, contained the same reddendum; and although, till lately, the lessees paid by composition, reckoning the bushel at nine gallons. *Hospital of St. Cross v. Howard de Walden (Lord)*, 6 T. R. 338.

**—Bushels.]**—A contract described as having been made for a certain number of bushels of corn must be considered as a contract for that number of statute bushels. *Hockin v. Cooke*, 4 T. R. 314; 1 Chit. 28 (a).

A bushel, without any other explanation, means a bushel by statute measure. *Id.*

**Sale of Bread.]**—In order to comply with the provision of 6 & 7 Will. 4, c. 37, s. 4, which enacts that all bread sold beyond the limits of the metropolis shall be sold by weight, it is necessary that bread should not only be sold as of a certain weight, but should be actually weighed before being sold. *Williams v. Deggan*, 16 L. T. 492.

Nor is it complied with by weighing the dough before it is put into the oven, and allowing a certain quantity for shrinkage while there. *Jones v. Huatable*, 2 L. R., Q. B. 460; 36 L. J., Q. B. 325; 16 L. T. 381; 15 W. R. 900; 8 B. & S. 433.

Where a person went into a baker's shop and asked for a quart loaf (meaning a quarter loaf), and he was served with a loaf which proved to be less in weight than 4 lb. (the understood weight of a quarter loaf), and there was no evidence that the bread had at any time been weighed:—Held, that this was evidence of a selling of bread otherwise than by weight. *Mitton v. Troke*, 20 L. T. 563.

When a customer asks a baker for bread by weight, the baker, whether he gives him ordinary bread or fancy bread, is bound to serve him with it as bread sold by weight, and which has been weighed. If the baker has only fancy bread, he should so inform the customer. It is not necessary that the bread should be weighed in the presence of the customer unless so required. *Reg. v. Kennett*, 4 L. R., Q. B. 565; 20 L. T. 656; 10 B. & S. 534.

Although bread which is now sold as fancy bread may not be such as it was at the time when the statute passed, yet, if it is now of a fancy character and differently baked, it is still fancy bread. *Id.*

By 6 & 7 Will. 4, c. 37, s. 4, any baker or seller of bread, who shall sell or cause to be sold bread in any other manner than by weight, is subject to penalties, provided that nothing in the act shall extend to prevent a baker or seller of bread from selling bread usually sold under the denomination of French or fancy bread without previously weighing the same:—Held, that bread, which was usually sold as fancy bread at the time of the passing of the act (1836), but was not usually sold as fancy bread at the time of the sale, was not within the proviso. *Reg. v. Wood*, 4 L. R., Q. B. 559; 38 L. J., M. C. 144; 20 L. T. 654; 17 W. R. 850; 10 B. & S. 534.

The 6 & 7 Will. 4, c. 37, s. 4, provides, under a penalty, that all bread shall be sold by weight, but nothing in the act contained is to prevent any baker or seller of bread from selling "bread usually sold under the denomination of French or fancy bread or rolls, without previously weighing the same." The exemption from the necessity of selling by weight applies only to that which was known as French or fancy bread at the time of the passing of the act (1836) and to bread of a like kind with it. *Aerated Bread Company v. Gregg or Grigg*, 8 L. R., Q. B. 355; 42 L. J., M. C. 117; 28 L. T. 816.

Bread made in separate loaves, and so baked as to be crusty all over, and known in the trade as

French or fancy bread, but differing from ordinary bread only in the manner of baking, is not French or fancy bread within the meaning of the exemption. *Id.*

The practice of a baker was to sell loaves of bread at 6d., varying the weight of the loaf with the price of corn. When he purposed to sell a 3½ lbs. loaf for 6d., the custom in his bakery was to put into the oven 4 lbs. of dough, but the loaf was not weighed after baking. He sold at 6d. each six loaves, which varied in weight, but all but one weighed over 3½ lbs. :—Held, that he was rightly convicted of selling bread otherwise than by weight, under 6 & 7 Will. 4, c. 37, s. 4. *Hill v. Browning*, 5 L. R., Q. B. 453; 22 L. T. 584; 19 W. R. 21.

#### — Obligation to Carry Weights and Scales. ]

—By 6 & 7 Will. 4, c. 37, s. 7, every baker or seller of bread . . . who shall convey or carry out bread for sale in and from any cart or other carriage, shall be provided with and shall constantly carry in such cart or other carriage a correct beam and scales with proper weights . . . and in case any such baker or seller of bread . . . shall, at any time, carry out or deliver any bread without being provided with such beam and scales with proper weights . . . then, and in every such case, every such baker or seller of bread shall for every such offence forfeit and pay a sum of money not exceeding 5l. A baker delivered bread from a cart at a customer's shop pursuant to a general order given some time previously; he was then unprovided with scales and weights :—Held, that he had committed an offence against the foregoing enactment. *Robinson v. Cliff*, 1 Ex. D. 294; 45 L. J., M. C. 109; 34 L. T. 689.

**Sale of Iron.** ]—A contract for the sale of a certain number of tons of iron by the ton "long weight" is not in contravention of the 5 Geo. 4, c. 74, and 5 & 6 Will. 4, c. 63, as it is a multiple of the standard pound, and consequently such contract is valid. *Giles v. Jones*, 10 Ex. 119; 2 C. L. R. 1100; 23 L. J., Ex. 292; 18 Jur. 878. Affirmed, 11 Ex. 393; 24 L. J., Ex. 259; 1 Jur., N. S. 982—Ex. Ch.

**Sale of Coal—Mode of Weighing.** ]—By 1 & 2 Will. 4, c. lxxvii, s. 54, coals delivered in sacks are to be weighed if required, each sack with the coals, and afterwards each sack without the coals: a weighing by putting the sacks of coal successively in one scale of a weighing machine against weights equal to the weight of which each sack should contain, and an empty sack in the other scale, is not a weighing according to that section. *Meredith v. Holman*, 16 M. & W. 798; 16 L. J., Ex. 126. See also sub tit. COALS.

**Rates on Coals.** ]—Where, by a navigation act, certain rates were imposed on coals landed within a certain district, which were directed to be paid to the commissioners therein named :—Held, that after the passing of the 5 & 6 Will. 4, c. 63, the commissioners had power to levy the rates by the ton (they having been previously levied by the chaldron), without first applying to the sessions for an inquisition under s. 14. *Goody v. Penny*, 9 M. & W. 687. See also *Mills v. Furnell*, 2 B. & C. 899; 4 D. & R. 561.

#### Acres—Meaning of—Admission of Evidence. ]

—A testator devised "forty-five acres of the lands of Dromquin, known as the house division," to A., and "fifty acres of the same lands" to B. :—Held, that extrinsic evidence was not admissible to shew that he meant Irish and not statute acres. *O'Donnell v. O'Donnell*, 1 Ir. Ch. D. 284.

By the statutory definition contained in 5 Geo. 4, c. 74, s. 2, the word "acre" has received a legal signification which must be attributed to that word, whether used in a will or other voluntary instrument, or in a contract. *Id.*

#### 2. CREATION BY CUSTOM.

**Validity of.** ]—A custom that every pound of butter sold in a particular market-town shall weigh eighteen ounces is bad. *Nobell v. Durell*, 3 T. R. 271.

**Effect of Statute upon.** ]—A declaration stated, that a corporation from time immemorial until the 1st January, 1836, (when the 5 & 6 Will. 4, c. 63, s. 9, came into operation,) had, by persons by them appointed, the sole and exclusive privilege of measuring, and from the 1st January, 1836, of weighing all coal imported into the port of London, and the right and privilege of appointing to perform such work a sufficient number of fit and proper persons, and of fixing a reasonable rate of payment for such work, to be proportioned, previously to the 1st January, 1836, to the measured quantity, and subsequently to that day to the weight of the coals, such payments to be made to the persons who should do the work, and to be for their benefit. The declaration alleged a right and privilege of the corporation, that every owner of a vessel arriving in the port with coals should give notice to the corporation, in order that the work might be done by the meters; and that the corporation had fixed a rate of payment for every score of tons weight, and had appointed meters, of whom the plaintiff was one; that the defendant imported several tons of coal into the port; and that, although it was his duty, on the arrival of the vessel, and before landing the coals, to give notice, he did not do so, whereby the plaintiff was prevented from weighing the coals, and earning the amount payable in respect thereof. Evidence was given of a custom to measure all coals imported into the port before the 1st January, 1836, and after that date to weigh them; and that the corporation had ordered that the meters should be paid at a rate per ton on coals weighed instead of per chaldron as before :—Held, that the right of the corporation by custom to measure coals imported was not converted by 5 & 6 Will. 4, c. 63, into a right to weigh. *Smith v. Cartwright*, 6 Ex. 927; 20 L. J., Ex. 401.

#### 3. FALSE WEIGHTS OR WEIGHING MACHINES.

##### Conviction for Possessing—Necessity of Use. ]

—Justices convicted a person for possessing false weights and an unjust weighing machine. He was receiver of the metropolitan police, and a station house, and all the chattels there, were vested in him under 10 Geo. 4, c. 44, s. 16; in the station house were weights which were light, and a weighing machine which, from an injury, gave light weight; these were used in weighing coals, which were allowed to the constables. The conviction was quashed, because the weights and

weighing machine were not being used within 5 & 6 Will. 4, c. 63, s. 21, and the station house not being a store where goods were exposed or kept for sale, nor weighed for conveyance or carriage, and therefore s. 28 being inapplicable. *Wray v. Reynolds*, 1 El. & El. 165; 7 W. R. 86.

A farmer had in his barn or outhouse a balance or portable weighing machine and two iron weights, which were found by the inspector of weights and measures to be light. The inspector saw no produce about the premises, and could not prove that the farmer exposed or kept for sale, or weighed for conveyance or carriage, any goods or produce. He was convicted by justices under 5 & 6 Will. 4, c. 63, s. 28.—Held, that the conviction was wrong. *Griffiths v. Place*, 20 L. T. 484.

**Incorrect Machine—What is.]**—A weighing bridge at a railway station, which weighs correctly if properly adjusted before use, found by the inspector, who does not adjust it, to be incorrect, is not a weighing machine found incorrect upon a proper examination, within 5 & 6 Will. 4, c. 63, s. 28. *London and North-Western Railway Company v. Richards*, 2 B. & S. 326; 8 Jur., N. S. 539; 5 L. T. 792.

At a station of a railway company was a weighing machine working by a spring, and having a dial plate and an index finger, with figures from zero to 560 lbs., which was used for weighing parcels and passengers' excess luggage. The machine becoming disordered, the index stood at 4 lbs. instead of zero.—Held, that the company was properly convicted of having in its possession a weighing machine which was found to be incorrect and unjust. *Great Western Railway Company v. Bailie*, 5 B. & S. 928; 34 L. J., M. C. 31; 11 Jur., N. S. 264; 11 L. T. 418; 13 W. R. 203.

A pair of scales had a hollow brass ball hanging upon the weight end of the beam; the ball was constructed with a neck which could be unscrewed so as to allow shot to be placed inside, and being hung by a hook upon the beam was easily removable. The scales were correct in that state; but if the shot inside the ball was removed the scales were unjust and against the purchaser.—Held, that justices were justified in finding that the ball loaded with shot was no part of the scales, and that consequently they were unjust. *Carr v. Stringer*, 3 L. R., Q. B. 433; 37 L. J., Q. B. 168; 18 L. T. 399; 16 W. R. 859; 9 B. & S. 238.

**Unjust is Question of Fact.]**—B. was charged with wilfully selling an unjust weighing machine. The machine consisted of a centre pan on a vertical spring, and when articles were put exactly in the centre it weighed correctly, but when put a little on one side it weighed incorrectly. The magistrate convicted, and the quarter sessions on appeal affirmed the conviction subject to a special case.—Held, that it was and must be a question of fact as to whether a weighing machine was unjust, and the justices having found that fact the conviction must be affirmed. *Reg. v. Bazendale*, 44 J. P. 763.

**Where Stamp has become Obliterated.]**—When weights or measures have once been duly stamped or sealed under the 5 & 6 Will. 4, c. 63, s. 22 (repealed), but the stamp or seal has become obliterated by time and use, the person using

them is not liable to the penalty imposed by that section for the use of unauthorized weights or measures, provided such weights or measures are otherwise unobjectionable. *Starr v. Stringer* or *Trinder*, 7 L. R., C. P. 383; 26 L. T. 735.

**Measures, what are—Earthen Vessels.]**—Earthenware jugs or drinking cups ordinarily used as imperial measures by a publican in his business, are, although not stamped as measures and exempted by 5 & 6 Will. 4, c. 63, s. 21, from being so stamped, nevertheless, measures within s. 28. *Reg. v. Aulton*, 3 El. & El. 568; 30 L. J., M. C. 129; 7 Jur., N. S. 238; 3 L. T. 699; 9 W. R. 278.

**Liability to Seizure.]**—Under 5 & 6 Will. 4, c. 63, earthen vessels are liable to seizure if ordinarily used as measures, and if on examination they are found to be unjust. *Washington v. Young*, 5 Ex. 403; 19 L. J., Ex. 348.

**Seizure of Balance—When Justified.]**—A person, when in the act of selling provisions upon a highway, used for the purpose of weighing the provisions, a spring balance which was incorrect, as being against the seller and in favour of the purchaser. No fraud on the public was intended.—Held, that the spring balance could not be seized under 22 & 23 Vict. c. 56, s. 3 (repealed), nor was the seller liable to the penalty imposed by that section upon persons having in their possession false and unjust beams, scales or balances. *Booth v. Shadgett*, 8 L. R., Q. B. 352; 42 L. J., M. C. 98; 29 L. T. 30. Provided for by 41 & 42 Vict. c. 49, s. 25. *And see cases post*, col. 798.

**Proof of Measures.]**—Contents of measures are not to be proved but by a production in court. *Chenies v. Watson*, Peake's Add. Cas. 123.

**Right of Action.]**—By 1 & 2 Will. 4 c. lxxvi., s. 57, a penalty is imposed on the seller of coals for every sack deficient in weight.—Held, that such penalties were recoverable by action in one of the superior courts, notwithstanding s. 77, directing all penalties to be recovered before justices of the peace. *Collins v. Hopwood*, 15 M. & W. 459; 16 L. J., Ex. 124.

**Action for Deceit—Declaration.]**—It is not sufficient, if a declaration, in an action for deceit, charges the defendant with fraudulently selling to the plaintiff divers large quantities of ale and beer, to wit, &c. (specifying the quantities under a videlicet), contained in puncheons and casks, and with deceitfully delivering less and deficient quantities; as the defendant ought to be charged with fraud in selling the liquors in short and defective measures. *Miles v. Dell*, 3 Stark. 23. See also *Frend v. Butterfield*, 11 A. & E. 828.

#### 4. INSPECTORS.

**Appointment—Validity of.]**—The quarter sessions, acting under 5 & 6 Will. 4, c. 63, s. 17, appointed an inspector and superintendents of police to be inspectors of weights and measures, without remuneration.—Held, that there was nothing in 2 & 3 Vict. c. 93, which rendered the appointment an excess of jurisdiction, and therefore it could not be questioned, the certiorari being taken away by 5 & 6 Will. 4, c. 63, s. 36. *Reg. v. Jarvis*, 3 El. & Bl. 640; 18 Jur. 1051.

— **Jurisdiction to Make.**—In counties of cities, and counties of towns, to which a court of quarter sessions has been granted under 5 & 6 Will. 4, c. 76, the recorder, by s. 105, has the powers relating to inspectors of weights and measures given by 5 & 6 Will. 4, c. 63, s. 17, to the magistrates in quarter sessions assembled. *Reg. v. Hull (Recorder)*, 3 A. & E. 638; 3 N. & P. 595; 1 W., W. & H. 385.

The 37 Geo. 3, c. 143, s. 1, by which the justices at their respective petty sessions within the divisions, districts and other places of the several counties of England, were authorized to appoint examiners of weights and balances, extends only to such divisions, &c., as were known and recognized at the time when the act passed; and therefore such appointment made at petty sessions, by two justices, for a district which they had, without the consent of the other magistrates, created within the last five or six years, was illegal. *Rea v. Decon (Justices)*, 1 B. & A. 588.

By a local act commissioners were appointed for a town, but they did not exercise any supervision with regard to weights and measures, except within the market-place. Under 37 Geo. 3, c. 143, and 55 Geo. 3, c. 43, the inhabitants of the parish of the town procured standard weights and measures, and the vestry nominated examiners of weights and measures, who were afterwards appointed by the justices of the county in petty sessions. Under 5 & 6 Will. 4, c. 63, s. 17, the justices of the county at quarter sessions appointed an inspector of weights and measures for a district comprising the parish. A charter of incorporation and a court of quarter sessions were afterwards granted to the town. The borough justices thereupon appointed an inspector of weights and measures within the borough, which was co-extensive with the parish; and the recorder appointed another person to the office:—Held, that by 5 & 6 Will. 4, c. 76, s. 105, the office of inspector of weights and measures was that of a district in the county, and that the power of appointing him was in the county justices at quarter sessions, and not in the recorder. *Duty v. Sharood*, 6 El. & Bl. 830; 25 L. J., M. C. 122; 3 Jur., N. S. 63.

**Acting beyond Special District—Penalty.**—An inspector of weights and measures for a city, appointed by the mayor of the city, knowingly stamped, at his office in that city, weights sent to him for that purpose by a person residing within a district for which another inspector had been legally appointed by the justices of the county:—Held, that he thereby incurred the penalty provided by 5 & 6 Will. 4, c. 63, s. 25. *Reg. v. Skelton*, 1 El. & Bl. 816; 28 L. J., M. C. 222; 5 Jur., N. S. 1347; 7 W. R. 447.

**Powers and Duties—Right of Search.**—An inspector of weights and measures, appointed by the sessions under 5 & 6 Will. 4, c. 63, s. 17, and having a general warrant from a magistrate under s. 28, to act as such within his jurisdiction, may, by virtue of such appointment and warrant, enter any shop within his district, at all seasonable times, to examine and seize false weights and measures, and need not have a special warrant from a justice in each individual case. *Hutchings v. Reeves*, 9 M. & W. 747; 6 Jur. 439.

A servant assisting such inspector in the discharge of his duty, but who has not himself re-

ceived any warrant or authority in writing from the quarter sessions or a justice of the peace, is a person acting in pursuance of the act, and in execution of the powers thereof, so as to entitle him, in an action brought against him for carrying away measures declared false by the inspector, to plead the general issue, and give the special matter in evidence. *Id.*

An inspector of weights and measures does not require a special warrant in order to authorize him to act in each individual case, his general warrant being sufficient for that purpose. *Kershaw v. Johnson*, 1 C. & K. 329.

By s. 21, no weight above 56 lbs. is required to be inspected and stamped; but the inspector may still enter places within the meaning of the act, in order to inspect, although no weight of 56 lbs. or under be kept therein. *Id.*

— **Right of Seizure.**—An inspector of weights and measures duly entered a shop to examine weights and measures and weighing machines. He seized and carried away as forfeited a pair of scales, and detained them after being requested to give them up; the owner sued in a county court, when the jury found that the scales were in fact unjust, that they were a weighing machine, and not a weight or measure, and that the defendant bona fide believed that he was acting in pursuance of the act:—Held, that under 5 & 6 Will. 4, c. 63, s. 28, weighing machines are not forfeited, though unjust, although weights and measures are; and consequently that the defendant was not authorized to seize the scales. *Thomas v. Stephenson*, 2 El. & Bl. 108; 22 L. J., Q. B. 258; 17 Jur. 597.

Held, also, that 5 & 6 Will. 4, c. 63, ss. 39, 40, give only privileges in pleading, and powers of tendering amends to a defendant for things bona fide done in pursuance of the act, but not authorized by it; and that it does not make bona fide, in itself, a defence, and consequently that the decision of the county court judge was right. *Id.*

An inspector is not authorized in seizing any weight, without having first compared it with the standard, in order to ascertain whether it is just or not. *Kershaw v. Johnson, supra.*

## 5. LEET JURY.

**Validity of Customs.**—A custom in a manor, for the leet jury to break and destroy measures found by them to be false, is lawful. *Wilcock v. Windsor*, 3 B. & Ad. 43.

A court leet, holden on the 28th of April, was adjourned, after the jury had been sworn in, till the 15th of December, which day was given them to make their presentments:—Held, that an adjournment of such duration (which was admitted to be according to the custom of the manor) was not unnecessarily unreasonable. *Id.*

A custom, to swear the jurors at one court leet to inquire and return their presentments at the next court, is bad in law. *Davidson v. Moscrop*, 2 East, 56.

— **Actions against Jurymen.**—In an action for seizing weights and measures, four defendants pleaded that they were sworn, with divers, to wit, twenty others, as a leet jury, according to the custom of the manor of Stepney; and that it was the custom of the jury so sworn to examine weights and measures within the manor, and

seize them if defective; and they alleged that they, the defendants, being on such jury so sworn as aforesaid, examined and seized the plaintiff's weights and measures, which they found defective. There was evidence at the trial that only five of the leet jurors were actually in the plaintiff's shop when the defendants made the seizure there, though the rest were close at hand; but the judge refused to let any question go to the jury on this part of the case, being of opinion that the objection was on the record:—Held, that the objection was on the record, and was valid; it not appearing by the plea that the examination and seizure were made by the jury sworn at the court leet, according to custom. *Sheppard v. Hall*, 3 B. & Ad. 433.

**Distress—Justification.**]—In an action against an officer and his assistant for distraining the goods of the plaintiff, it appeared that the annoyance jury of Westminster had visited the plaintiff's shop, and had condemned his scales. It further appeared that two only of the jury entered the shop, the rest being in the street, near the door and window:—Held, that the distress was not justifiable unless all the jury were sufficiently near to concur in the condemnation of the scales. *Holland v. Heath*, 2 Jur. 234.

**Obstruction of Jury.**]—An avowry stated the holding of a court leet, and an adjournment, and that the jurors proceeded according to the custom of the manor to examine the weights and measures within the manor; and that the plaintiff, not regarding his duty, but contriving to prevent the examination, according to the custom of the weights and measures, while the jurors were proceeding in their examination, knowingly and unlawfully obstructed them; that, therefore, at the court holden by adjournment, it was presented that he obstructed the jury in the execution of their duties in examining the weights and measures within the manor, and that by the judgment of the court he was amerced for his obstruction:—Held, that the presentment was insufficient, for not stating what the act of obstruction by the plaintiff was. *Frost v. Lloyd*, 9 Q. B. 130; 16 L. J., Q. B. 13; 11 Jur. 59.

## WEIRS.

See FISH AND FISHERY.

## WELLS.

See WATER.

## WEST INDIES.

See COLONY.

## WHARF & WHARFINGER.

See WAREHOUSEMAN.

## WIDOW.

See HUSBAND AND WIFE.

## WIFE.

See HUSBAND AND WIFE.

## WILD BIRDS.

**Foreign Bird—Exemption from Penalties.**]—The Wild Birds Protection Act, 1880, s. 3 (repealed), imposes a penalty on any person who shall shoot or take wild birds between the 1st of March and the 1st of August, or who "shall expose or offer for sale, or shall have in his control or possession after the 15th day of March, any wild bird recently killed or taken . . . unless such person shall prove that the said wild bird was either killed or taken, or bought or received, during the period in which such wild bird could be legally killed or taken, or from some person residing out of the United Kingdom." The appellant, a poulterer, was summoned, under this section, for having in his possession and exposing for sale some wild birds on the 18th of March, 1881. He proved that he had bought them from S., a salesman in Leadenhall Market, who had bought and received them from a person residing out of the United Kingdom:—Held, that the appellant had not brought himself within the exemption clause, which contemplated a direct purchase or receipt from a person residing out of the United Kingdom. *Taylor v. Rogers*, 50 L. J., M. C. 132; 45 L. T. 314. See now 44 & 45 Vict. c. 51.

## WILL.

[Cases relating to the CONSTRUCTION OF WILLS are not included in this Digest.]

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## I. TESTAMENTARY CAPACITY.

1. *Sovereign*.
2. *Soldiers and Sailors*.
3. *Blind Persons*, 803.
4. *Married Women*, 803.
5. *Soundness of Mind*, 805.
6. *Undue Influence and Fraud*, 808.

### 1. SOVEREIGN.

The Probate Court has no jurisdiction to inquire into the validity or invalidity of a will of a sovereign of the realm. *Geo. III., In goods of*, 3 S. & T. 199; 32 L. J., P. 15; 8 Jur., N. S. 1134; 11 W. R. 190.

The will of the sovereign has no effect in conveying the demesne lands of the crown. *Att.-Gen. v. Windsor (Dean and Canons)*, 8 H. L. Cas. 369; 80 L. J., Ch. 529.

### 2. SOLDIERS AND SAILORS.

**Soldiers.**—When a will made by an officer whilst engaged on active military service was signed by him, but not attested, the court required that there should be an affidavit of two disinterested persons, stating in terms the signature to be in his handwriting, and that the form for an affidavit given in the rules should be strictly followed. *Neville, In goods of*, 4 S. & T. 218; 28 L. J., P. 52.

When a will made by a soldier while engaged on active military service is signed by his mark, before the will can be proved an affidavit must be filed in the registry in compliance with the rules, that the deceased had at the time of its execution a knowledge of its contents. *Hackett, In goods of*, 4 S. & T. 220; 28 L. J., P. 42.

— **Proof as to.**—A mere averment that the deceased held such a rank in his regiment, was in such a place, and was in actual military service, at the date of writing the paper in question, is not necessarily enough to entitle such paper to be treated as a soldier's testament; but the affidavit should contain a statement of the circumstances full enough to enable the court to judge whether the case falls within the meaning attri-

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buted by previous cases to 7 Will. 4 & 1 Vict. c. 26, s. 11. *Thorne, In goods of*, 4 S. & T. 36; 35 L. J., P. 131; 11 Jur., N. S. 569; 12 L. T. 639.

**Master and Part Owner of Trading Vessel.**—A master and part owner of a trading vessel, in the course of a voyage, arrived at Port Adelaide, whence he wrote, and forwarded by post, a letter, some sentences of which were testamentary. The vessel was subsequently lost at sea:—Held, that he was a mariner at sea, and, consequently, that such a letter, being in his handwriting, and testamentary, was entitled to probate. *Parker, In goods of*, 2 S. & T. 375; 28 L. J., P. 91; 5 Jur., N. S. 553.

**Mate under Age.**—A mate, whilst on board her Majesty's ship *Excellent*, which was permanently stationed in Portsmouth harbour, and when under age, executed a will, of which probate was granted to one of the executors named in it. On an application to revoke the probate, the court held that the deceased came under the exception contained in 7 Will. 4 & 1 Vict. c. 26, s. 11, as a seaman at sea, and, although a minor at the time, that he had legally executed a will. *McMurdo, In goods of*, 1 L. R., P. 540; 37 L. J., P. 14; 17 L. T. 393; 16 W. R. 283.

**Surgeon in Navy.**—A surgeon in the navy was invalidated when on foreign service. On his voyage in a passenger ship, after being so invalidated, he wrote a letter signed by him, but not in the presence of two witnesses, giving directions as to the disposition of his personal estate after his death, and died before reaching England:—Held, that the letter was entitled to probate as the "will of a mariner or seaman being at sea," within 7 Will. 4 & 1 Vict. c. 26, s. 11. *Saunders, In goods of*, 1 L. R., P. 16; 35 L. J., P. 26; 11 Jur., N. S. 1027; 14 W. R. 148.

### 3. BLIND PERSONS.

**When in Conformity with Instructions.**—Will executed by a blind testatrix established, the will being in conformity with the instructions given by the testatrix to her solicitor, though not proved to have been read over to her previously to execution. *Edwards v. Fincham*, 4 Moore, P. C. C. 198.

A codicil prepared by a solicitor, appointing him a joint executor, with a legacy, which was read over to the testator, who was blind, and, at the time of execution, of fluctuating capacity, in the presence of the attesting witnesses, pronounced against; there being no direct evidence that it was prepared in consequence of instructions from the testator, or satisfactory proof that at the time of the execution he was cognizant of its contents, and in a condition to exercise, and did exercise, thought, judgment and reflection respecting the act he was doing. *Dufar v. Croft*, 3 Moore, P. C. C. 136.

**Acknowledgment of Signature by Testator.**—A testator who is so blind that he can do little more than distinguish night from day, is capable of acknowledging his signature to his will. *King v. Berry*, 5 Ir. R., Eq. 309.

### 4. MARRIED WOMEN.

**Extent of, under Wills Act.**—A married

woman possesses under 7 Will. 4 & 1 Vict. c. 26, no greater or different power to make a will than she possessed before that statute. *Willock v. Noble*, 7 L. R., H. L. 580; 44 L. J., Ch. 345; 32 L. T. 419; 23 W. R. 809.

The 24th section does not, retroactively, operate to give effect to her will as to property which it was not in her power to dispose of at the time when the will was made. *Ib.*

Without the husband's knowledge of the contents of a will made by a married woman, the will cannot be said to be made with his assent. *Ib.*

A general assent to a wife's making a will is not sufficient, but the husband's assent to the particular will which his wife has made ought to be proved. *Ib.*

A married woman was entitled to 3,822*l.* consols for her separate use, and, by settlement made on her marriage, she was entitled to 14,000*l.*, if she survived her husband, absolutely, and if she died in his lifetime she had a power of appointing that sum by will notwithstanding coverture. She had also a fee-simple estate over which she had a power of appointment by will. Her husband, who died in her lifetime, bequeathed to her the residue of his personal estate. The wife by will, made in the lifetime of her husband, who consented to her making a will, though it did not appear that he knew the contents of it, after disposing of her separate estate and appointing the fee-simple estate, gave to her niece all the residue of her real and personal estate of which at the time of her death she should have power to dispose. The will was not republished after the husband's death:—Held, that, though the will was valid and effectual so as to pass the consols to which she was entitled for her separate use, and so as to appoint the fee-simple estate, it was not valid or effectual as an exercise of the power of appointing the 14,000*l.*, nor so as to pass the property acquired by her under her husband's will. *Ib.*

Held, also, that the death of the husband operated as a revocation of any assent he had given to his wife's will. *Ib.*

Where there is a devise of real estate to a married woman, for her, her heirs, executors, administrators, and assigns, for her and their own use and benefit for ever, free and without the intermeddling or control of her husband:—Held, that a will by the devisee passed the real estate. *Hall v. Waterhouse*, 5 Giff. 64.

A wife may make a will disposing of property, which she only has in autre droit, as executrix, without her husband's consent. *Scammell v. Wilkinson*, 2 East, 552. See also cases, post, col. 826.

**— Wife of Convicted Felon.**—The wife of a convicted felon is a feme sole as to the power of disposing by will at least, of property acquired after her husband's conviction. *Coward, In goods of*, 4 S. & T. 46; 34 L. J., P. 120; 11 Jur., N. S. 569; 13 L. T. 210.

**Will made during Coverture—Husband Predeceasing.**—By a marriage settlement personal property was assigned to trustees to pay the income to the wife for her separate use for life, without power of anticipation, and after her death, in case her husband should survive, to pay him so much of the income as she should by deed or will appoint for his life, and subject thereto

for the children of the marriage; and in case there should be no children, then upon trust, in case the wife should survive her husband, for her, her executors, administrators, and assigns, for her sole and separate use; but if she should not survive her husband, then for such of her relations as she should, notwithstanding coverture, by deed or will appoint. The wife made a will in exercise of the power during coverture, and survived her husband without having had issue of the marriage:—Held, that the will, made during coverture, was a good disposition of all the property. *Bishop v. Wall*, 3 Ch. D. 194; 45 L. J., Ch. 194; 25 W. R. 93.

If a wife, with her husband's assent, makes a will of personalty, in which she has an expectant interest, but that interest does not actually vest in her until after her husband's death, she must, to give validity to her will, re-execute it after his death. *Willock v. Noble*, *supra*.

So, also, if her will affects property which (by his will) he made some years before and never altered) he had bequeathed to her absolutely. *Id.*

The death of the husband before his wife operates as a revocation of his assent. *Id.*

**Separate Estate.]—See HUSBAND AND WIFE.**

#### 5. SOUNDNESS OF MIND.

**Presumption of Sanity.]—**The competency of a testator is to be assumed until it is impeached by evidence, but it is not to be assumed, as a matter of law, that a will is valid as made by a competent testator, unless the court or jury who has to decide upon it is convinced that he was competent. *Sutton v. Sadler*, 3 C. B., N. S. 87; 26 L. J., C. P. 284; 3 Jur., N. S. 1150.

If a testamentary paper, rational on the face of it, is shewn to have been executed and attested as prescribed by law, it is presumed, in the absence of any evidence to the contrary, that it was made by a person of competent understanding; but if there are circumstances in evidence which counterbalance that presumption, the court will pronounce against it, unless on the whole the evidence is sufficient to establish affirmatively that the testator was of sound mind when he executed it. *Symes v. Green*, 1 S. & T. 401; 28 L. J., P. 83; 5 Jur., N. S. 742.

**What constitutes "Soundness of Mind."]—**In contemplation of law the expression, "sound mind," does not mean a "perfectly-balanced mind." The question of mental soundness is one of degree. In considering it large allowance must be made for the difference of individual character; but in every case the highest degree of mental soundness is required in order to constitute capacity to make a testamentary disposition, inasmuch as the act involves a larger and a wider survey of facts and things than is required in the other transactions of life. *Boughton v. Knight*, 3 L. R., P. 64; 42 L. J., P. 25; 28 L. T. 562.

A man, moved by capricious, frivolous, mean or even bad motives, may disinherit wholly or partially his children, and leave his property to strangers. He may take an unduly harsh view of the character and conduct of his children, but there is a limit beyond which it will cease to be a question of harsh, unreasonable judgment, and

then the repulsion which a parent exhibits to his child must be held to proceed from some mental defect. If such repulsion, amounting to a delusion as to character, is shewn to have existed previously to the execution of his will, it will be for the party setting up that document to establish that it was inoperative when the will was made, and the jury, in determining whether or not the delusion was operative, will have regard to the contents of the will and the circumstances surrounding the execution of it. *Id.*

To constitute a sound disposing mind, a testator must not only be able to understand that he is by will giving the whole of his property to one object of his regard, but he must also have capacity to comprehend the extent of the property, and the nature of the claims of others, whom by his will he is excluding from participation in that property. *Harwood v. Baker*, 3 Moore, P. C. C. 282.

A sound and disposing mind means a mind of natural capacity, not unduly impaired by old age or enfeebled by illness or tainted by morbid influence. *Smith v. Tebbitt*, 1 L. R., P. 398; 36 L. J., P. 97; 16 L. T. 841; 16 W. R. 18.

If disease is once shewn to exist in the mind of a testator,—it matters not that the disease is discoverable only on a certain subject, or that on all other subjects the action of the mind is apparently sound and the conduct even prudent,—the testator must be pronounced incapable. Further, the same result follows whether or not the particular subjects upon which disease is manifested have any connexion with the testamentary disposition before the court. *Id.*

The testamentary capacity involves more than the mere fact of recognizing familiar persons or objects, and means a sound disposing mind; that is to say, a power of understanding the nature of the property and the family, and the effect of the will. *Sefton (Earl) v. Hopwood*, 1 F. & F. 578.

**When Competency Doubtful.]—**On motion, where the competency of a testator was doubtful, the court refused to make a grant, as in the case of intestacy, but made a grant with the will annexed. *Hanson v. Shepherd*, 17 L. T. 123; 16 W. R. 144.

**Weakness of Mind and Forgetfulness.]—**Weakness of mind and forgetfulness are not sufficient to invalidate a will, if it is proved that the mind of the testator was, when called to exertion, capable of attention and application. *Tufnell v. Constable*, 3 Knapp, P. C. C. 122.

**—Total Departure from Expressed Intention.]—**A will executed by a husband on his death-bed in favour of his wife, to the exclusion of the other members of his family, he being of a weakened and impaired capacity at the time of the factum, from disease affecting the brain, which produced torpor, and rendered his mind incapable of exertion unless roused, pronounced against: the disposition in the will being a total departure from, and contrary to his previous expressed intentions. *Harwood v. Baker*, 3 Moore, P. C. C. 282.

**Testator Subject to Delusions.]—**The mere fact that a testator is subject to insane delusions is not sufficient reason why he should be held to have lost his right to make a will, if the jury is

satisfied that the delusions have not affected the general faculties of his mind and cannot have influenced him in any particular disposition of his property. *Banks v. Goodfellow*, 5 L. R., Q. B. 549; 39 L. J., Q. B. 237; 22 L. T. 813.

Where insanity, though confined to certain one or more delusions, has once existed, and the evidence shews the deceased to have been instructed to conceal the continued existence of such delusion or delusions, and the evidence to prove perfect recovery of capacity is at least doubtful, a will made by a person so affected, though rational and rationally instructed and executed, is not entitled to probate. *Dyce Sombre v. Troup*, Deane, Ecc. Rep. 22.

Where a person afflicted with habitual insanity, with intermissions, makes a will, the fact that the will is a rational one, and made in a rational manner, though not conclusive, is strong evidence of its having been made in a lucid interval. *Nichols v. Binn*, 1 S. & T. 239.

Where a person is labouring under an insane delusion, his sanity is to be tested by directing his attention to the subject-matter of such delusion, but where a person is afflicted with habitual insanity, unaccompanied with delusions, his sanity is to be tested by his answers to questions, his apparent recollection of past transactions, and his reasoning justly with regard to them, and with regard to the conduct of individuals. *Id.*

**Question for Jury.**—At a trial, where the question was as to the testamentary capacity of a testator, it was proved that at one period of his lifetime he had been confined in a lunatic asylum, and that at the time of making his will he was subject to certain fixed delusions. These delusions, however, could not be connected with any of the dispositions in the will. The judge left it to the jury to say whether at the time of making his will, the testator was capable of having such a knowledge and an appreciation of facts, and was so far master of his intentions and free from delusions, as to be able to have a will of his own in the disposition of his property and to act upon it:—Held, that there was no misdirection. *Banks v. Goodfellow*, 5 L. R., Q. B. 549; 39 L. J., Q. B. 237; 22 L. T. 813.

W. S. was subject to insane delusions on one particular subject. Apart from them he appeared to be perfectly rational, managed his affairs with ordinary prudence, and exhibited in various ways considerable mental capacity. His last will was contested by his next of kin on the ground that when he executed it he was not of sound mind. The president, in directing the jury, followed the ruling in *Banks v. Goodfellow*, *supra*, in which it was laid down that the mere fact that a testator is subject to insane delusions is no sufficient reason why he should be held to have lost his right to make a will, if the jury are satisfied that the delusions have not affected the general faculties of his mind and cannot have influenced him in any particular disposition of his property. *Smee v. Smee*, 5 P. D. 84; 49 L. J., P. 8; 28 W. R. 703; 44 J. P. 220.

**Proof and Establishment.**—A will cannot be admitted to probate in a contested case, unless the strength or degree of proof offered is such as to satisfy the court, without reasonable doubt, that the testator was, at the time of execution,

of sound mind, memory and understanding. *Keays v. McDonnell*, 6 Ir. R., Eq. 611.

Therefore, when the evidence was inconsistent and unsatisfactory, and the balance was against his competency, the court refused to grant probate of the will. *Id.*

Testamentary incapacity established by the cross-examination of the plaintiff's witnesses merely, without any direct evidence on the part of the defendant. *Id.*

The question being as to the sanity of a testatrix, evidence of a surviving medical attendant in a lunatic asylum in which she resided at the time of making the will, was received, to shew that she was sane, and that her continuance in the asylum was voluntary. *Martin v. Johnston*, 1 F. & F. 122.

#### — Onus of Proof on Party propounding.]

—The burden of proving capacity to make a will rests upon those who propound the will, and, a fortiori, when it appears that the testator was subject to delusions. *Smee v. Smee*, *supra*.

He who relies upon a will, in opposition to the title of the heir-at-law, must prove that it is the will of a person of sound mind. Such proof having been given, if incompetency of the testator to make a will is alleged, it is incumbent on the party alleging it to prove it. *Sutton v. Sadler*, 3 C. B., N. S. 87; 26 L. J., C. P. 284; 3 Jur., N. S. 1150. See also cases post, col. 812.

#### — Evidence of Acts of Competency.]

—On a question as to the competency of a deviser to make a will, letters addressed to him, found after his death open, with their seals broken, in a cupboard under his book-case, in a private room, together with other letters indorsed by him, to some of which answers had been written by him, are not admissible; as there is nothing to shew any knowledge or act of the testator with regard to them. *Wright v. Doe d. Tatham*, 2 N. & P. 303; 7 A. & E. 313. Affirmed in Dom. Proc., 4 Bing. N. C. 489; 6 Scott, 58; 5 C. & F. 670.

But a letter addressed to the testator requesting him to communicate on a matter of business with his attorney, and found with the other letters indorsed by the attorney, who lived some miles off, is admissible, as it shews an act done upon it by the testator. *Id.*

**Right of Executor to Costs.**—*Prima facie*, an executor is justified in propounding his testator's will, and if the facts within his knowledge at the time he does so tend to shew eccentricity merely on the part of the testator, and he is totally ignorant at the time of the circumstances and conduct which afterwards induce a jury to find that the testator was insane at the date of the will, he will, on the principle that the testator's conduct was the cause of litigation, be entitled to receive his costs out of the estate, although the will is pronounced against. *Boughton v. Knight*, 3 L. R., P. 64; 42 L. J., P. 25; 28 L. T. 562.

#### 6. UNDUE INFLUENCE AND FRAUD.

**What constitutes Undue Influence.**—Undue influence may exist in the form of bad companionship and bad example, and yet not be sufficient to invalidate a will made under its operation. To be within the meaning of the rule

of law, so as to produce that effect, it must be an influence exercised by coercion or by fraud. But actual violence is not necessary to constitute coercion; imaginary terrors may be sufficient for that purpose. *Boyse v. Rossborough*, 6 H. L. Cas. 2; 3 Jur., N. S. 373.

In order to set aside the will of a person of sound mind, it must be shewn that the circumstances under which it was executed are inconsistent with any hypothesis but that of undue influence, which cannot be presumed, but must be shewn to have been exercised, and exercised in relation to the will itself, and not merely to other transactions. *Id.*

A pressure, of whatever character, whether it acts on the fears or on the hopes of an individual, if so exerted as to overpower the volition, without convincing the judgment, is a species of restraint under which no valid will can be made. *Hall v. Hall*, 1 L. R., P. 481; 37 L. J., P. 40; 17 L. T. 162; 16 W. R. 544.

On an issue devisavit vel non, the will being impeached on the ground that the testator's mind was impaired by drinking, and was under undue influence on the part of the devisee or his family:—Held, that though the testator was proved to have been addicted to drinking, and to have had delirium tremens a few days before the will, the question was whether he was sane and sensible, and able to understand the nature and contents of the will at the time when it was executed. And, although it was drawn by a son of the devisee (an old friend), and at his house:—Held, that if the testator had really requested him to do it, and it was his voluntary and spontaneous act, not under constraint, free from force or fraud, from imposition or importunity, there was no undue influence, and the will was valid. *Handley v. Stacey*, 1 F. & F. 574.

Supposing a will made by a person of testamentary capacity, it is not sufficient to avoid it that it is not such a will as a sensible person would make, or that it is harsh, capricious, or unjust; nor, on the other hand, is it enough to avoid it on the ground of undue influence, that it was made under the influence of acts of attention and kindness; but the influence or importunity must be such as to deprive the testator of the free exercise of his will. *Sefton (Earl) v. Hopwood*, 1 F. & F. 578.

Undue influence, to defeat a will, made by a person otherwise of testamentary capacity, must not be such as arises from the influence of gratitude, affection, or esteem, but it must be the control of another will over that of the testator, whose faculties have been so impaired as to submit to that control, so that he has ceased to be a free agent, and has quite succumbed to the power of that controlling will. *Lovett v. Lovett*, 1 F. & F. 581.

On an issue devisavit vel non, it appeared that at the time of the will the testator was in extreme old age, and in the last stage of bodily infirmity, bedridden, utterly helpless, and dependent on the care of the plaintiff (sole devisee of the realty), and a nurse (the only legatee), and a physician, an attesting witness, and an intimate friend of the devisee, her own attorney (another witness) having prepared the will, upon instructions elicited by himself from the testator by interrogatories. They had a few days before represented him as "quite incapable of managing his own affairs or taking care of his person;" and it being admitted that two or

three days before he was not competent to make the will, yet the jury being told that if he understood the state of his property and his family, and the effect of the will, and if he had free volition, and the will was really in accordance with his intentions, and there being evidence that it was, a verdict in favour of the will was not disturbed. *Swinfen v. Swinfen*, 1 F. & F. 584.

— **Different from Gifts inter vivos.**—The influence which is undue in the case of gifts inter vivos is different from that which is required to set aside a will. In the case of gifts or other transactions inter vivos, it is considered by the courts of equity that the natural influence arising out of the relation of parent and child, husband and wife, doctor and patient, attorney and client, confessor and penitent, or guardian and ward exerted by those who possess it to obtain a benefit for themselves is an undue influence. Gifts or contracts brought about by it are, therefore, set aside, unless the party benefited can shew affirmatively that the other party to the transaction was placed in such a position as would enable him to form an absolutely free and unfettered judgment. The law regarding wills is different. The natural influence which such relations as those in question involve may lawfully be exerted to obtain a will or a legacy, so long as the testator thoroughly understands what he is doing and is a free agent; and hence the rules adopted in courts of equity in relation to gifts inter vivos are not applicable to the making of wills. *Parfitt v. Lawless*, 2 L. R., P. 462; 41 L. J., P. 68; 27 L. T. 215; 21 W. R. 200.

**May affect Part of Will only.**—When an undue influence is exercised over the mind of a testator in making his will, the provisions in the will, in favour of the person exercising that influence are void, but the will may be good as far as respects other parties. So that a will may be valid as to some parts and invalid as to others; may be good as to one party and bad as to another. *Trimbletown (Lord) v. D'Alton*, 1 Dow & Clark, 85.

**Confessor and Penitent.**—A Roman Catholic lady gave the bulk of her property to a Roman Catholic priest, whom she named residuary legatee and devisee. He had lived in her house, and had been her confessor for a number of years:—Held, that undue influence could not be inferred from the relation in which he stood to the testatrix—confessor and penitent—combined with the disposition of the property, and that it lay on the party who impeached the residuary clause on the ground of undue influence to establish the allegation. *Parfitt v. Lawless*, *supra*.

A Roman Catholic priest had resided with the testatrix and her husband many years as chaplain, and for a part of the time as confessor. He was a confessor at the time the will in dispute was made. There was no evidence that he had interfered in the making of such will, or that he had procured the gift of the residue to himself, or that he had brought such gift about by coercion or dominion exercised over the testatrix against her will, or by importunity not to be resisted. Moreover, it was not shewn that even in the common affairs of life, in business

or in anything else, the testatrix was under the priest's control or dominion:—Held, that there was no evidence to go to a jury on an issue of undue influence. *Ib.*

**Doctor and Patient.]**—Although there is no rule of law which forbids a man to bequeath his property to his medical attendant, yet it is not a favourable circumstance for one in such a confidential position, with respect to a patient labouring under a severe disease, to take a large benefit under such patient's will, more particularly if executed in secrecy, and the whole transaction assumes the character of a clandestine proceeding. In such a case the onus will lie very heavily upon the party benefited to maintain the validity of the will. *Ashwell v. Lomi*, 2 L. R., P. 477.

**Knowledge and Approval of Contents—Presumption—Proof.]**—There is no rule that if it is proved or admitted that a testator was of sound mind, memory and understanding, and that a will has been read over to him or that he has read it to himself, and that he has signed it, he must be taken to have known and approved of the contents of such will, and that such knowledge and approval must be held to extend to every part of such will. *Fulton v. Andrew*, 7 L. R., H. L. 448; 44 L. J., P. 17; 32 L. T. 209; 23 W. R. 566.

The presumption in favour of every part of the will arising where these circumstances exist may be removed, where the proof that the will was read to or by the testator is open to suspicion, or where there is room for a suggestion of fraud, especially in a case where the will has been prepared and propounded by strangers in blood to the testator, but who are beneficiaries under it. *Ib.*

If it is proved or admitted that a testator is of sound mind, memory, and understanding, that a will has been read over to him, or that he has read it to himself, and that he has put his signature to it, the question whether he knew and approved of the contents of such will must be answered in the affirmative, and such knowledge and approval will be held to extend to every part of the will. *Atter v. Atkinson*, 1 L. R., P. 665; 20 L. T. 404.

It is essential to the validity of a will, that at the time of its execution the testator should know and approve of its contents. *Hastilow v. Stobie*, 1 L. R., P. 64; 35 L. J., P. 18; 14 W. R. 211.

Unless fraud can be proved in obtaining the execution of a will, the fact that such will has been read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, will, when coupled with his execution of it, be conclusive evidence that he both knew and approved its contents. *Guardhouse v. Blackburne*, 1 L. R., P. 109; 35 L. J., P. 116; 12 Jur., N. S. 278; 14 L. T. 69; 14 W. R. 463.

A testatrix having made a will, whereby she charged certain legacies upon her real estate, and having subsequently desired to grant an additional legacy, her attorney prepared a draft codicil, which he carefully read over to her, and which she approved. He immediately afterwards made a fair copy, but inserted certain words not consistent with the instructions of the testatrix, nor contained in the draft. This copy was hastily read over to the testatrix, and executed

by her:—Held, that parol evidence could not be admitted to vary the written provisions contained in a paper so executed. *Ib.*

A testatrix during her last illness made a will in favour of two persons who were strangers in blood. The will was in accordance with her previously-expressed intentions, but the instructions for it were given to the persons interested under it when no one else was present, and it was not read over to her, and its contents were not distinctly explained to her before or at the time of the execution. Her next of kin were denied access to her during her illness:—Held, that there was evidence that the testatrix knew and approved of the contents of the will, and it was pronounced for; but the costs of the unsuccessful opposition of the next of kin were allowed out of the estate. *Goodacre v. Smith*, 1 L. R., P. 392; 36 L. J., P. 43; 15 L. T. 511; 15 W. R. 561.

If a testatrix has given instructions for her will, and it is prepared in accordance with them, the will will be valid, though at the time of execution the testatrix merely recollects that she has given those instructions, but believes that the will which she is executing is in accordance with them. *Parker v. Felgate*, 8 P. D. 171; 52 L. J., P. 95; 32 W. R. 186; 47 J. P. 808.

**Legacy to a Relative who prepared Will and took active Part in its Execution.]**—A person propounding a will prepared by himself without the assistance of any third person, and under which he takes a benefit, is bound to give clear and convincing evidence that the testator knew and approved of the clause under which he takes the benefit; and this principle applies even in the case of a near relative of the testator. In the absence of such evidence, probate of that portion of the will may be refused, and granted of the remainder. *Hegarty v. King*, 7 L. R., Ir. 18—C. A.

**Onus probandi.]**—The burden of proving that a testator knew and approved of the contents of his will lies upon the party propounding it. *Cleare v. Cleare*, 1 L. R., P. 655; 38 L. J., P. 81; 20 L. T. 497; 17 W. R. 687.

A party who pleads that the deceased did not know and approve of the contents of his will may therefore, upon that question, cross-examine the witnesses produced by the plaintiff, without being liable to costs, if he has given the notice required by the rule of court. *Ib.*

The onus of proving an instrument as the last will of a free and competent testator lies on him who propounds it, and where the person propounding is himself a beneficiary under it and also a stranger in blood to the testator, the court should be vigilant and jealous in examining the evidence supplied in support of the instrument or will. *Fulton v. Andrew*, *supra*. See also cases *ante*, col. 808.

**Animus testandi.]**—It is not sufficient to support a devise that the testatrix knew she was signing her will and disposing of her property, unless also the particular devise expresses her mind and will; but it is not sufficient evidence that it does not do so, that it is a devise to the mother of the attorney who prepared the will, and that it was made in a state of great debility on her deathbed. *Haddock v. Trotman*, 1 F. & F. 31.

A person sent instructions to his solicitor to prepare a codicil, by which his daughter was to be deprived of all participation in his property. The document so prepared was executed by him in the presence of two witnesses. At the trial of an issue, whether this document was a codicil to his will or not, evidence was admitted to shew, that neither at the time he sent instructions for, nor when he executed, the paper, did he intend it to operate on his death, and the jury found a verdict in accordance with that evidence:—Held, that as the facts proved plainly and conclusively established that he had no animus testandi when he signed the paper, it could not be admitted to probate. *Lister v. Smith*, 3 S. & T. 282; 33 L. J., P. 29; 10 Jur., N. S. 107; 9 L. T. 578; 12 W. R. 319.

The court will not pronounce against a properly-executed paper, testamentary on the face of it, simply because a jury has been induced to find that it was not intended to operate as testamentary. It must consider the character and nature of the evidence upon which the verdict is founded. *Id.*

A testator ordered a will to be drawn up, leaving blanks for names of legatees, trustees, executors, and the amounts of an annuity and legacies. He did not sign it until shortly before his death, when he did so at the earnest desire of his friends, but expressing his doubts as to its validity in consequence of the blanks not being filled up. These were not filled up by him because he did not know the amount of his money or property, and frequently expressed an intention of having a valuation made in order to enable him to fill them up in a satisfactory manner. The court considered that the requirements of 7 Will. 4 & 1 Vict. c. 26, had been complied with, and declined to hold, on a motion supported by affidavit only, that the testator had no animus testandi at the time he signed the will. *Pool, In goods of*, 1 L. R., P. 206; 35 L. J., P. 97; 14 L. T. 859; 14 W. R. 976.

When a person claims probate of a paper signed and attested, but not on the face of it clearly testamentary, the burthen of proof is on that person to satisfy the court that it was executed animus testandi. *Thorncroft v. Lashmar*, 2 S. & T. 479; 31 L. J., P. 150; 8 Jur., N. S. 595; 6 L. T. 476; 10 W. R. 733. *See also cases post*, cols. 818, 819.

**Questions for Jury.**—In ejectment on the title by heir against devisee—the main issue being whether the will was obtained by undue influence—the judge submitted two questions to the jury—first, whether the testator was, at the time of the execution of the instrument, of sound disposing mind, memory and understanding; secondly, whether he was induced to make the will by the undue influence of W. L. The jury having answered the first question in the affirmative and disagreed as to the second, the judge, being of opinion that there was no evidence of undue influence against the defendant in possession, directed a verdict for him:—Held, that, there being evidence from which, though not directly bearing on the instrument in question, the jury might reasonably infer that the will had been obtained by undue influence, the verdict so directed could not be upheld. *Purdon v. Longford (Earl)*, 11 Ir. R., C. L. 267.

An issue—whether a will was obtained by undue influence—ought not to be submitted to

the jury unless there is reasonable evidence that the person charged had influence over the testator; that he exercised that influence over the testator, to the extent of coercion, in relation to the will itself; and that the execution of the impeached instrument was procured by the exercise of such influence as the causa causans of the act itself. *Longford (Earl) v. Purdon*, 1 Ir. Ch. D. 75.

An issue—whether a will was obtained by fraud—ought not to be submitted to the jury unless there is reasonable evidence that fraud has been practised; that its influence continued so that the testator was labouring under it at the time he made his will, and that he was by that means induced to make his will. *Id.*

## II. TESTAMENTARY INSTRUMENTS, WHAT ENTITLED TO PROBATE, &c.

1. *General Principles*.
2. *Foreign and Colonial*, 821.
3. *By Married Women*, 826.
4. *Deaf and Dumb Persons*, 830.
5. *Persons Dying Abroad*.—*See post*, col. 823.
6. *Soldiers and Sailors*, 830.
7. *Flo do se*, 831.
8. *Where there are Several Instruments*.
  - a. Probate Granted to more than one Will, 831.
  - b. Probate Granted to One only, 833.
  - c. Codicils and Wills, 835.
9. *Incorporation of Unattested and Detached Papers*, 841.
10. *Conditional and Contingent*, 850.
11. *Joint and Mutual Wills*, 853.
12. *In Execution of Power of Appointment*, 854.
13. *Alterations, Additions, and Omissions*, 856.
14. *When Lost, Misaid, or Destroyed*, 864.

### 1. GENERAL PRINCIPLES.

**What Testamentary.**—A. and his wife of the first part, and B. of the second, executed a deed, by which A. granted all the real and personal estate he then possessed to B., in trust, upon the decease of A., to pay the annual income arising therefrom to A.'s wife, and on her death to divide the whole trust property amongst the children of A. in the proportions and on the conditions therein expressed. The deed also reserved a power to A., at any time during his life, by a deed, duly executed, to revoke, annul or make void the whole or any of the trusts in and by the deed created, and to declare new and other trusts respecting the property conveyed. After-acquired property was not vested in the trustee, nor was he authorized to pay the deceased's debts. A court of competent jurisdiction in the Isle of Man, the place of domicile of the deceased, granted probate of this deed as testamentary to B., as executor according to the tenor thereof. The court followed the grant so far as to recognize the deed as testamentary, but not the appointment of B. as executor. *Cornahan, In goods of*, 1 L. R., P. 183; 35 L. J., P. 76; 14 L. T. 387; 14 W. R. 969.

A paper, purporting to be a last will and testament, duly executed, but containing simply an appointment of a guardian of his children by a father, and not disposing of personal property,

nor appointing an executor, is not entitled to probate. *Morton, In goods of*, 3 S. & T. 422; 33 L. J., P. 87; 9 L. T. 809; 12 W. R. 320.

M., on his deathbed, signed a letter to his brother, which had been written in pencil at his dictation, and his signature was attested by two witnesses. The letter contained the following clauses: "It is my deathbed request that you will consent to charge the estates with a sum, to be equally divided between our dear brothers and sisters, and that it shall be raised and paid as soon as possible after my death. I make this request knowing that it is not legal, but trusting in your affection:"—Held, that the letter was testamentary and entitled to probate. *Mundy, In goods of*, 2 S. & T. 119; 30 L. J., P. 85; 7 Jur., N. S. 52; 3 L. T. 380.

A person executed as a will a paper writing, which commenced: "I have given all that I have to B.;" and contained provisions which were consistent with an intention that it should take effect after his death:—Held, that the instrument was testamentary. *Coles, In goods of*, 2 L. R., P. 362; 41 L. J., P. 21; 25 L. T. 852; 20 W. R. 211.

A., being in India, in 1840, executed the following instrument, attested by two witnesses: "Know all men, that I make B. my lawful attorney, for me, in my name, and to my use, to ask, demand or receive the possession of, or produce of the rent of the freehold of, &c. And I do empower her, B., to hold and retain all proceeds of the property for her own use until I may return to England and claim possession in person; or, in the event of my death, I hereby, in my name, assign and deliver to B. the sole claim to the property, to be held by her during her life, and disposed of by her as she may deem proper at the time of her death; at the same time I wish it to be understood, that I claim all right and title to the property on my arrival in Great Britain, when the term of B.'s occupancy shall be considered at an end. In witness," &c. The instrument was acted on as a power of attorney by B. Afterwards, A. died in India, without returning to Great Britain, and left B. surviving:—Held, that the instrument operated, on A.'s death, as a devise to B. *Doe d. Cross v. Cross*, 8 Q. B. 714; 15 L. J., Q. B. 217; 10 Jur. 564.

An instrument may pass property from the dead to the living, and yet not be testamentary or subject to legacy duty. *Brown v. Advocate-General*, 1 Macq. H. L. Cas. 79.

A person, by an instrument, attested by one witness, covenanted with trustees, that his devisee, or heirs, executors or administrators, should after his death, on being satisfied that all his debts were paid, convey and assign to them all the realty and personalty to which he, or any one in trust for him, should at the time of his death be seised, possessed or entitled for any beneficial estate or interest, or which he should then have disposed of by his will. By the same instrument the trustees declared that they would stand possessed of the property to pay debts, and convert in their discretion, and transfer the remainder to his wife, if she should be living, and if not, to his next of kin:—Held, that this instrument was a valid deed, and not a will. *Patch v. Shore*, 2 Drew. & S. 589; 32 L. J., Ch. 185; 9 Jur., N. S. 63; 7 L. T. 554.

#### —Promissory Notes inclosed in Letter.]

—Among the papers of a testator were found

two letters sealed and directed "For S. G., my late servant." S. G. had been in his service as housekeeper for some years before his death, but had left him for some time previously to that event. These letters contained promissory notes for large sums of money, and one of the letters stated that the testator "inclosed 200*l.* as a mark of respect," and the other letter stated that "the inclosed was for her long and faithful services." S. G. applied to the executors for payment of the notes, but they refused to pay:—Held, that an action was not maintainable by S. G. upon the notes, which were in effect a legacy, and an informal one in not being duly attested as required by 7 Will. 4 & 1 Vict. c. 26, s. 9, and therefore void. *Gough v. Findon or Tindon*, 7 Ex. 48; 21 L. J., Ex. 58.

#### —Deed-poll with requisite Formalities.]—

A deed-poll was executed with the formalities required for the execution of wills:—Held, that it was capable of being admitted to probate. *Robson, In re, Emley v. Davidson*, 51 L. J., Ch. 337; 45 L. T. 418; 30 W. R. 257—O. A. See also *Morgan, In goods of*, post, col. 832.

—Instrument made in Contemplation of Marriage.]—In 1873, a father, in contemplation of the marriage of his son, signed, and two witnesses attested, a written instrument. The contemplated marriage having been solemnized, and the father having died:—Held, that by the solemnization of the contemplated marriage the instrument had been rendered irrevocable. *Halpin, In goods of*, 8 Ir. R., Eq. 567.

W., in anticipation of a marriage with a deceased sister's husband, executed a deed, whereby she transferred funds to trustees, in trust, in case she died in the lifetime of C., her intended husband, for such persons as she should by deed or will appoint. A marriage was, in fact, solemnized with C., which was of course invalid. W. subsequently executed a will, which contained a clause, "Now I hereby ratify and confirm the settlement, and in pursuance and exercise of the power reserved to me, and of all other powers enabling me, I do direct and appoint." W. survived C., and executed no other testamentary paper:—Held, that as W. intended to give her property in a certain manner, in whatever way her authority to do so was acquired, and as she had an absolute power over it, the will was valid, although the opportunity for exercising the special power never arose. *Southall v. Jones*, 1 S. & T. 298; 27 L. J., P. 112; 5 Jur., N. S. 369; 7 W. R. 381.

A. in 1828 made his will in contemplation of his intended marriage, providing for his intended wife and for the children of such marriage, and making his intended wife executrix:—Held, that the marriage which ensued, together with the birth of a child, operated as a total revocation of the will. *Cadywold, In goods of*, 1 S. & T. 34; 27 L. J., P. 26.

#### —Orders on Savings Bank.]—

B. having been informed that he could not recover from the illness under which he laboured, expressed a wish that his wife should be in a position to receive, at his death, certain sums of money in two savings banks, and signed, in the presence of witnesses, two orders on a savings bank to pay to his wife, at any time she might apply for the same, any money deposited. B. died on the fol-

lowing day. The court granted administration with the two orders, as together containing the will of B. annexed, to his widow. *Maraden, In goods of*, 1 S. & T. 542; 6 Jur., N. S. 405; 2 L. T. 87.

A deceased executed, in the presence of two witnesses, a paper to the effect: "I wish my sister to have my savings bank book for her own use." On the same day she gave her sister the book, and authorized her to draw out all the money in the bank; but, from some informality, that was not done in the deceased's lifetime:—Held, that from the terms of the paper itself, and from the declarations of the deceased at the time she executed it, the court was satisfied that the deceased intended it should operate on her death, and that it must be admitted to probate. *Cock v. Cooke*, 1 L. R., P. 241; 36 L. J., P. 5; 15 W. R. 89, 296.

— **Instructions to make Will.**—The court granted probate as of the last will and testament of a deceased person of a testamentary paper, drawn up in the form of instructions for a will, which had been duly executed. *Fisher, In goods of*, 20 L. T. 684.

A testator desired that instructions previously given by him on the same day to an attorney's clerk, should be carried out. The instructions were oral, but the clerk had at the time made short notes of them in the testator's presence:—Held, that the notes could not be included in the probate. *Pascall, In goods of*, 1 L. R., P. 606; 38 L. J., P. 3; 19 L. T. 366.

— **Memorandum cancelling Will.**—On the death of H. his will was found cancelled, and beneath the signature there appeared this memorandum, which was duly executed: "This my last will is hereby cancelled, and as yet I have made no other." The court admitted the memorandum of proof. *Hicks, In goods of*, 1 L. R., P. 683; 38 L. J., P. 65; 21 L. T. 300.

An instrument which disposes of no property, but simply declares an intention to revoke a previous will, is not a will or a codicil, and is therefore not entitled to probate. *Fraser, In goods of*, 2 L. R., P. 40; 39 L. J., P. 20; 21 L. T. 680; 18 W. R. 263.

— **Appointment to Situation after Death of Testator.**—W. signed, in the presence of two witnesses, a document as follows:—"To A. B., I hereby offer you the situation of collector and overseer of my property, at a salary of 3l. 3s.; and I further wish that A. B. shall continue in the office, with the same salary, after my decease, and same allowances:—"—Held, not testamentary. *Thorncroft v. Lashmar*, 2 S. & T. 479; 31 L. J., P. 160; 8 Jur., N. S. 595; 6 L. T. 476; 10 W. R. 783.

— **Instrument relating to Rent after Death of Lessor.**—An agreement for a seven years' lease, duly executed and attested by two witnesses, contained a provision as to the application of the rent in the event of the lessor's death before the expiration of the lease, the lessee being beneficially interested in such application:—Held, that as no part of the agreement was revocable, and as it came into operation immediately upon its execution, it was not entitled to probate as a testamentary paper. *Robinson, In goods of*, 1 L. R., P. 384; 36 L. J. P. 93; 17 L. T. 19.

— **Only Appointing Executors.**—The principle that a will appointing executors, and not disposing of any personal estate, is entitled to probate, will be applied to the case of a joint will on the death of one of the co-testators. *Miskelly, In goods of*, 4 Ir. R., Eq. 62.

— **When Disposing of Realty only.**—When a will disposes of real estate only, directions in it for the payment of debts, for the sale of a portion of the estate and the payment of legacies out of the proceeds, do not give the court jurisdiction to grant probate. A probate of such a will cannot be granted to suit the convenience of the parties interested. *Bootle, In goods of*, 3 L. R., P. 177; 43 L. J., P. 41; 31 L. T. 273.

A will limited to the disposition of real property only is not entitled to probate, although it contains the appointment of an executor, and the real estate is given to such executor, with directions to convert the same into personal estate. *Barden, In goods of*, 1 L. R., P. 325.

A will disposing of realty only, but containing an appointment of an executor, is entitled to probate notwithstanding the renunciation of the executor. *Jordan, In goods of*, 1 L. R., P. 555; 37 L. J., P. 22; 16 W. R. 407.

— **On Probate of Second Will Renounced.**—A testator left two wills, disposing of his property in different ways. The second will was executed the day before his death, when he was supposed to be of unsound mind. The universal legatee appointed by it renounced probate, but the court declined to grant probate of the first will until the next of kin, who were interested in the first will being established, had been cited. *Thomas, In goods of*, 31 L. T. 553.

— **Of Copy.**—The copy of a will may be admitted to probate in order to aid the completion of the title of a testator's representative in the Court of Chancery, but the consent of those persons, if any, who may be interested in the event of an intestacy is required before a grant of probate can be made. *Entiehnep, In goods of*, 35 L. T. 427.

— **After Supposed Intestacy.**—A person died as was supposed intestate, and letters of administration were granted to his wife. She realized as much as she could of the estate, and left the country. A will was subsequently discovered, and a citation was issued, calling on her to bring in the letters of administration, which she did not obey. The court admitted the will to probate, notwithstanding that the letters had not been brought in, but directed the fact that the administration was outstanding to be recited on the probate. *Ingall v. Drayton*, 21 L. T. 367.

— **Clause Inserted Per incuriam.**—Where a clause is introduced in a testamentary paper per incuriam, and the deceased executes the paper, not having given any instructions for and being ignorant of the existence of such clause, it forms no part of his will, and probate will be granted of the remainder of the paper, omitting such clause. *Duane, In goods of*, 2 S. & T. 590; 31 L. J., P. 173; 8 Jur., N. S. 752; 6 L. T. 788.

— **Evidence to shew Testamentary Character.**—

Where something to suggest a doubt as to whether an instrument is intended to be testamentary appears on the face of it, extrinsic evidence as to the circumstances of its execution is admissible, but the burden of proof is not thereby thrown upon the persons propounding the instrument. *Whyte v. Pollock*, 7 App. Cas. 400; 47 L. T. 356; 47 J. P. 340—H. L. (Sc.).

Evidence of the declarations of an alleged testator as to the contents of a will not forthcoming, made after its execution, is not admissible to prove the contents. *Quick v. Quick*, 3 S. & T. 442; 33 L. J., P. 146; 10 Jur., N. S. 682; 10 L. T. 619; 12 W. R. 1119.

But the intention of a testator, that a duly-executed paper writing should operate as a will, may be proved by parol evidence. *English, In goods of*, 3 S. & T. 586; 34 L. J., P. 5; 11 L. T. 612; 13 W. R. 503.

D. duly executed a will, wherein he named three persons executors; he subsequently instructed his attorney to draw out a codicil to this will, for the sole purpose of altering two bequests therein contained. The attorney, in drawing the codicil, intended to conclude with a paragraph, "and in all other respects I confirm my will, but by error wrote "revoke" instead of "confirm;" and in this state the codicil was executed:—Held, that there was not sufficient ambiguity on the face of the codicil to authorize the admission of evidence as to his intention. *Davy, In goods of*, 1 S. & T. 262; 5 Jur., N. S. 252.

A person duly executed a will and five codicils. The fourth codicil revoked the three preceding codicils, and the fifth confirmed all:—Held, that there was sufficient ambiguity on the papers to allow of the introduction of parol evidence; and as that clearly showed that in executing the fifth codicil the intention of the testator was to confirm the will and fourth codicil only, probate was granted of the will, and the fourth and fifth codicils only. *Thomson, In goods of*, 1 L. R., P. 8; 13 L. T. 608; 14 W. R. 316.

The fifth codicil was wrongly dated. The court declined to alter the date on the face of the instrument, but directed probate to issue as having been executed on the 30th August, 1865, the correct date. *Id.*

A testator having erased a clause in his will after the execution, asked a friend to make a fresh copy of it, omitting the erased clause. The copy was made, but the person who made it by mistake omitted several other clauses. The copy was duly executed, and the omissions were not discovered until after the testator's death, both wills having remained in his custody up to that time. The two wills were not inconsistent with each other, and the latter contained no express clause of revocation. Probate was granted of both documents upon parol evidence of the circumstances under which they were drawn up and executed as together containing the deceased's last will and testament. *Birke v. Birke*, 4 S. & T. 23; 34 L. J., P. 90; 13 L. T. 193; 13 W. R. 638.

A testatrix duly executed two inconsistent wills bearing the same date, and written on different sides of the same sheet of paper. Evidence was admitted to shew that the deceased signed one of them only as her will, and signed the other by mistake. The court granted probate of the paper signed by the testatrix, with the

intention that it should operate as her will, and not of the other paper. *Nosworthy, In goods of*, 4 S. & T. 44; 34 L. J., P. 145; 11 Jur., N. S. 570. See also *cases ante*, col. 812.

**Fraud or Inadvertence—Rejection of Part.]**—Where a portion of a will has been introduced through fraud or perhaps inadvertence, it may be rejected and probate granted of the remainder if the two are severable. But where the rejection of part alters the sense of the remainder, *quære*, whether there is a valid will within the meaning of 7 Will. 4 & 1 Vict. c. 26, s. 9. *Rhodes v. Rhodes*, 7 App. Cas. 192; 51 L. J., P. C. 53; 46 L. T. 463; 30 W. R. 709—P. C.

**Of Will Executed by Mistake.]**—B. and C., sisters, living together, having agreed to make mutual wills, B. prepared the instruments. In both wills the bequests and objects of the sisters' testamentary bounty were the same, with this exception, that while B. gave a legacy of 19*l.* 19*s.* to a particular charity, C. gave a legacy of like amount to a different charity; and in both wills the same executors were appointed. On the death of B. it was found that each sister had by mistake executed the paper prepared for the other. The court was moved to grant probate of the instrument executed by B., but declined to treat it as her will, and rejected the application for probate. *Hunt, In goods of*, 3 L. R., P. 260; 44 L. J., P. 43; 33 L. T. 321; 23 W. R. 553. See also *Nosworthy, In goods of, supra*.

**Duty of Solicitor in Drafting Will—Legacy to Solicitor's Wife—Evidence.]**—B., a solicitor, drew the will of R., his father-in-law, which bequeathed a share of residue, amounting to 45,000*l.*, to B.'s wife, and appointed B. sole executor. The will contained no direction that this sum should be for the separate use of B.'s wife. There was no evidence as to what had passed between B. and R. at the time of the execution of the will:—Held, that, in the absence of evidence, the court could not assume such a dereliction of duty on B.'s part in not informing R. of the effect of the will, as to make B. a trustee for his wife. *Birchall, In re, Wilson v. Birchall*, 44 L. T. 243; 29 W. R. 461.

**—Reduction into Possession.]**—B. afterwards made a will which gave the bulk of his property to his illegitimate children, and died, leaving his wife surviving. At R.'s death part of his estate consisted of a sum of 5,000*l.*, outstanding on mortgage, as part of a sum of 20,000*l.*, the residue whereof did not belong to the testator. This sum was still standing in the same investment at B.'s death. Another part of R.'s estate, at his death, consisted of 15,000*l.* London and North-Western Railway stock standing in B.'s name. B. had also similar stock of his own standing in his name. He transferred 2,000*l.* of the testator's stock to another residuary legatee, and retained 13,000*l.* as part of his wife's share. He sold part of the stock standing in his name during his life, but at his death 12,000*l.* thereof was still standing in his name:—Held, that he had possession of his wife's stock as executor only, that the sales must be attributed to that part which was his own property, and that neither the 5,000*l.* on

mortgage, nor the 12,000*l.* stock had ever been reduced into possession. *Ib.*

## 2. FOREIGN AND COLONIAL.

**Generally.**—As personal property, wherever situate, follows the person, the court will grant probate of a document, though it purports to deal only with property out of its jurisdiction. *Winter, In goods of*, 30 L. J., P. 56.

But when it appears, on the papers before the court, that the only property of which a person died possessed is not in this country, the court will decline to grant administration of the goods of the deceased. *Fittock, In goods of*, 32 L. J., P. 157; 9 Jur., N. S. 311.

A will disposing only of property in a foreign country is not entitled to probate in this country. *Coode, In goods of*, 1 L. R., P. 449; 36 L. J., P. 129; 16 L. T. 746.

**— Wills separately Disposing of English and Colonial Property.**—A testator died leaving two wills—one limited to property in England, the other to property in Tasmania, and he appointed different executors in each. The court granted probate of both papers as together constituting his will, to the executors named in the English will. *Harris, In goods of*, 2 L. R., P. 83; 39 L. J., P. 48; 22 L. T. 630; 18 W. R. 901.

Three duly-executed testamentary papers bore the same date, two of which purported to dispose of the residue. It was proved that the first was intended to apply only to property in Canada, and that the two last were intended to apply only to property in England. The three papers were admitted to probate as together containing the testator's last will and testament. *Nickalls, In goods of*, 4 S. & T. 40; 34 L. J., P. 103; 13 W. R. 1047.

Where a testator left two wills, one disposing of his property in Australia, and the other of his property in England, on the same trusts, the court directed an affidavit of the contents of the Australian will to be attached to the probate. *Cole, In goods of*, 20 L. T. 894.

**British Subject—Domiciled Abroad.**—A testator, by birth, a British subject, but domiciled in Spain at his death, executed a will in England, and subsequently several codicils valid by the law of Spain. Lastly, he executed a paper in England which confirmed the English will in whatever it did not clash or interfere with the contents of the codicil, which was to be considered as his last and deliberate will:—Held, that the Spanish codicils were not revoked by the last-mentioned paper, but as forming part of the will which did not clash with such paper, were confirmed by it. *De la Saussaye, In goods of*, 3 L. R., P. 42; 42 L. J., P. 47; 28 L. T. 368; 21 W. R. 549.

An Englishwoman was married to a Frenchman, and resided with him in France until his death. Some time after that event she gave up her house in that country, and proceeded to a seaport, where she embarked, with her children and effects, on board an English steamboat, with an intention of permanently residing in England. Before the vessel left the harbour she was seized with illness, and was carried on shore, and died there:—Held, that her domicile was French, and that a will made in the English form could not be admitted to probate.

*Raffeneil, In goods of*, 3 S. & T. 49; 32 L. J., P. 203; 9 Jur., N. S. 386; 8 L. T. 211; 11 W. R. 549.

A. throughout his life, and at his death, was domiciled in Portugal, where he died a bachelor, leaving a natural son, B. B. instituted a suit of filiation and inheritance in the Court of First Instance at Faro, and obtained a decree, by which he was declared entitled to the movable and immovable property of A. This decree was ultimately confirmed by the Supreme Court at Lisbon:—Held, that as A. was domiciled in Portugal, the succession to his personal estate, whether he died testate or intestate, must be determined by the law of that country; and that as the proper courts in Portugal had already decided to whom the inheritance belonged, the Probate Court was bound by that decision. *Crispin v. Doglioni*, 3 S. & T. 96; 32 L. J., P. 169; 9 Jur., N. S. 653; 8 L. T. 518; 11 W. R. 853. Affirmed in Dom. Proc., nom. *Doglioni v. Crispin*, 1 L. R., H. L. 301; 35 L. J., P. 129; 15 L. T. 44.

**Naturalized.**—An Italian by birth obtained in 1852 letters of naturalization as a British subject, and in 1871 he executed in England his will according to the laws prescribed by the English law. The letters of naturalization excepted from the privileges conferred on the testator "any rights and capacities of a natural-born subject out of and beyond the dominions of the British crown and the limits thereof;" and he died, in 1876, domiciled in Italy:—Held, that the will was entitled to probate under 24 & 25 Vict. c. 114, s. 2. *Gally, In goods of*, 1 P. D. 438; 45 L. J., P. 107; 24 W. R. 1018.

A will made according to the forms of English law by an alien who, though her domicile of origin was English, was domiciled abroad at the time of making her will and of her death, is not entitled to probate in this country. In determining what is the valid will of an alien, the general principles of law prior to the passing of the Naturalization Act, 1870, are still applicable. *Bloxam v. Favre*, 8 P. D. 101; 52 L. J., P. 42; 31 W. R. 610; 47 J. P. 377.

**— Dying Abroad.**—A Frenchman by birth but naturalized in England, executed at Paris a will and codicil in the English form relating to his property in England only, and a holograph will, signed and dated, disposing of his property in France, but referring directly to the English will. He died at Paris:—Held, that if it could be shewn that the will and codicil in the English form were made in a form permitted by the law of France in the case of British subjects resident in France, they could be admitted to probate under 24 & 25 Vict. c. 114, s. 1, as valid according to the law of the place where made. *Lacroix, In goods of*, 2 P. D. 94; 46 L. J., P. 40.

When a British subject dies abroad, after the passing of this act, leaving a will executed in England in accordance with the law of England, upon motion for probate it is not necessary to consider whether he had or had not acquired a foreign domicile. *Rippon, In goods of*, 3 S. & T. 177; 32 L. J., P. 141; 9 L. T. 117.

A testator made a will in India, and added a codicil at Florence. They were not witnessed, and were invalid both by the law of England and Italy. He wrote on the back of the will, at Genoa, a second codicil, which was also not witnessed, but which was well executed, though

not valid, according to the law of Italy :—Held, that in determining the question whether a paper is valid as a testamentary instrument under 24 & 25 Vict. c. 114, s. 1, the court can have regard to the law of one country only at a time. It therefore declined to regard so much of the Italian law as held the second codicil well executed, and then, recurring to the English law, to apply the principle of confirmation, and refused probate of all three papers. *Pechell v. Hilderley*, 1 L. R., P. 673 ; 38 L. J., P. 66 ; 20 L. T. 1014 ; 17 W. R. 865.

A., a British-born subject, left England many years before death, resided in Paris for the last fifteen years of her life, and died there ; assumed for many years an Italian name, and described herself and was described in legal documents as widow of an Italian. There was no evidence of the fact of marriage ; and the statements made by the deceased in respect to the marriage were contradictory. She had real property in India, the bulk of her personality in England, and made her will in the English form, disposing of her property, with the exception of four small legacies, amongst English persons :—Held, that by the law of nations the deceased was domiciled in France, but that, as she had not been naturalized, nor obtained an authorized domicile in and as required by the law of France, she might by the French law make a will in the English form, and that such will was entitled to probate in this country. *Bremer v. Freeman*, 1 Deane Ecc. Rep. 192.

A testator made a will in England, appointing A. and B. his executors. He afterwards made a codicil in India, in which he desired that his affairs might not be placed in the hands of the administrator-general, but might be managed entirely by C. and D., whom he appointed his executors in that country :—Held, that C. and D. were not entitled to probate in England. *Wallich, In goods of*, 33 L. J., P. 87.

An application for probate of a testamentary instrument executed by a person when domiciled abroad should be supported by evidence that, according to the law of the domicile, such instrument is a good will. *Stoddart, In goods of*, 2 S. & T. 356 ; 31 L. J., P. 195.

A holograph will, confirmed by the tribunals of France, in which country a testatrix was legally domiciled, will be admitted to probate, but the directions of such tribunals will be acted upon only so far as they are in accordance with, or not contrary to, the practice of the court. *D'Orléans (Duchesse), In goods of*, 1 S. & T. 253 ; 28 L. J., P. 129 ; 5 Jur., N. S. 104 ; 7 W. R. 269.

**Dutch Mutual Wills.**—By the Roman-Dutch law, the mutual will of a husband and wife, notwithstanding its form, is to be read as the separate will of each. *Denysen v. Mostert*, 4 L. R., P. C. 236 ; 41 L. J., P. C. 41 ; 20 W. R. 1017 ; 8 Moore, P. C. C., N. S. 502.

The dispositions of each spouse are to be treated as applicable to his or her half of the joint property. *Ib.*

Each is at liberty to revoke his or her part of the will during the co-testator's lifetime, with or without communication with the co-testator, and after the co-testator's death ; but when a spouse who dies first has bequeathed any benefit in favour of the survivor, and has afterwards limited the disposal of the property in general after the

death of such survivor, then such survivor, if he or she accepts such benefits, may not afterwards dispose of his or her share in any manner at variance with the will of the deceased spouse. *Ib.*

**Scotch Will.**—If a will has been formally recognized and acted upon by the court of competent jurisdiction in the country of the testator's domicile at the time of his death, and remains unquestioned in that country, the court of probate will not allow the validity of such will to be litigated here. *Miller v. James*, 3 L. R., P. 4 ; 42 L. J., P. 21 ; 27 L. T. 862 ; 21 W. R. 272.

A testator executed a trust disposition and settlement, valid according to the law of Scotland, and applicable to the whole heritable and movable estate which should belong to him at time of his death. He subsequently executed a will, by which he disposed of all his real and personal estate, whether in Scotland or in England. By the law of Scotland, the English will was ineffectual as a conveyance of the Scotch heritage, and did not revoke the previous settlement, and the two documents together formed the complete testamentary disposition of the testator. His domicile was English, but he had a freehold estate in Scotland. The court granted probate of the will and trust disposition as together containing the will of the deceased. *Donaldson, In goods of*, 3 L. R., P. 45 ; 42 L. J., P. 19 ; 28 L. T. 477 ; 21 W. R. 549.

A domiciled Scotchman made a will, and afterwards married in Scotland. He subsequently left Scotland, and died domiciled in England :—Held, that, under the above statute, the will was not revoked by his change of domicile, and was entitled to probate. *Reid, In goods of*, 12 Jur., N. S. 300 ; 13 L. T. 680 ; 14 W. R. 316.

B. and C., domiciled Scotch people, in contemplation of their marriage entered into a contract, or a settlement, in 1823, under which they had certain powers of appointment. On the fly-sheet of the settlement appeared what described itself as a codicil of September, 1832, signed by B. and C., and attested by two witnesses. Below this, of the date of 1st January, 1857, was an holograph of Alexander Stoddart, and signed by him, which purported to be testamentary. In 1855, the deceased acquired an English domicile, which he retained till death. The court refused to grant letters of administration with the settlement, and two writings annexed, as together containing the last will and codicil thereto of the deceased. *Stoddart, In goods of*, 2 S. & T. 356 ; 31 L. J., P. 195.

In the repositories of the deceased, who left no other testamentary instrument was found, a holograph writing, signed and dated and complete in its testamentary provisions ; but headed "Notes of intended settlement by" the deceased. The proof allowed threw no light on the intentions of the deceased :—Held, affirming the decision of the court below, that the document was the last will and settlement of the deceased. *Wayte v. Pollock*, 7 App. Cas. 400 ; 47 L. T. 356 ; 47 J. P. 340—H. L. (Sc.).

Per Lord Watson : A mere ambiguity occurring in the descriptive title written by the testator cannot qualify the terms or destroy the validity of the document which it professes to describe, when the legal character and effect of the document taken by itself are not doubtful.

Such an ambiguity will justify inquiry; but should the parties lead no proof, or should the proof adduced by them be inconclusive, the document must receive effect according to its tenor and substance. *Ib.*

**Executor's Affirmation not Oath.]**—A., a native of and domiciled in Germany, made and duly executed his last will and testament, with ten codicils thereto, according to German law, and thereof appointed B., his nephew, executor. The will was proved in the Court of Gera, in Germany. It was requisite that probate of it should also be obtained in this court, and the necessary papers for the purpose, with due instructions, were forwarded to B., the executor, in Germany. The papers were returned by B., accompanied by an affirmation which was made by him before the British vice-consul at Breslau, but it contained no statement that he had a conscientious objection to the taking of an oath, so as to bring him within the exception created by the Common Law Procedure Act, 1854, s. 20. The court held that the affirmation was defective, and refused to receive the papers. *Henry LXIX. of Reuss-Kostritz, In goods of*, 49 L. J., P. 67; 41 L. T. 803; 28 W. R. 398.

**Affidavit, &c. of Execution.]**—A will made in Queensland, and attested by witnesses resident there, was proved and lodged in the Supreme Court of New South Wales at Sydney. The executor having applied for probate in Ireland, upon the evidence of one of the attesting witnesses of its due execution (to whom a copy only of the will had been exhibited), and upon an affidavit of a solicitor and officer of the court at Sydney that they had inspected the will there, and had set out a true copy of it in the affidavit, and proving the handwriting of the signatures of the testator and attesting witnesses, there being no suspicious circumstances attached to the will.—Held, that probate should be granted, it being assumed, in the absence of evidence to the contrary, that Queensland was outside the jurisdiction of the courts of New South Wales. *Wilson v. Collum*, 9 L. R., Ir. 150—C. A.

**Executed Abroad—According to what Law.]**—A will executed in a foreign country by a foreign subject in accordance with the requirements of English law is not entitled to probate in this country. *Buseck, In goods of*, 6 P. D. 211; 51 L. J., P. 9; 30 W. R. 140; 46 J. P. 104.

Before 7 Will. 4 & 1 Vict. c. 26, a will must be executed according to the law of the country where the testator was domiciled at the time of his death. *Whicker v. Hume*, 7 H. L. Cas. 124; 28 L. J., Ch. 124; 4 Jur., N. S. 933.

The grant of probate not appealed against, conclusively established that it was so executed. *Ib.*

When an executor is cited by next of kin to prove a will, and has appeared, he cannot try the question of the domicile of the testator before propounding the will. *Hawarden v. Dunlop*, 2 S. & T. 150; 4 L. T. 339.

Where a declaration propounding a will depends on due execution according to the law of a testator's domicile, it must contain a distinct averment that it was duly executed according to the law of the domicile. An averment that the will was admitted to probate by a competent court of the domicile is insufficient. *Isherwood v.*

*Ceetham*, 2 S. & T. 607; 31 L. J., P. 99; 7 L. T. 250.

**Form of Grant of Foreign Will.]**—R., domiciled in Mexico, made a will according to the law of Mexico. The proper court there decreed probate of a Spanish translation and not of the original.—Held, that the grant in this country must be made upon the production of an English translation of the Spanish copy, and not of the certified copy of the original. *Rule, In goods of*, 4 P. D. 76; 47 L. J., P. 32.

P., domiciled in Brazil, made a will according to the law of that country. The will was written in Portuguese, and probate granted of such will as written in that language. The court refused to grant probate of an English translation of the will made in Brazil, and certified in that country by the British consul. The only document on which it can act is the document which was before the foreign court, and which must be re-translated after it has been brought into the registry here. *Rule, In goods of (supra)*, distinguished. *Petty, In goods of*, 41 L. T. 529.

### 3. BY MARRIED WOMAN.

**Testamentary Capacity.]**—*See ante*, col. 803.

**Generally.]**—The 24th and 27th sections of the Wills Act (7 Will. 4 & 1 Vict. c. 26) apply to the wills of married women in the same manner as to those of other persons. *Noble v. Phelps or Willock*, 2 L. R., P. 276; 40 L. J., P. 60; 25 L. T. 65; 19 W. R. 1115.

**Granting Probate without prejudicing Questions as to Property.]**—A woman, when under coverture, executed a will in which, having disposed of property to which she was entitled for her separate use, she bequeathed the residue of the real and personal estate which she should possess or have power to dispose of at the time of her death to her niece. She survived her husband, who left to her considerable personal property, but she did not re-execute her will.—Held, that although the court may be of opinion that the language of the will of a woman made during coverture, taking it to speak and take effect at the time of her death, is sufficiently large to include the whole property, it will not grant a general probate, but limit it in such a way as to leave the whole question as to the property affected by such will open to a court of equity, without concluding or prejudicing the rights of any party. *Ib.*

By a marriage settlement, power was reserved to the wife to appoint all her settled property either by deed, revocable or irrevocable, or by will. She executed a will giving a life interest in all the property to her husband; but she afterwards executed a deed irrevocably appointing all the property to her husband, subject to her own life interest. The court granted probate of the will, leaving the effect of the deed to be determined by the court of construction. *Parkinson v. Townend*, 44 L. J., P. 32; 33 L. T. 232; 23 W. R. 636. *See next case.*

**Of what Property Consists.]**—When the will of a married woman is tendered for probate on the ground that she had separate property, and the probate is contested, if the court is satisfied

that there is separate property, it has power to grant probate of all such property as the testatrix had power to dispose of without deciding what that property is. But it is generally the duty of the court, so far as the evidence and pleadings enable it to do so, to decide judicially of what such property consists. *Tharp, In goods of, Tharp v. McDonald*, 3 P. D. 76; 38 L. T. 867; 27 W. R. 770—C. A.

**Deserted by Husband.**—A woman was deserted by her husband in 1843. She subsequently acquired property by her own industry. In 1861 she made a will, disposing of her property, but did not obtain a protection order until 1858. The order, however, stated that it was "to protect all earnings and property acquired since 22nd of July, 1843, the commencement of the desertion."—Held, that the will was entitled to probate. *Elliott, In goods of*, 2 L. R., P. 247; 40 L. J., P. 76; 25 L. T. 203; 19 W. R. 1072.

**Two Wills under different Covertures.**—A feme covert made two wills during different covertures, the one in 1848 under one power, and the other in 1857 under another power. The latter will contained a general revocatory clause, but did not refer to the previous will or to the power under which it was made.—Held, that the will of 1848 was entitled to probate. *Joye, In goods of*, 4 S. & T. 214.

**Executors Named—Execution of Will of Realty under Power.**—In the case of a married woman executing a will under a power, the appointment of executors is not sufficient to entitle the instrument to probate, if it disposes only of real estate. *Tomlinson, In goods of*, 6 P. D. 209; 50 L. J., P. 74; 46 L. T. 484; 30 W. R. 61; 46 J. P. 73.

**Arrears of Rent—Personalty.**—A married woman having a power of appointment over real property executed the power in favour of herself. She afterwards made her will, by which she directed (amongst other things) that a portion of the property should be sold to pay legacies, and to erect a memorial window. She also appointed an executor. There were arrears of rent due at the time of her death and subsequently.—Held, that as she possessed the property as separate estate, and had appointed an executor and directed him to pay the legacies, &c., and as the arrears of rent were part of her personal estate, the will was entitled to probate. *Brownrigg v. Pike*, 7 P. D. 61; 51 L. J., P. 29; 46 L. T. 821; 30 W. R. 567; 46 J. P. 360.

**Where Will cannot be Found.**—When a wife has executed a will during coverture with the consent of her husband, and the will is not forthcoming at her death, and no copy can be found, the court will make a grant of probate of the draft of the will limited until the original will, or an authentic copy of the will, is brought into the registry, and limited also to all such personal estate and effects as she had power and a right to dispose of, and has in and by the draft appointed and disposed of. *Trippleton, In goods of*, 35 L. T. 909.

**Deed of Non-Community of Property—Colonial Law.**—A married woman and her husband had their domicile at the Cape of Good Hope, and, in accordance with the laws of that colony, pre-

viously to their marriage, they executed a deed of non-community of property, and such deed was duly registered. The court granted administration to the brother and next of kin of the wife, to the exclusion and without the citation of the husband. *Probart, In goods of*, 36 L. J., P. 71; 16 L. T. 298; 15 W. R. 798.

**Under Power of Appointment.**—By a marriage settlement, property was vested in trustees, as to a portion for A., if she survived her then intended husband; and in case she died in his lifetime, for such person or persons, and for such intents and purposes as she, notwithstanding her coverture, should by will appoint. In the lifetime of her husband, and in express exercise of the power given to her, as of every other power enabling her in that behalf, she duly executed a will. She survived her husband, and died without republishing it.—Held, that the court could not, on motion, make a general grant of probate of such a will. *Wollaston, In goods of*, 32 L. J., P. 171; 9 Jur., N. S. 727; 12 W. R. 18.

A married woman who clearly had power under a settlement to dispose of some part of her property, executed a will purporting to dispose of the whole of it. The court, without deciding whether or not it was a valid disposition of the whole of the property, made a grant of probate, limited to such property as she had power to dispose of. *De Pradel, In goods of*, 1 L. R., P. 454; 37 L. J., P. 2; 17 L. T. 220.

A feme covert, having made her will under a power during coverture, survived her husband, and subsequently died a widow without having republished it.—The court granted a general administration, with the will annexed, to her executor, on the consent of all the next of kin except one who was resident in New Zealand, but required the administrator to give justifying security. *Thorild, In goods of*, 16 L. T. 853.

A. died, leaving a will, whereby he appointed his wife sole executrix and universal legatee. She proved his will, and afterwards married B., and during her coverture made a will in execution of a power vested in her, and appointed B. sole executor. Upon her death, B. took limited probate of her will, and also administration of the rest of her effects.—Held, that B., as representing the whole of his wife's personal estate, was entitled to administration of the unadministered effects of A. *Martin, In goods of*, 3 S. & T. 1; 32 L. J., P. 5; 8 Jur., N. S. 1134; 7 L. T. 766; 11 W. R. 191.

Where a married woman in execution of a power devises real estate only, and names executors "of this my will," she, if she survives her husband, without altering, revoking, or republishing such will, is intestate as regards any property not specifically mentioned therein, and such executors taking nothing jure representationis. *Parkin, In goods of*, 1 S. & T. 465; 29 L. J., P. 47; 5 Jur., N. S. 1366.

**—When Right to Appoint Doubtful.**—When the court is satisfied that a *bonâ fide* question as to the existence of a power enabling a married woman to make a will is intended to or may be raised, it will grant a limited probate of such will, in order to enable the question as to the existence of the power to be determined by the Court of Chancery. *Paglar v. Tongue*, 1 L. R., P. 158.

— **More than One Will.**—*See post*, col. 832.

— **Subsequent Will not reciting Power.**—A married woman executed a will in pursuance of a power therein recited, leaving all the property comprised in the power to her son. By a later will containing no recital of a power and no words of a revocation, she left all her property to her son. She was possessed of property other than that appointed by the first will, on which the second will could operate. Both the wills were included in the probate, as together containing her last will. *Fenwick, In goods of*, 1 L. R., P. 319; 36 L. J., P. 54; 16 L. T. 124.

— **Subsequent Will as to Property not included in Power.**—A married woman, by virtue of powers given to her, which were particularly set out, executed a will in which she appointed three persons executors. She afterwards, by a second testamentary paper, disposed of other property which had been left to her for her separate use. In this she nominated one of the above persons sole executor. Probate was granted of both papers, as together containing her will, to the three executors named in the paper of earlier date. *Morgan, In goods of*, 1 L. R., P. 323; 36 L. J., P. 64; 16 L. T. 181.

— **Scotch Domicil—Will made in English form, but not valid by Scotch Law.**—A married woman, domiciled in Scotland, made a will under a power in the English form, but not valid by the law of Scotland:—Held, that it was entitled to probate. *Hallyburton, In goods of*, 1 L. R., P. 90; 35 L. J., P. 122; 12 Jur., N. S. 416; 14 L. T. 136.

**Under Protection Orders.**—A wife, having been deserted by her husband, obtained a protection order by reason of his desertion. On her death, in the life of her husband, intestate, the court decreed letters of administration, limited to such personal property as she had acquired or become possessed of since the desertion, without specifying of what that property consisted, to be granted to one of her next of kin. *Worman, In goods of*, 1 S. & T. 513; 29 L. J., P. 164; 5 Jur., N. S. 687.

A married woman obtained a protection order for her property on the 12th of April, 1861; she made a will on the 19th, and died on the 24th. The order was not entered with the registrar of the county court till the 24th, being more than ten days after it was obtained:—Held, that the requirement of the 20 & 21 Vict. c. 85, s. 21, as to the entry of the order with the registrar was directory and not imperative, and, on affidavits from the executors that they were ignorant of the husband's place of abode, probate was granted, limited to the property acquired since the date of desertion. *Faraday, In goods of*, 2 S. & T. 369; 31 L. J., P. 7; 7 Jur., N. S. 252.

In order to obtain administration of the effects of a married woman who died intestate, after obtaining a protection order from the court of divorce, it is not necessary that the husband should be cited. *Brighton, In goods of*, 34 L. J., P. 55.

**Wife of Convict.**—A wife of a convicted felon is a feme sole as to her testamentary capacity, and a will made by her whilst her husband is undergoing his sentence is entitled to

probate. *Chward, In goods of*, 4 S. & T. 46; 34 L. J., P. 120; 11 Jur., N. S. 569; 13 L. T. 210.

#### 4. DEAF AND DUMB PERSONS.

Where a testator, who was deaf and dumb, made his will by communicating his testamentary instructions to an acquaintance by signs and motions, who prepared a will in conformity with such instructions, which was afterwards duly executed by the testator, the court required an affidavit from the drawer of the will, stating the nature of the signs and motions by which the instructions were communicated to him, and ultimately refused to grant probate on motion. *Owston, In goods of*, 2 S. & T. 461; 31 L. J., P. 177; 6 L. T. 368; 10 W. R. 410.

And where probate was sought of the will of a testator who was deaf, dumb, and illiterate, the court required evidence on affidavit of the signs by which the testator had signified that he understood and approved of the provisions of the will, before making the grant. *Geale, In goods of*, 3 S. & T. 430; 33 L. J., P. 125; 12 W. R. 1027.

#### 5. PERSONS DYING ABROAD.

(*See ante*, col. 823.)

#### 6. SOLDIERS AND SAILORS.

**In the Case of Soldiers.**—Probate of a will made by a soldier in actual service, signed but not attested, will not be granted unless the signature is proved to be in his handwriting by the affidavits of two disinterested persons. *Neville, In goods of*, 4 S. & T. 218; 28 L. J., P. 52.

It is not sufficient that the affidavits state that the whole paper-writing is in the handwriting of the deceased, but they should in terms state that the signature is in his handwriting. *Ib.*

The form for an affidavit of handwriting given in the rules should be strictly followed. *Ib.*

The rule of court, which directs that the registrars are not to allow probate of the will, or administration with the will annexed, of any obviously illiterate person to issue, unless they have previously satisfied themselves that the will was read over to the deceased before the execution, or that the deceased had at such time knowledge of its contents, applies to a will made by a soldier in actual military service and executed by mark. *Hackett, In goods of*, 4 S. & T. 220; 28 L. J., P. 42.

**Advertisements.**—The court refused to dispense with the usual advertisement in newspapers before presuming the death of a sailor who had been last heard of in 1859, as then about to sail from New Zealand to China in a barque now believed to have been lost. *Atkinson, In goods of*, 7 Ir. R., Eq. 219.

**Sailors.**—A general grant of administration of the effects of a seaman in the navy, who died a bachelor, bastard and intestate, having wages or prize money due to him, will not be granted to the solicitor of the Treasury for the use of the crown, unless the provisions of the 11 Geo. 4 & 1 Will. 4, c. 20, s. 56, have been complied with, those provisions, although they do not in any terms affect the crown, being binding on the

court. *Beran, In goods of*, 1 L. R., P. 1; 35 L. J., P. 25; 11 Jur., N. S. 982; 13 L. T. 608; 14 W. R. 147. *See also cases ante*, col. 802.

#### 7. FELO DE SE.

A party, after having executed her will, committed suicide by taking poison, and a coroner's jury returned a verdict of *felo de se*:—Held, that the will was entitled to probate. *Bailey, In goods of*, 2 S. & T. 156; 31 L. J., P. 178; 7 Jur., N. S. 712.

#### 8. WHERE THERE ARE SEVERAL INSTRUMENTS.

##### a. Probate Granted to more than one Will.

**No Executors appointed in Later one.**—A testator left two testamentary papers, in the earlier of which was an appointment of executors. In the later one he disposed of his whole property in a manner at variance with the dispositions made in the earlier paper, but no executors were appointed, nor was the previous appointment revoked. The court included both papers in the probate. *Lewis, In goods of*, 25 L. T. 510; 19 W. R. 1038.

A person left two testamentary papers, and the bequests of the second were inconsistent with those of the first. The second paper, however, did not appoint any executors, and did not revoke the appointment contained in the first. The court granted probate of both papers as together constituting his will. *Griffiths, In goods of*, 2 L. R., P. 457; 26 L. T. 780; 20 W. R. 425.

A testator, by a will fully disposing of his property, bequeathed various legacies, appointed executors, and named a residuary legatee; and afterwards made another will, beginning "This is my last will," repeating some of the legacies in the same words, altering others, and making additional ones, but naming no executor or residuary legatee:—Held, that the two documents were to be taken together as his last will and testament. *Leslie v. Leslie*, 6 Ir. R., Eq. 332.

**Identity of Testamentary Papers.**—A testatrix left a will revoking previous wills, and in which, after reciting that by two deeds of certain dates made in exercise of a power under her marriage settlement she had settled certain properties in a certain way, she confirmed the deeds. No such deeds existed, but two testamentary papers similar in dates and substance were found. The court held, that the proof of identity was sufficient, and incorporated the two papers in the probate. *Hastings, In goods of*, 26 L. T. 715; 20 W. R. 616.

**One English and One Colonial.**—Where a testator left two wills, one disposing of his property in Australia, and the other of his property in England, on the same trusts, the court held that it was unnecessary to incorporate the Australian will with the English will, but directed an affidavit of its contents to be attached to the probate. *Cole, In goods of*, 20 L. T. 758.

A testator died leaving two wills, one limited to property in England, the other to property in Tasmania, and he appointed different executors in each. The court granted probate of both papers to the executors named in the English will. *Harris, In goods of*, 2 L. R., P.

83; 39 L. J., P. 48; 22 L. T. 630; 18 W. R. 901.

Three duly executed wills bore the same date, two of which purported to dispose of the residue. It was proved that the first was intended to apply only to property in Canada, and that the two last were intended to apply only to property in England. The three papers were admitted to probate. *Nickalls, In goods of*, 4 S. & T. 40; 34 L. J., P. 103; 13 W. R. 1047.

**In Form of Deeds.**—A person executed on the same day three indentures, described as deeds of gift, by which he assigned to trustees all his property for the benefit of his three children:—Held, that, as it appeared from the contents of such documents that they were to take effect only on the death of the deceased, they ought to be admitted to probate as together containing the will of the deceased. *Morgan, In goods of*, 1 L. R., P. 214; 35 L. J., P. 98; 15 L. T. 894; 14 W. R. 1022; *S. P., Robson, In re, Emley v. Davidson, ante*, col. 816.

**Under Power of Appointment.**—G., a widow, by a will dated 25th February, 1862, bequeathed certain specified property, over which she had a power of appointment under her marriage settlement, between her four sons, R., L., W. and G., and made R. sole executor. By another testamentary paper, dated 28th October, 1862, she left all the property of which she might die possessed between her three sons, L., W. and G., and appointed W. sole executor:—Held, that both papers ought to be included in the probate. *Graham, In goods of*, 3 S. & T. 69; 32 L. J., P. 113; 8 L. T. 610; 11 W. R. 638.

A married woman having a power to appoint by will under her marriage settlement, executed on the same day two instruments, the first purporting to be a deed of gift to her sister of all her property; the second, after reciting the contents of the first, expressing a wish that her sister should pay certain bequests out of the property. These two papers were handed by the deceased after their execution, inclosed in an envelope, to the sister, in whose custody they remained till her death. It was shewn that the deceased had afterwards spoken of these papers as constituting her will, and that the property referred to in them had remained under her control up to her death:—Held, that the papers were testamentary, and entitled to be proved. *Webb, In goods of*, 3 S. & T. 482; 33 L. J., P. 182; 10 Jur., N. S. 709; 11 L. T. 277.

**No Revocation Clause in Later Will.**—A mother executed a will, in which, after disposing in legacies of a small part of her property, she left the rest to her daughter absolutely, and she appointed her executrix. She subsequently executed another instrument, which purported to be her last will and testament, but had no revocatory clause. By this she gave the whole of her property to her daughter for life, and made her whole and sole executrix. On the death of the daughter she gave legacies to a larger amount than in the first will, but did not dispose of the residue:—Held, that the two instruments ought to be admitted to probate as together containing the will of the deceased. *Petchell, In goods of*, 3 L. R., P. 153; 43 L. J., P. 22; 30 L. T. 74; 22 W. R. 353.

**Administration with Will Annexed as to one**

**Revoked—Granted as to Both.**—A married lady, the absolute owner of property and the donee of a power to appoint a trust fund to the children of her marriage, appointed the fund, by a will of the 11th of January, 1864, in favour of five of the children, among them R. H. B., and made her husband residuary legatee and executor. On the 24th of December, 1873, she made another will disposing of her own property, not referring to her power, and appointing R. H. B. residuary legatee. She died in 1879, and administration with the will annexed was granted to R. H. B. by a district registry without referring to the will of 1864; the husband died in 1880 without having proved the will of 1864, but having appointed R. H. B. executor, who obtained probate. The court on the application of R. H. B. revoked the administration with the will of 1863, and granted him administration with both wills annexed. *Bland, In goods of*, 9 L. R., Ir. 53.

**Similar except as to Dates.**—A testator executed two testamentary papers of different dates, but otherwise exactly similar. Each purported to dispose of all his property, and contained charitable bequests affecting land. The testator lived for more than three months after the execution of the first paper, but died within three months of the execution of the second:—Held, that the papers together constituted one will, and should be admitted to probate. *O'Leary v. Douglass*, 1 Ir. L. R. 45.

**Letter revoking prior Will, but not disposing of Residue.**—The instructions for a will were reduced to writing, and the testator duly executed the paper pending the preparation of the more formal instrument. In this paper the residue was disposed of. On the following day the testator executed a second and more formal will. It did not dispose of the general residue, and it expressly revoked all former wills. In both papers the same executors were appointed. All parties consenting, and the papers not being entirely inconsistent with one another, the court granted probate of both documents as together constituting the will of the deceased. *Robinson v. Clarke*, 2 P. D. 269; 47 L. J., P. 17; 39 L. T. 43.

**Several Papers consistent with each other.**—When several testamentary papers are found after a death, each consistent in all important respects with the others, the whole will be taken to form one will, and will be admitted to probate as such even where one or more may be irregular in form and imperfect in attestation. *Rotton, In goods of*, 35 L. T. 518.

**Second giving Additional Legacies.**—A testatrix duly executed a holograph will. Four years afterwards she signed her name to a paper directing certain additional legacies to be given. This paper was annexed to the original will by a pin, and her signature was attested by two witnesses who placed their own signatures on the back of the will:—Held, that the second document was duly executed and attested, and probate was granted of the will as altered. *Braddock, In goods of*, 1 P. D. 433; 45 L. J., P. 96; 24 W. R. 1017.

#### b. Probate Granted to one only.

#### Different Residuary Legatees—No Revocation

**Clause.**—A party duly executed two testamentary instruments, of different dates, appointing the same persons executors, but nominating different residuary legatees. The later instrument, though it did not in terms revoke the former, was alone admitted to probate, as his last will. *Pepper v. Pepper*, 5 Ir. R., Eq. 85.

**Words "Last Will."**—The words "last will," contained in a testamentary instrument, are not, of themselves, sufficient to constitute it the last will of the testator. *Ib.*

**Internal Evidence as to which last executed.**—Two letters, lettered A and D, of even date, similar in substance, but differing in language (will D being on the face of it an amended copy of will A). In the absence of extraneous evidence to determine which was last executed, the court acted on the internal evidence afforded by the wills themselves, and granted probate of will D alone. *Stephens, In goods of*, 22 L. T. 727; 18 W. R. 528.

**When Second does not refer to First.**—A testator, having executed a will, completely disposing of his own property, and also of other property over which he had a disposing power, subsequently, and after some changes had taken place in the investment of the property, and having the former will before him, executed a later will complete in form, having no word of a codicillary character, and no reference to the former—by which he fully disposed of his own property, but not of that over which he had the power, although on comparing the two together it was plain that he intended to dispose of both; the effect of admitting the former will to probate would be the retention, contrary to the intention of the testator, of a certain appointment:—Held, that the latter will alone should be admitted to probate. *Shiel v. O'Brien*, 7 Ir. R., Eq. 64.

**Where Second could not be found.**—A testator made a will in 1831. A few years before his death in 1863, he produced to two acquaintances a paper dated 4th June, 1847, which he alleged to be his will, and got one of them to make a copy of it. This paper was in substance the same as the will of 1831. It had his name and the names of two attesting witnesses at the bottom of it, but neither of the persons to whom it was shewn could speak to any of the signatures. The copy which he signed in their presence was forthcoming, but the original document could not be found. The court held that there was no evidence of its existence as a will, and granted probate of the will of 1831. *Gray, In goods of*, 39 L. J., P. 42; 22 L. T. 489; 18 W. R. 900.

C. made a will on the 30th April, 1857, in which he devised to H. a freehold house for life, and the residue of his real and personal estate to C., making H. and C. executors. In September, 1857, he made a codicil "to my last will of 30th April, 1857," by which he left H. 200*l.* in addition to the devise in the will, and left other specific money legacies. On 13th February, 1858, he made another codicil referring to his will of 1857, and bequeathed a leasehold house and the furniture therein to H., and otherwise confirmed his will. On 3rd June, 1858, he made a will identical with that of 1857, except the substitu-

tion of F. for C.; at the same time he re-executed the codicil of September, 1857, which then purported to be a codicil "to my last will, dated 3rd June, 1858." On C.'s death, in March, 1862, the will of April, 1857, and the two codicils, were found in an envelope sealed and indorsed by C., "Sealed 13th June, 1860—P. F. M'C." The will of 1858 was not forthcoming, though it had been in the testator's possession. There was evidence tending to shew that before the beginning of 1860 the deceased intended to exclude F. and reinstate C., and that he had destroyed the will of 1858. In June, 1860, the deceased wrote a letter to H., confirming what he had already done by will for her, which letter was signed by him and attested. The court granted probate of the last will of C., as contained in the letter and the papers found in the sealed envelope. *McCabe, In goods of*, 2 S. & T. 474; 31 L. J., P. 190; 6 L. T. 474; 10 W. R. 848.

### c. Codicils and Wills.

**Reference to prior Will by Mistake.]**—A. executed a will on February 13th, 1864, and another on June 24th, 1865, revoking all former wills. He afterwards executed a codicil which purported to be a codicil to his will dated February 13th, 1864, and after devising some property, confirmed his will. The solicitor who prepared the codicil had inserted the date of the first will under the supposition that it was the last will. There was nothing in the codicil which shewed an intention to revive the first will:—Held, that the second will and codicil were entitled to probate. *Anderson, In goods of*, 39 L. J., P. 55; 22 L. T. 308.

A testator executed a will in 1877, in which he directed the residue of his real and personal property to be sold and divided between his six children, to each of whom he had made certain devises and bequests. In 1878 he executed another will, in which he directed all his property real and personal to be realized and divided among his six children, directing further that certain arrears of accrued rent should be deducted from the shares of two of them. In the year 1880 his solicitor prepared a codicil by his direction which should, if rightly drawn as applying to the latter will, have deprived those two of his children of all participation in this property. The solicitor, by an error, drew the codicil as applicable to the will of 1877, making in it no mention of the will of 1878:—Held, that to render the testamentary papers intelligible, they must all be included in the probate. *Stedham, In goods of*, or *Dyke, In goods of*, 6 P. D. 205; 50 L. J., P. 75; 45 L. T. 192; 29 W. R. 743; 45 J. P. 784; 46 J. P. 40.

**Mistake—Inconsistent Attestation Clause.]**—In an attestation clause of a third codicil, it was stated by mistake that the first codicil was cancelled:—Held, that an attestation clause forms no part of a codicil, and that therefore the first codicil must be admitted to probate. *Atkinson, In goods of*, 8 P. D. 165; 52 L. J., P. 80; 31 W. R. 660; 47 J. P. 440.

**Revocation of Will—Revival by Codicil.]**—The testator made a will on the 13th of March, 1876, and a second will on the 29th of April, 1876, by which he revoked the former will, and made some changes in the disposition of his

property, and a codicil, dated the 9th of June, 1880, commencing thus, "I make and publish this codicil to my will, dated 13th March, 1876. I cancel the gift of 400*l.* willed to my son, W. J., having paid him that amount since I made said will:—Held, that the codicil revived the first will, and that the three documents should be admitted to probate. *Edge, In goods of*, 9 L. R., Ir. 516.

**Codicil not revoking last Will as intended.]**—A testatrix being desirous to revive a will and codicil which had been revoked by a will of later date, sent them to her solicitor, in order that he might prepare a new will for that purpose. To save time he directed his clerk simply to re-copy them, which the clerk did, including the reference by date of the codicil to the first will. In this state the will and codicil were executed on the same day:—Held, that as there was no distinct intention expressed in the codicil to revoke the last will, the probate should be granted of it, together with the codicil. *Jace, In goods of*, 2 P. D. 111; 46 L. J., P. 30; 36 L. T. 519; 25 W. R. 396.

**Mistake in Date of Will.]**—A testatrix left a will, dated 3rd June, 1868, and three codicils. The second codicil referred to a will dated April, 1870. No such will could be found, and the only evidence of its existence was an entry in the bill book of her solicitor. The court held that there had been a mistake in the date, and granted probate of the codicil, as being a codicil to the will of 1868. *Dent, In goods of*, 31 L. T. 552; 23 W. R. 417.

**Misrecital in Codicil—Inconsistent Dispositions—Effect given to Later Disposition.]**—The mere misrecital of a will by a codicil is inoperative, and will not modify the dispositions of the will; but an erroneous recital of a will, coupled with or followed by a clear indication of the testator's intention to make some modified or different disposition, inconsistent with the dispositions of the will, is operative to modify or alter the earlier gifts. *Margitson, In re, Haggard v. Haggard*, 48 L. T. 172; 31 W. R. 257—C. A. Affirming 46 L. T. 807; 30 W. R. 920.

A testator by his will gave to his daughter (in events which happened) an estate tail in his real property, and an absolute estate in his personal property. By a codicil, after reciting that his daughter would take an estate for life in his property, with remainder to her issue, he directed that the life estate should be for her separate use, that she should have a power of appointing a life estate to any husband who should survive her, and that if she should have more than one son, and her eldest son should inherit property from other sources of a certain value, then her second son should succeed to the property given by the will, with certain gifts over:—Held, that the estates given by the will were modified by the codicil, and that the daughter was entitled to a life estate only in the real and personal property of the testator, with remainder by implication to her eldest son absolutely, subject to the appointment by her of a life estate in favour of a husband, and to a shifting use in favour of a second son. *Id.*

**Three Codicils on Three Separate Papers—One only Signed.]**—A testatrix wrote three

separate lists of legacies on three separate sheets of paper, the first of which was headed "Codicil to the will of S. P.," and signed all three sheets in the presence of the witnesses, but they attested her signature to the first sheet only. There being nothing in the contents of the three papers to connect them with each other, and the first which was attested being complete in itself, the court refused to grant probate to the two which were unattested. *Pearse, In goods of*, 1 L. R., P. 382; 36 L. J., P. 117; 16 L. T. 853.

**Misdescription of Codicil.]**—A testator died leaving a will revoking all former wills. He subsequently executed a codicil, which by mistake he described as a codicil to a previous will: the court admitted the codicil to probate. *Law, In goods of*, 21 L. T. 399.

**Codicil Revoking other Codicils.]**—At the foot of a deed to which a woman was a party, but which disposed of no property after her death, the following document, duly executed as a will, was written:—"I do add unto my will this codicil, hereby revoking any other codicil or codicils heretofore made by me. I constitute and appoint my son A. G." (a trustee under the deed) "my sole and only trustee and administrator under my will." When she executed this document, she said, pointing to the deed, "This is my will:—Held, first, that the deed, as it was not of a testamentary nature, was not entitled to probate. *Hubbard, In goods of*, 1 L. R., P. 53; 35 L. J., P. 27.

Held, secondly, that as there was no will A. G. was not executor. *Ib.*

Held, thirdly, that as the codicil, though it disposed of no property, revoked other codicils, administration with it annexed should be granted to the next of kin. *Ib.*

D. executed a will containing certain bequests, and subsequently a codicil purporting to be a codicil to that will, the provisions of which were in no way dependent upon those of the will, and in all other respects he confirmed the will. Afterwards, being offended at persons benefited by the will, he cancelled it *animo revocandi*. The court refused to grant administration with the codicil annexed upon motion whereby the parties interested in case of intestacy had not been cited. *Dutton, In goods of*, 3 S. & T. 66; 32 L. J., P. 137; 8 L. T. 609; 11 W. R. 1063.

**Identification of Codicil.]**—A testator duly executed a will and five codicils. The first executed codicil, dated the 25th of March, 1848, commenced,—"This the second codicil to the will of A.;" and ended, "In all other respects I confirm my said will, save only so far as the same is unrevoked by my first codicil thereto, and I do hereby confirm the said codicil." It did not appear that the testator had executed any codicil to his will prior to this one, described as the second codicil to his will; but his solicitor, after the date of the will, and before the date of this codicil, forwarded to him for his perusal, a draft codicil, which, when he prepared this codicil, he erroneously concluded had been executed, and therefore described it as a second codicil. The draft codicil was, after the testator's death, found tied up in a parcel containing the will and five executed codicils:—Held, that the draft codicil was not sufficiently identified, as the paper intended to be referred to by

the deceased in his first-executed codicil, and could not be admitted to probate. *Allnutt, In goods of*, 3 S. & T. 167; 33 L. J., P. 86; 9 Jur., N. S. 581.

**Revocation of Will—Revokes Codicil.]**—T. M. B. having executed a codicil at the foot of his will, cut off his signature to the will. Upon proof that he thereby intended to revoke the codicil the court held that the codicil was also revoked. *Bleckley, In goods of*, 8 P. D. 169; 52 L. J., P. 102; 31 W. R. 171; 47 J. P. 663.

**— By Codicil.]**—K., by his will dated in 1862, after reciting that he had two children, namely, his son F. and his daughter M., and that under a codicil of his father he had power, by deed or will to appoint to his children, in such proportions as he might think fit, the principal share wherein he took a life interest in the residuary estate of his father, in exercise of such power directed and appointed that such share should, from and after his decease, go and belong absolutely to his daughter M., but in case she should die in his lifetime, then to his son F. The testator's daughter was married to B. By a settlement dated in 1866, and made upon her marriage, it was declared that K., in consideration of the marriage, appointed his daughter to receive the property over which he had a power of appointment, only reserving to himself the faculty of disposing in favour of his wife of the reversion of 10,000 francs during her life. K., by a codicil to his will, dated in 1871, and made in France, where he was then residing, stated as follows:—"When I married my daughter . . . I expressed the desire of leaving to my wife . . . a small revenue at my death . . . but not having it in my power to do so, my daughter and her husband . . . proposed to me as follows: that if I would consent to leave to them the whole of the sum of my share of the residue of my father's estate . . . which I have power to dispose of in favour of my children, that they would take the engagement at my death to have placed in my said wife's name, for her life, the sum of 10,000 francs . . . and at my wife's death the said sum to return to my said daughter . . . In the case that my said daughter and . . . her husband should respect my memory and their signature, then it is my will and desire that my daughter and her husband should and may have the whole of the sum of my aforesaid share." This codicil was written and signed by the testator, but was unattested. It was, however, admitted to probate under 24 & 25 Vict. c. 114:—Held, that the appointment under the settlement and codicil were invalid, as being respectively frauds upon the power; that neither the settlement nor the codicil operated so as to revoke the will of 1862; but that the bargain which had been made had, in equity, the effect of preventing the appointee from taking under the appointment in the will, and consequently the fund must go as in default of appointment. *Kirwan's Trusts, In re*, 52 L. J., Ch. 952; 49 L. T. 292.

**Codicil—Appointment of Additional Executor.]**—A testator appointed his wife, his brother, and two sisters executors by his will, and his wife and a fresh executor joint executors by a codicil. All executors, with the exception of the wife and

one sister of the testator, renounced. The wife took out probate and died while the estate was being administered. Upon an application alternatively to grant probate to the sister who had not renounced, or to allow the joint executor appointed by the codicil to retract his renunciation and prove:—Held, that the appointment of executors by the codicil did not revoke that of those under the will, and that the executrix appointed by the will who had not renounced was entitled now to prove, but the executor who had been appointed by the codicil and had renounced could not be allowed to withdraw the renunciation and prove. *Elmsley, In goods of*, 48 L. T. 125.

**Codicil to Revoked Will.**—When a will and a codicil have been in existence, and the will has been revoked, the court will not grant probate of the codicil unless it is satisfied that the testator intended it to operate separately from the will. *Greig, In goods of*, 1 L. R., P. 72; 35 L. J., P. 113; 13 L. T. 680.

**Will and Codicil improperly attested.**—A. signed her will below the signatures of the attesting witnesses, but before they signed. She afterwards executed a codicil, but signed it after the witnesses who attested it, though on the same occasion. The will was held entitled to probate, but the codicil was not. *Hoskins, In goods of*, 32 L. J., P. 158.

**Probate of Will and Part of Codicils.**—A testator left a will and six codicils. The will and first two codicils were in the possession of the executor in England. The other codicils were in India, and probate of them had been granted by the court at Calcutta, but no exemplification or authentic copies of them had been sent to this country. It being for the benefit of the estate that the executor in England should be at once qualified to act, the court decreed to him probate of the will and two codicils in his possession, reserving power to him to prove the other codicils when they reached England, and he filing an undertaking to do so. *Roberts, In goods of*, 3 L. R., P. 110; 42 L. J., P. 63; 28 L. T. 913; 21 W. R. 824.

**Codicil confirming Will.**—When a testator by a codicil confirms his will, the will, together with all previous codicils, is taken to be confirmed. *Green v. Tribe*, 9 Ch. D. 231; 47 L. J., Ch. 783; 38 L. T. 914; 27 W. R. 39.

Where a prior codicil has a proper force of its own, the mere fact that a testator in a subsequent codicil describes the will by reference to its original date is not sufficient to exclude the inference that the will referred to is the will as modified by the prior codicil. *Id.*

A will or a codicil, containing a devise of real estates, but not duly witnessed, was held good if confirmed by a subsequent codicil, having the proper attestation, though the latter document was in no way annexed to the will or prior codicil, and though the attesting witnesses to the latter codicil did not see the former one or the will. *Utterton v. Robins*, 1 A. & E. 423.

Before 7 Will. 4 & 1 Vict. c. 26, a codicil was duly executed and attested, and expressly referred to in an unexecuted will on the same paper:—Held, that such execution gave effect to the will, and that it thereby became a good will of

lands. *Doe d. Williams v. Evans*, 1 C. & M. 12.

The rule, that a codicil confirming a will makes the will for many purposes to have the date of the codicil, is subject to the limitation that the intention of the testator be not defeated thereby. *Doe d. Biddulph v. Hole*, 15 Q. B. 848; 20 L. J., Q. B. 57; 15 Jur. 13.

Though a codicil for certain purposes confirms a will, and brings it down to the date of the codicil, it does not necessarily make the will operate as if it had been originally made at the date of the codicil. *Hopwood v. Hopwood*, 7 H. L. Cas. 728; 5 Jur., N. S. 897.

**Implied Revocation of Will.**—The fact that a will is found with a codicil in an envelope, indorsed as containing the codicil only, will not raise any presumption that the will was not meant to take effect. *Bellamy, In goods of*, 14 W. R. 501.

**Implied Revocation of Intermediate Codicil.**—A testator by will gave legacies to three of his daughters, and devised and bequeathed his residuary real and personal estate upon trusts for his wife and children. By a first codicil in 1878 he revoked one of the legacies in his will and increased another, concluding, "In all other respects I confirm my said will." By a second codicil, after reciting that he was desirous of altering the residuary devise contained in his will, he made a specific devise, and in all other respects confirmed his will. He afterwards made a third codicil, by which, after referring to his will by date and reciting a promise to that effect, he directed his trustees to grant an underlease of a house to his daughter-in-law, and gave his wife a pecuniary legacy in addition to the benefit she derived under his said will, and concluded, "In all other respects I confirm my said will except as altered by a certain codicil made thereto in 1878, whereby I revoked a legacy to my daughter Mary:—Held, that the words of confirmation in the first and third codicils were to be read as meaning that the testator did not intend to alter his general testamentary dispositions further than in the specific way mentioned in those codicils; and that the devise in the second codicil being clear, no intention to revoke it had been shewn with sufficient clearness to enable the court to reject that devise. *Follett v. Pettman*, 23 Ch. D. 337; 52 L. J., Ch. 521; 48 L. T. 865; 31 W. R. 779.

**Evidence—That two Codicils are one.**—At the death of a testator two copies of his will were produced, one of which had been retained by himself, the other deposited with his bankers; each with a codicil containing the same gift in the same words, but of different dates, and attested by different witnesses. Probate having been granted of the duplicate will and of the two codicils:—Held, that evidence by one of the attesting witnesses to one of the codicils was admissible for the purpose of shewing, from the circumstances attending the execution, that the two codicils were not two but one instrument, and accordingly that the legatee therein named was entitled to one legacy only. *Hubbard v. Alexander*, 3 Ch. D. 738; 45 L. J., Ch. 740; 35 L. T. 52; 24 W. R. 1058.

— **Parol.**—A person duly executed a paper

which commenced, "I hereby make a free gift to," &c. The court admitted parol evidence to explain his intention, and being satisfied therefrom that he intended the operation of such paper to be dependent on his death, granted probate of it as a codicil to his will. *Robertson v. Smith*, 2 L. R., P. 43; 39 L. J., P. 41; 22 L. T. 417.

T. executed a will and three codicils. He subsequently executed a fourth codicil, in which he directly and absolutely revoked the three previous codicils. He afterwards executed a fifth codicil, in which he confirmed his will and four codicils:—Held, that there was sufficient ambiguity on the papers to allow of the introduction of parol evidence; that that clearly shewed that the error had been made by the copying clerk, and that consequently probate would be granted of the will, and of the fourth and fifth codicils only. *Thomson, In goods of*, 35 L. J., P. 17; 11 Jur., N. S. 960.

#### 9. INCORPORATION OF UNATTESTED AND DETACHED PAPERS.

**Principle of Admission.]**—An unattested paper, which would have been incorporated in an attested will or codicil, executed according to the Statute of Frauds, is now in the same manner incorporated, if the will or codicil is executed according to the requirements of the 7 Will. 4 & 1 Vict. c. 26, s. 9. *Allen v. Maddock*, 11 Moore, P. C. C. 427.

Where there is a reference, in a duly-executed testamentary instrument, to another testamentary instrument imperfectly executed, but by such terms as to make it capable of identification, it is necessarily a subject for the admission of parol evidence, and such parol evidence is not excluded by 7 Will. 4 & 1 Vict. c. 26. *Ib.*

If the parol evidence satisfactorily proves that, in the existing circumstances, there is no doubt as to the instrument referred to, it is no answer that by possibility circumstances might have existed in which the instrument could not have been identified. *Ib.*

A married woman, having power under a settlement to make a will, in 1851 made a testamentary instrument in her own handwriting, which she intended to operate as a will, but which was not attested according to the requirements of 7 Will. 4 & 1 Vict. c. 26, s. 9. In 1856 she duly executed a codicil, which was headed, "This is a codicil to my last will and testament." This codicil contained no reference to the testamentary paper of 1851, which was not produced at the time the codicil was executed, but was found at her death in a trunk in her room in her residence, enclosed in a sealed envelope, on which was indorsed, "Mrs. Anne Foote's will." The codicil was found in a drawer in her bed-room. No other will or testamentary paper was found:—Held, first, that as there was a distinct reference in the codicil to a last will and testament, and as no other will had been found, the testamentary paper of 1851 was, by parol evidence, sufficiently identified as the last will referred to by the codicil of 1856. *Ib.*

Held, secondly, that, though informally executed, the testamentary paper of 1851 was incorporated with and made valid by the duly-executed codicil of 1856, and probate was granted of both papers as together containing the last will and codicil of the testatrix. *Ib.*

The court will not extend the principle of incorporation of law as laid down in the above case. *Grees, In goods of*, 1 S. & T. 250; 28 L. J., P. 18; 7 W. R. 86.

**Duty of the Court of Construction in regard to.]**—It is the duty of the court of construction to decide whether a document merely omitted from probate is incorporated or not, and, if incorporated, it is of equal efficacy with the rest of the will both as to real and personal estate. *Watson v. Arundell*, 11 Ir. R., Eq. 53.

**Document must be referred to in Will.]**—L. signed her name to a testamentary paper, but not in the presence of two witnesses, nor did she acknowledge her signature in their presence. She afterward duly executed another paper, in which she nominated A. executor, and empowered him to draw her money and employ it for her after her decease in all things necessary. The first paper was lying before her at the time she executed the latter, and she placed both of them in one envelope, and delivered it to A., in whose possession it remained until the death of the deceased:—Held, that the first paper was not so referred to in the latter; that it could be incorporated with it, or admitted to probate. *Luke, In goods of*, 34 L. J., P. 105; 11 Jur., N. S. 397.

A person executed a will on the first side of a sheet of paper; on the back of the will was a codicil, to which the signatures of the deceased and two witnesses were attached, but which had not been executed in accordance with the requirements of the statute. Below this codicil, and partly on the third side of the sheet of paper, was another codicil, duly executed. In this last document there was no other reference to the first codicil than that a specific legacy given in such first codicil was revoked, the legatee's name being misstated:—Held, that as there was a reference, although in erroneous terms, to the contents of the first codicil in the one duly executed, and they were on the same paper, the court would grant probate of both as incorporated. *Widdrington, In goods of*, 35 L. J., P. 66; 14 L. T. 369; 14 W. R. 774.

**— So that it can be Identified.]**—In order that an unattested paper may be adopted as part of a duly-attested will, it must be referred to by the will in such a manner as shall, with the assistance of parol evidence when necessary and properly admissible, leave no doubt of its identity. *Diokinson v. Stidolph*, 11 C. B., N. S. 341.

In order that an unexecuted paper writing may be incorporated, it must be so described in the will as to leave no doubt in the mind of the court that it is the paper writing referred to. *Brewis, In goods of*, 3 S. & T. 473; 33 L. J., P. 124; 10 Jur., N. S. 593.

A testatrix wrote a letter, addressed to her nephew, in which she gave directions as to her funeral, and as to the distribution of her property. She signed it, but not in the presence of witnesses, and inclosed it in a sealed envelope. On a subsequent occasion, by the advice of A., the following words were written on the outside of the envelope, signed by the deceased, and duly attested, "I confirm the contents written in the inclosed document, in the presence of:"—Held, that the words of this confirmation were sufficiently clear

to allow evidence to be admitted to identify the document referred to, and that the evidence so admitted was sufficient for its purpose. *Almonino, In goods of*, 1 S. & T. 508; 29 L. J., P. 46; 6 Jur., N. S. 302.

A testator left a will revoking all former wills, by which he directed certain articles to be distributed by the executors according to written instructions affixed to his will. No such instructions were found affixed to the will, but a paper was found duly executed, which had been referred to in a former will, and which contained instructions to his executor. The court refused to incorporate it with the existing will, on the ground that it did not correspond to the description therein, and also refused to admit it to probate independently, as it had been revoked by the last will. *Gill, In goods of*, 2 L. R., P. 6; 39 L. J., P. 5; 21 L. T. 399.

But where a duly-executed paper refers to a written document then existing in such terms as to enable the court to identify the latter document, probate will be granted of both documents, as containing the will of the testator. *Norris, In re*, 14 W. R. 348.

When a will refers to a paper, such paper cannot be incorporated with the will, unless it is clearly identified with the description of it given in the will, and is shewn to have been in existence at the time the will was executed. Both these matters must be established, and though there may be no doubt about the former, unless the latter also is proved, there can be no incorporation of the paper with the will. *Singleton v. Tomlinson*, 3 App. Cas. 404; 38 L. T. 653; 26 W. R. 722.

Parol evidence is not admissible for the purpose of incorporating in a duly-executed testamentary paper, papers not duly executed, unless the duly-executed paper refers to some written document as then in existence, and describes it in such a manner as to enable the court to ascertain its identity. *Watkins, In goods of*, 1 L. R., P. 19; 35 L. J., P. 14; 12 Jur., N. S. 12; 13 L. T. 445.

#### —What is Sufficient Identification.]—

A testamentary instrument was written on the first three pages of a sheet of paper. The portion on the first page only was duly executed, and the only reference it contained to any other paper was the following clause:—"I bequeath the following sums to my sons and daughters hereunder named, and I declare the under-mentioned sons and daughters to be my executors." No names were mentioned in the first page, but on the second and third pages there were unexecuted bequests, and the names of sons and daughters:—Held, that there was not a sufficient reference in the duly-executed portion of the paper to render parol evidence admissible for the purpose of incorporating in it the portion not executed. *Ib.*

S. duly executed a will and two codicils. The will contained the following clause: "I direct my executors to distribute" . . . all pictures, books and other "articles according to any list or lists signed by me." A paper was found, without any date, but which was executed before the second codicil, headed "list referred to in my will and codicils." By this paper a picture was given to a nephew; wearing apparel, one year's wages, and mourning to a servant, and directions to the executors as to the inscriptions on the

tombstone. The second codicil commenced: "This is a codicil to the last will and testament, with other codicils annexed, of me. . . . I hereby confirm my said last will, with all the codicils thereto duly signed by me:—Held, that the unattested paper was sufficiently identified and referred to in the will, and, having been signed before the execution of the codicil, was entitled to be admitted to probate as a portion of the will confirmed by the codicil. *Stewart, In goods of*, 3 S. & T. 192; 32 L. J., P. 94; 9 Jur., N. S. 417; 11 W. R. 540.

A testatrix left a will by which a portion of her property was to be disposed of according to instructions contained in "any document or documents accompanying this my will." Three letters were found along with the will, one dated anterior to the will, another bearing date before the will, but evidently altered after, and the third written after the execution of the will:—Held, that none of the documents were sufficiently identified as being in existence when the will was executed, and probate refused of all three. *Yockey, In goods of*, 29 L. T. 699.

—Onus of Proof.]—The onus of establishing existence and identification lies on the person who seeks to make the paper admissible for such a purpose. *Singleton v. Tomlinson, supra.*

#### Necessity of Existence of Papers referred to.]

—A. inclosed and sealed up in an envelope two sheets of paper, on which she had in writing expressed her wishes as to the disposal of moneys belonging to her, and of her jewellery and other personal effects. These papers were not duly executed. On the inner side of the envelope she wrote as follows:—"It is my wish for my husband to administer the moneys; and for the smaller bequests B. will attend to them." This memorandum was signed by A., in the presence of two witnesses. The only surviving witness deposed that after the execution two similar sheets of paper to those found therein were placed and sealed up in the envelope by A., but that she could not further identify them. The envelope had been opened after the execution:—Held, that as the words in the memorandum did not refer to any paper as existing, or if so, not in such terms as to enable the court to identify it; and as the evidence did not shew that the papers found in the envelope were the same as those placed there after the execution by A., the papers so found inclosed were not entitled to probate, and that without them the memorandum was not testamentary. *Straubenzer v. Monck*, 3 S. & T. 6; 32 L. J., P. 21; 8 Jur., N. S. 1159; 11 W. R. 109.

When a will referred to a paper, as not then existing, the court refused to incorporate the paper with the will, although the paper and the will were written on the same day. *Sims, In goods of*, 17 L. T. 619; 16 W. R. 407.

When a will, if read as speaking at the date of the execution of the codicil, contains language which would operate as an incorporation of a document to which it refers, such document, although not in existence until after the execution of the will, is entitled to probate by force of the codicil. But where the reference in the will was to a future document, and the language of the codicil, in which the reference was repeated, was ambiguous, and might be read as pointing either to an existing or future document,

the court refused to incorporate unexecuted papers written by the testatrix between the date of the will and codicil. *Roid, In goods of*, 38 L. J., P. 1; 19 L. T. 265.

A testatrix left the residue of her property to trustees, save and except such articles of furniture in her house at the time of her death "as may be ticketed or may be described in a paper in my own handwriting, to shew my intention regarding the same." The testatrix, at the time she instructed her attorney to draw a will, produced to him two lists, which she informed him were the papers she intended to refer to, but they were not at the time the will was executed shewn to the witnesses:—Held, that as the will did not describe the papers as being then in existence, the court could not receive parol evidence of the fact, and could not allow them to be incorporated in the probate. *Sunderland, In goods of*, 1 L. R., P. 198; 35 L. J., P. 82; 14 L. T. 741; 14 W. R. 971.

**Reference in Will—To Lists or Schedules.]—**

A testatrix having directed her executors in her will to distribute certain articles according to any list or lists signed by her, and having, prior to the execution of a second codicil, signed a list to which no reference was made in the second codicil, the court allowed the list to be included in the probate. *Stewart, In goods of*, 4 S. & T. 211.

A testator empowered his executors to pay his debts and funeral and testamentary expenses out of the proceeds of his property, and after reciting that he was possessed of landed and chattel property, "as stated in the annexed schedule," directed his executors to sell his property. The will was written by the testator himself on three sides of a sheet of paper and duly executed; the schedule was on the fourth side, also written and signed by him, and dated the same day as the will, but unattested; it was omitted from the probate, and there was no extrinsic evidence that it was already written when the will was executed:—Held, that the identity and previous existence of the schedule were sufficiently established by its position and its being referred to in the will as "annexed," and that it was therefore incorporated. *Watson v. Arundell*, 11 Ir. R., Eq. 53.

G., in 1866, executed a will, and a few days afterwards a paper, which he called directions to his executors, to form a part of his will. In 1868 he executed a fresh will, revoking all former wills and codicils. In this last will he expressed a wish that the goods and chattels in and about the rooms he should occupy at the time of his death should be disposed of according to the written directions left by him, and affixed to his will. No paper was found affixed to his will, but the codicil above mentioned, which in many respects answered to the written directions described in the will, was found in his private room:—Held, that it could not be included in the probate. *Gill, In goods of*, 2 L. R., P. 6; 39 L. J., P. 5; 21 L. T. 399.

A testator by his will dated the 22nd day of November, 1872, declared for the information of his trustees that the amount or values expressed in his ledger and entered on the 21st page and signed by him and dated the 8th of November, 1872, were, and were the only, advancements either by way of gift or loan made by him to any of his children before the 8th of November,

1872. The 21st page of the ledger was not admitted to probate. The sums entered therein were not in all instances the true amounts actually received by the children:—Held, that the will must be read as if the entries in the ledger were incorporated into it, and that the entries were conclusive for the purposes of the will. *Quikhampton v. Going*, 24 W. R. 917.

A will began, "I direct my executors to pay the expenses of my funeral, and all my lawful debts, out of the proceeds of my property." It went on thus:—"Whereas I am possessed of landed and chattel property, as stated in the annexed schedule; I direct my executors to sell my landed property, namely" (and then four separate pieces of landed property were named), "for its full value." Several legacies were then given, and then a fifth landed property was specially devised to W., a person fully described, with an ultimate remainder to T., and then came the gift of other legacies, and finally the will declared, "I constitute the said T.," describing him, "my residuary legatee." The will was written on three sides of a sheet of paper, the signature and attestation were at the bottom of the third side, the schedule was on the fourth side; it was in the handwriting of the testator, was signed by him and bore the same date as the will. It described the four portions of landed estate, and as to the fifth landed estate said, it "is not included in the above schedule, being willed by me to W.; my executors have no control over it." The witnesses who attested the will had not seen the schedule when they made their attestation:—Held, that as this schedule was not proved to have been written at the time of the execution of the will, it could not be incorporated with the will nor referred to for the purpose of assisting in its construction. *Singleton v. Tomlinson*, 3 App. Cas. 404; 38 L. T. 653; 26 W. R. 722.

A lady, by her will, gave to A. all such articles of silver plate and plated articles "as are contained in the inventory signed by me and deposited herewith." A list of such articles, professedly the one referred to in the will, signed by the deceased at the foot of each page and at the end, but having on it a date on the last page later than the date of the will, was deposited with the will by her at her bankers'. In conversation with one of the witnesses, before the execution, she referred to this list, but it was not shewn to the witnesses at the time of the execution of the will. She subsequently executed a codicil, which described itself as a codicil to the will of such a date, but did not confirm it in direct terms:—Held, that the will might be read as if it had been executed at the time of the execution of the codicil; and as the court was satisfied from the language of the will so read that the list referred to was then in existence, and from the other evidence that it had been before that date signed by her and deposited with her will, it might be taken to be incorporated therewith, and be admitted to probate. *Twro (Lady), In goods of*, 1 L. R., P. 201; 35 L. J., P. 89; 14 L. T. 893; 14 W. R. 976.

W. bequeathed all her jewels, furniture, &c., to such of her children in such portions as she should by any list signed by herself direct. She subsequently duly executed a codicil in the following words: "I declare that this writing shall be a codicil to my will." When she executed the codicil there was a list annexed to it in her own writing, but unsigned by her, and ex-

pressed to be made for the purpose of carrying out the intentions expressed in her will, disposing of different articles of jewellery, furniture, &c., amongst her children. The court granted probate of the will and codicil, but without the list annexed to the codicil. *Warner, In goods of*, 10 W. R. 566.

A testator, after executing his will, delivered to his brother a list of small sums of money which he wished to be paid to different persons after his death. Subsequently he wrote him a letter which was duly executed, in which he referred to the list thus: "In the legacies I gave to you":—Held, that the list was sufficiently identified, and that it should be included in the probate. *Daniels, In goods of*, 8 P. D. 14; 52 L. J., P. 23; 48 L. T. 124; 31 W. R. 248; 46 J. P. 808.

— **To Memorandum.**—M. duly executed a will, in which she directed her trinkets to be divided "as I shall direct in a small memorandum." She afterwards wrote a list of trinkets, which she headed, "Memorandum of trinkets referred to in my will." Subsequently she duly executed a codicil, which did not confirm the will, nor did it refer to the memorandum:—Held, that the memorandum could not be included in the probate. *Matthias, In goods of*, 3 S. & T. 100; 32 L. J., P. 115; 9 Jur., N. S. 630; 8 L. T. 471; 11 W. R. 808.

A testatrix bequeathed personalty to certain legatees, "in the confidence that they will distribute it as I may by memorandum or deed, or otherwise, direct." She afterwards executed a codicil, revoking some legacies, but confirming her will in all other respects. After her death, the will and codicil, and several unattested memoranda in her handwriting, containing directions for the distribution of the personalty, bearing dates later than the will, and earlier than the codicil, were found tied up together:—Held, that the memoranda could not be admitted to probate. *Lancaster, In goods of*, 29 L. J., P. 155.

— **To French Will.**—A testator executed a will in France in 1858, and added a codicil thereto in 1865, and a second codicil in 1872. In 1860 he executed a second will, which he deposited with his bankers in England, and in it appointed executors, and confirmed and renewed in all its parts the will of 1858. The French will (1858) disposed only of his property in France, the English will (1860) disposed only of his property in England, and both contained statements to the effect that they were independent of each other:—Held, that the French papers were incorporated by reference with the English will, and that all should be included in the probate. *Houden (Lord), In goods of*, 43 L. J., P. 26; 30 L. T. 768; 22 W. R. 711.

— **To Annulled Will.**—A will made in November, 1861, contained a clause, "I make no specific bequest to my brother's children, &c. Upon this subject I refer my wife to my annulled will, dated the 11th of February, 1851." The annulled will contained no bequest to those children; in it the testator stated that in the present aspect of affairs there was every prospect that they would be left well provided for, but, that if any reverse should overtake them, he trusted and felt sure that his wife would share her all with them. Upon motion for probate of

the will of November, 1861:—Held, that the annulled will did not raise any implied trust in favour of the children, and that therefore it need not be embodied in the probate. *Ouchterlony, In goods of*, 3 S. & T. 175; 32 L. J., P. 140; 9 L. T. 117.

— **To Copy of Will.**—M. made his will in India and deposited it with a bank at Calcutta. While temporarily resident in Scotland he executed a codicil, in which he referred in distinct terms to a copy of the will. This copy he produced to the witnesses at the time he executed the codicil, and he deposited both papers in the hands of his executor:—Held, that the copy was incorporated by the codicil, and probate of the copy will and codicil granted, without the production of the original will. *Mercer, In goods of*, 2 L. R., P. 91; 39 L. J., P. 43; 23 L. T. 195; 18 W. R. 1040.

— **To Settlement.**—L. bequeathed certain leaseholds to trustees upon the same trusts as declared in a certain indenture of settlement. With a slight exception, the whole of these leaseholds were included in the settlement, which was of great length. The court granted probate without requiring the settlement to be embodied in it, upon an affidavit being filed describing and giving the date of the settlement. *Lansdowne (Marquis), In goods of*, 3 S. & T. 194; 32 L. J., P. 121; 9 L. T. 22; 11 W. R. 749.

A testator bequeathed the residue of his estate to trustees, upon the same trusts as those contained in a deed of settlement made between third persons, and in which the testator had no interest. The court, upon an affidavit that the persons in whose possession the deed was refused to produce it, decreed probate without requiring a copy of the deed to be inserted therein. *Sibthorp, In goods of*, 1 L. R., P. 106; 35 L. J., P. 73; 13 L. T. 803; 14 W. R. 543.

D. devised his real and leasehold estates in accordance with the provisions of a deed of settlement made by his son on his marriage, so far as they related to a particular property. He left no leaseholds, and the trustees of the son's marriage settlement declined to allow it to be taken into the registry:—Held, that the court would not compel the trustees to bring in the deed of settlement, and that probate might issue without any portion of the deed of settlement being included in it, the party applying being willing to take it in that form. *Dundas, In goods of*, 32 L. J., P. 165; 9 Jur., N. S. 360; 12 W. R. 18.

A testatrix bequeathed all her estate on the same trusts as those contained in her marriage settlement. The court dispensed with the necessity of incorporating the whole of the settlement in the probate, and required only such extracts as would explain the nature of the bequests. *Garbett, In goods of*, 21 L. T. 366.

A domiciled American subject made a will in the United States, by which he directed his property in this country to be paid over, after the discharge of specified legacies, to his executors in America, and to be by them distributed according to the provisions of a trust deed also executed in the United States. The deed did not affect the devolution of property in this country, and the court therefore allowed probate to go without incorporating it, an affidavit being filed in the registry identifying it

by date and the names of the trustees. *Peabody, In goods of*, 21 L. T. 730.

A husband left a will containing the following clause: "I confirm the provision made for my wife by her marriage settlements, and of the settlement made on the marriage of my son." The court allowed probate of the will to go, without requiring the settlements to be incorporated, but directed a copy of the settlements to be deposited in the registry. *Leigh, In goods of*, 28 L. T. 914.

**Presumption that Papers fastened together at Execution.**—A will had been engrossed by a law stationer on fifteen brief sheets of paper, consecutively numbered. On the sixteenth sheet the testator had written a codicil, and on the eighteenth and last a schedule of property referred to in the will. On his death, it was found that the original fourth sheet had been removed and placed loose in his desk, and that the original seventeenth sheet had been used by him in substitution of the fourth. The several sheets were tied together with tape:—Held, that the legal presumption that papers bound together and constituting the will, as found at his death, were so bound together at the time of execution and attestation was not rebutted by the circumstances of the case. *Rees v. Rees*, 3 L. R., P. 84; 29 L. T. 375.

**Incorporation—Of Invalid Will by Codicil.**—S. M. H., while a married woman, made a will which was invalid. Afterwards, when a widow, she executed a document beginning with the words "This is a codicil to the last will and testament of me." The codicil was written on the same paper as the will, and immediately after it, and it was proved that she had made no other will:—Held, that the will was incorporated in the codicil. Probate granted of both documents. *Heathcote, In goods of*, 6 P. D. 30; 30 L. J., P. 42; 44 L. T. 280; 29 W. R. 356; 45 J. P. 361.

**— By Enumeration of Codicils.**—Semble, a document containing the words "This is a third codicil to my will" is not incorporated in a codicil of subsequent date by the words "This is a fourth codicil to my will." *Stockil v. Punshon*, 6 P. D. 9; 50 L. J., P. 14; 44 L. T. 280; 29 W. R. 214; 45 J. P. 159. Explained in *Heathcote, In goods of, supra*.

**When Unincorporated.**—A. executed his will in February, and a codicil on the same paper in December; below the signature to the will, and before the commencement of the codicil, appeared a memorandum, which, from the evidence of the solicitor who prepared the will, had been written on the paper before the execution of the will:—Held, that the memorandum, being no part of the will as originally executed, was not entitled to probate by reason of the duly-executed codicil of a subsequent date, such codicil referring merely to the will. *Willmott, In goods of*, 1 S. & T. 36.

D. made a testamentary disposition on a first page of a sheet of note paper, which was signed by himself and attested by one witness only. He shortly afterwards duly executed a testamentary disposition (but which contained no reference to the former disposition) on the third side of the same sheet. At the time of the exe-

cution he did not mention to the attesting witnesses the writing on the first page, and one of them believed that he asked them to attest his will:—Held, that the disposition on the first page was not incorporated in the document executed on the third page, and was therefore inoperative; that, as the disposition on the third page related exclusively to real property, it was not entitled to probate. *Drummond, In goods of*, 2 S. & T. 8; 8 W. R. 476.

A testatrix made a testamentary disposition on the first three pages of a sheet of letter paper, which was signed by herself, but unattested. She some time afterwards duly executed a testamentary disposition (but which contained no reference to the former disposition) on the fourth page of the same sheet. At the time of the execution the testatrix told the witnesses that it was her will; but the paper was so folded that they could not see the writing above her signature, and they did not know that there was any writing on the other pages:—Held, that the disposition on the first three pages of the sheet was not incorporated in the document executed on the fourth page, and was therefore inoperative. *Tovey, In goods of*, 47 L. J., P. 63; 39 L. T. 235; 27 W. R. 140.

**Where Probate allowed without Incorporation.**—An American, by a will and codicils, disposed of his property generally, and by a second will, in which he named separate executors, of moneys he had invested in the British funds. He expressed a distinct wish that the British will should take effect as a separate testamentary disposition of property independently of and disconnected from his general will:—Held, that it was unnecessary to incorporate the American will, which was very bulky, in the English probate, but that an authenticated copy of the American will and codicils should be filed in the registry, and a note be added to the English probate to the effect that such copy had been so filed. *Astor, In goods of*, 1 P. D. 150; 45 L. J., P. 78; 34 L. T. 856; 24 W. R. 539.

**— Deeds of Settlement.**—*See supra*, col. 848.

## 10. CONDITIONAL AND CONTINGENT.

**Sailor.**—A master mariner, whilst on a voyage, wrote with his own hand a will which commenced, "This is the last will and testament of me, that in case anything should happen to me during the remainder of the voyage from hence to Sicily and back to London, then I give and bequeath," &c.:—Held, that the dispositions of the will were dependent on the event referred to at the beginning of it, and that it had therefore only a contingent operation. *Robinson, In goods of*, 2 L. R., P. 171; 40 L. J., P. 16; 23 L. T. 397; 19 W. R. 135.

A mariner's will, commencing "Instructions to be followed if I die at sea or abroad," is conditional. *Lindsay v. Lindsay*, 2 L. R., P. 459; 42 L. J., P. 32; 27 L. T. 592; 21 W. R. 272.

A master mariner being about to sail from Liverpool to Wales, made a will, which contained the following clause: "Should anything happen to me on my passage to Wales, or during my stay there, I leave all my goods," &c. He returned from that voyage, but evidence was offered of adherence to and recognition of the will subsequently:—Held, that the will was conditional,

and that no evidence was admissible to shew that he intended that it should be operative after the time limited in the condition had expired. *Roberts v. Roberts*, 2 S. & T. 337; 31 L. J., P. 46; 8 Jur., N. S. 220; 5 L. T. 689.

**On Going a Journey.]**—When a will is expressed to take effect during absence on a particular voyage, and the writer returns to England, the court cannot admit evidence to shew the writer's intention of adhering to that will during a subsequent absence. *Winn, In goods of*, 2 S. & T. 147; 7 Jur., N. S. 764; 9 W. R. 852.

W. executed a paper in which he stated that he was on the eve of embarking for foreign parts, and thereby, in case of his decease during his absence being fully ascertained and proved, he made certain bequests. He returned from that voyage the following year, and subsequently again left England, and was supposed to have died in Australia:—Held, that the paper was conditional, to operate only if he died on his then intended voyage; and that, as he returned from it, the will had no further effect. *Id.*

Where a person wrote with his own hand a will, in which he stated he did so "being about to proceed on a long voyage, and not knowing what will happen to me;" and he made a tour, and returned home, and subsequently duly executed this paper in the presence of two witnesses:—Held, entitled to probate. *Hobson, In goods of*, 7 Jur., N. S. 1208.

**"In Case of my Death on the Way."]**—A testator being about to travel, made his will, which contained the following words: "On leaving this station for T. and M., in case of my death on the way, know all men this is a memorandum of my last will and testament:"—Held, that the will was not contingent upon his death before arriving at T. or M.; and therefore it was admitted to probate. *Mayd, In goods of*, 6 P. D. 17; 50 L. J., P. 7; 29 W. R. 214; 45 J. P. 8.

A person executed his will in England. He then went to India, and while there executed a second will, which contained this clause: "I write this as my last will and testament in case of a sudden or accidental death befalling me in India." He died in England:—Held, that the will was contingent on his dying in India, and that, as the event had not occurred, the instrument was inoperative. *Newton, In goods of*, or *Jobson v. Ross*, 42 L. J., P. 58; 28 L. T. 677; 21 W. R. 648.

A party executed a paper in which he made use of the following language: "Being obliged to leave England to join my regiment in China, I leave this paper containing my wishes. Should anything unfortunately happen to me whilst abroad, I wish everything that I may be in possession of at that time, or anything appertaining to me hereafter, to be divided," &c. The deceased returned to England from China:—Held, that the dispositions of the will were dependent upon his death in China, and therefore that the will itself was conditional. *Porter, In goods of*, 2 L. R., P. 22; 39 L. J., P. 12; 21 L. T. 680.

After the death of a testator a will was found amongst his papers which had been executed two years previously, commencing, "In case of any fatal accident happening to me, being about to travel by railway, I hereby leave all my property," &c.:—Held, that the will was not con-

tingent upon his death by accident during the journey he was about to take. *Dodson, In goods of*, 1 L. R., P. 88; 35 L. J., P. 54; 13 L. T. 758; 14 W. R. 408.

A person wrote and signed a will on the 14th of August, 1858, beginning, "In the prospect of a long journey, should God not permit me to return to my home, I make this my last will." He afterwards went on a journey, and returned on the 25th of September, 1858. In February, 1859, he acknowledged his signature to the will in the presence of two witnesses, who duly subscribed the same:—Held, that the will was entitled to probate, as it was executed after the completion of the journey contemplated. *Cawthorne, In goods of*, 3 S. & T. 417; 33 L. J., P. 23; 10 Jur., N. S. 51; 12 W. R. 443.

**On Death from Particular Illness.]**—A will in these words: "I, W. M., being physically weak in health, have obtained permission to cease from all duty for a few days, and I wish during such time to be removed from the brig Apellina, to the floating hospital ship Berwick Walls, in order to recruit my health; and in the event of my death occurring during such time, I do hereby will and bequeath," &c., is not contingent on the event of the testator's death in consequence of the illness from which he was suffering when the will was made. *Martin, In goods of*, 1 L. R., P. 380; 36 L. J., P. 116; 17 L. T. 32.

**On Death from Particular Climate.]**—The words "I request that in the event of my death while serving in this horrid climate, or any accident happening to me," do not make a testamentary paper conditional in the event of death while in that climate. *Thorne, In goods of*, 4 S. & T. 36; 34 L. J., P. 131; 11 Jur., N. S. 569; 12 L. T. 639.

**"On my Son Dying under Twenty-one," &c.]**—A general probate decreed of a will intended "to take effect only in the event of my son Charles dying under twenty-one, and my daughter dying under that age unmarried." *Cooper, In goods of*, 1 Deane Ecc. Rep. 9.

**Husband and Wife.]**—A husband made a will by which he left all his property to his wife, and made her sole executrix. He subsequently, with his wife, executed a joint will, which was expressed to take effect in case they should be called out of the world at one and the same time and by one and the same accident. By this will they revoked all former wills. The husband died in the lifetime of his wife:—Held, that the joint will was dependent upon a contingency which did not happen, and was, therefore, inoperative even to revoke a previous will. *Hugo, In goods of*, 2 P. D. 73; 46 L. J., P. 21; 36 L. T. 518; 25 W. R. 396.

A wife made a will in exercise of a power, but appointed no executor. The will was dependent on events which never happened, and the legatees named in it died in her lifetime. The will being clearly inoperative, the court refused to admit it to probate. *Graham, In goods of*, 2 L. R., P. 385; 41 L. J., P. 46; 26 L. T. 529; 20 W. R. 614.

A. disposed of his personal and certain of his real property, and appointed executors. He subsequently executed another testamentary paper, in which was the clause, "If my wife sur-

vives me, in two years after my wife's death my second cousin, B., and next of kin, to take possession of all my real and personal property, and to pay all my just debts according to my will. . . . I give B. this written document, as I am afraid my executors will not put my will into court." The executors died in the lifetime of A. :—Held, that as the paper was testamentary and duly executed, although not to operate until some time after the death of the testator, it was entitled to probate, and that B. was executor according to the tenor thereof, but that he must take probate of the will as well as of that paper. *Newns, In goods of*, 7 Jur., N. S. 688.

A testator wrote a codicil with his own hand, which concluded as follows: "I give my wife the option of adding this codicil to my will or not, as she may think proper or necessary:"—Held, that the validity of this paper was conditional on the assent of the wife, and that as she elected not to avail herself of its provisions, it ought not to be included in the probate. *Smith, In goods of*, 1 L. R., P. 717; 38 L. J., P. 85; 17 W. R. 1110; 21 L. T. 340.

"Until I Recover," &c.]—A will, executed in 1851, contained a clause in the following terms: "I leave to P. and D. the house and lands of L., until I am able to live there and enjoy it myself." At the date of the will the testator was absent from L., and was suffering from a dangerous illness; he, however, survived a considerable time, and on several occasions afterwards resided at L., and many years after the execution of the will executed codicils which referred to and republished it. In an ejectment by parties entitled to the residuary real estate against P. and D., to recover the lands of L., parol evidence was offered by the defendants, and admitted, shewing that the testator entertained peculiar religious opinions, and believed that he would revisit the earth after his death for a period which he described as the millennium, and that he had frequently stated that he would reside at L. during that period:—Held, independently of the parol evidence as to the religious opinions of the testator, first, that the above clause in the will was to be construed as a devise, operating as a testamentary disposition, to take effect upon his death, and not as a gift inter vivos of the lands, or the profits thereof, until the testator, on recovering from his then illness, should be able in his lifetime to enjoy them. *Bunbury v. Doran*, 8 Ir. R., C. L. 516. Affirmed, 9 Ir. R., Ch. 284—Ex. Ch.

— When Contingent Clauses Rejected.]—Held, secondly, that the words "until I am able to live there and enjoy it myself" should be rejected, as a limitation until an impossible event, and that the estate in the lands given to P. and D. passed to them unqualified by these words. *Id.*

#### 11. JOINT AND MUTUAL WILLS.

Upon Death of both.]—Probate granted of a joint will of two persons, as a distinct will, upon the death of both. *Stracy, In goods of*, Deane Ecc. Rep. 6; 1 Jur., N. S. 1177.

A. and B., partners in a farming business, and joint tenants in certain freeholds, executed a will

containing various devises and bequests, to take effect after the decease of both of them. On the death of A., B. surviving, application for probate, as of the will of A., was made by the executor therein named :—Held, that probate could not be granted of such an instrument till after the death of both parties. *Raine, In goods of*, 1 S. & T. 144.

Two sisters executed a joint will, in which they stated their desire, that as they were living mutually together upon the joint savings of each other, at the death of either, the survivor should have all that remained; and further, on the death of the survivor, that any residue should be divided amongst certain persons. The surviving sister did not prove this document, but on her death, administration, with this paper annexed as the will of the survivor, was granted to one of the parties entitled in distribution to her property. *Lovegrove, In goods of*, 2 S. & T. 453; 31 L. J., P. 87; 8 Jur., N. S. 442; 6 L. T. 131.

Contingent.]—Husband and wife executed a joint will, which was expressed to take effect in case they should be called out of the world at one and the same time, and by one and the same accident. The husband died in the lifetime of the wife :—Held, that the joint will was dependent upon a contingency which did not happen, and was therefore inoperative. *Hugo, In goods of*, 2 P. D. 73; 46 L. J., P. 21; 36 L. T. 518; 25 W. R. 396.

#### 12. IN EXECUTION OF A POWER OF APPOINTMENT.

Generally.]—Before the passing of the 20 & 21 Vict. c. 77, though the ecclesiastical court could grant probate of the will or testamentary appointment of a married woman, yet if parties who claimed under such will were about to institute a suit in equity to enforce their right to a part of the fund bequeathed by it, a court of common law would not interfere by prohibition, to restrain the ecclesiastical court from granting probate of such will or testamentary document, limited only to so much of the sum bequeathed as was sought to be recovered; it appearing that, according to the practice of the Court of Chancery, such limited administration was necessary for the purpose of instituting the suit. *Tucker v. Southcote*, 12 L. J., C. P. 21; *S. C.*, nom. *Tucker v. Inman*, 5 Scott, N. R. 843; 4 M. & G. 1049; Car. & M. 82.

7 Will. 4 & 1 Vict. c. 26, s. 10, applies as well to powers of appointment created after the act as to those previously created, and therefore a power created after the act, to appoint by will attested by three witnesses, is well executed by a will attested by two witnesses, in conformity with s. 9. *Hubbard v. Lee*, 1 L. R., Ex. 255; 35 L. J., Ex. 169; 12 Jur., N. S. 435; 13 L. T. 367; 14 W. R. 694; 4 H. & C. 418.

A power of appointment which is not in terms a power to appoint by will is not well executed by a will executed in the manner required by the Wills Act, unless the formalities required by the power are also observed. *Taylor v. Meads*, 34 L. J., Ch. 203; 11 Jur., N. S. 166; 13 W. R. 394.

The circumstance that a will is made in execution of a power does not exempt it from the general rule that probate cannot be granted of an instrument, unless it is duly executed as a

will in conformity with the law of domicile of the testator. *Crookenden v. Fuller*, 1 S. & T. 441; 29 L. J., P. 1; 5 Jur., N. S. 1222; 1 L. T. 70.

In the absence of a contrary intention apparent on the face of a will, a general residuary bequest operates as an exercise of a general power of appointment, of which the testator is the donee, although the residuary legatees are the persons who would be entitled, in default of appointment, under the instrument creating the power. *Att.-Gen. v. Brackenbury*, 1 H. & C. 782.

If in such case the testator has in the first instance charged his residuary estate with the payment of debts and legacies, it is not competent for the residuary legatees to disclaim the fund under the appointment, and elect to take under the gift to them in the original instrument. *Id.*

Where a testamentary paper is alleged to have been made in execution of a power, and proof of a power enabling the deceased to dispose of property by will is given, the court is bound to decree probate, and has no authority to inquire whether the will is in the form required by law for the due execution of a power, or whether it has been executed with the formalities required by the power. It is for a court of construction to decide whether the will is operative. *De Chatelain v. De Pontigny*, 1 S. & T. 411; 29 L. J., P. 147; 5 Jur., N. S. 579.

A will of a person who dies domiciled abroad disposing of personal estate in this country, if made in pursuance of a power of appointment, and executed in compliance with the requisites of the power, is entitled to probate, though not executed according to the testamentary law of the domicile of the testator. *Alexander, In goods of*, 29 L. J., P. 93; 6 Jur., N. S. 345.

**Revocation.**—A widow, under the powers given to her by her marriage settlement, executed a will in favour of B., without having executed any fresh settlement of the property included in her first marriage settlement:—Held, that she had a right to revoke the will so made by any of the methods prescribed by the Wills Act. *Hawkeley v. Barrow*, 1 L. R., P. 147; 35 L. J., P. 67; 14 W. R. 822; 14 L. T. 672.

A married woman exercised two powers of appointment in separate wills executed at different times. The later will contained a clause revoking all former wills. Evidence being adduced that she did not thereby intend to revoke the appointment in the first will, the court granted probate of both wills. *Meredith, In goods of*, 29 L. J., P. 155.

A married woman made a will in 1848, in execution of a power of appointment, and in 1857 made another in execution of another power of appointment. The later will contained a general revocatory clause, but it did not refer to the will of 1848, or to the power in execution of which it was made; or to the property thereby appointed:—Held, that the will of 1848 was not revoked. *Jays, In goods of*, 30 L. J., P. 164. See also cases, post, cols. 902, 903.

**Exercise of Power—Subsequent Marriage.**—The will of M., by which he exercised a power of appointment and also disposed of his own personal estate, having been, as to his own estate, revoked by his subsequent marriage, the court

granted letters of administration of his effects, save as to such of them as he was entitled to appoint by will. *Mason, In goods of*, 30 L. J., P. 168. See also cases, ante, col. 827.

### 13. ALTERATIONS, ADDITIONS, AND OMISSIONS.

**General Rules as to.]**—The court will rectify an expression, or even supply proper words, in a will, in order to effectuate a testator's intention. *White v. Barber*, 5 Burr. 2703.

The rule of construction of a devise is to give effect, if possible, to every word used by the testator; and particular words used by him are not to be rejected, unless the retaining of them would induce a construction totally irreconcilable with the rest of the instrument. *Doe d. Littlewood v. Green*, 2 Jur. 859.

If a will contains passages cancelled by the testator, they cannot be called in aid to explain the remaining parts of the will, but it must be read as if the cancelled passages were a blank. *Doe d. Spencer v. Pedley*, 2 Gale, 106.

It is a common rule of construction, that if the words of a gift are of themselves plain, distinct, and capable of having a legal effect, effect must be given to them, notwithstanding any improbability which may arise from looking at the other parts of the will. On the other hand, if the words are ambiguous in expression or effect, they are not to be rejected for uncertainty, but you must collect, if you can, from the other parts of the will, an indication of what the testator meant by those words which by themselves appear to be ambiguous. *Wilson v. Eden*, 11 Beav. 289.

Where the words of a will are capable of a construction which will give effect to every word, it is not within the competency of the court to alter their collocation. *S. C.*, 12 Beav. 454.

Words may be supplied in a will to render a sentence complete and intelligible, in aid of the apparent intent to be collected from the whole context. *Doe d. Leach v. Michlem*, 6 East, 486; 2 Smith, 499. And see *Right d. Day v. Day*, 16 East, 67.

**Presumption is that they were made after Execution.]**—Obliterations, interlineations, or other alterations in a will, after execution, are void, if not affirmed in the margin or otherwise by the signature of the testator and the attestation of witnesses. *Greville v. Tylee*, 7 Moore, P. C. C. 320.

The mere circumstance of the amount, or the name of a legatee, being inserted in different ink, and in a different handwriting, does not alone constitute an obliteration, interlineation, or other alteration, within the meaning of the statute, nor does any presumption arise against a will being duly executed as it appears. The case is different where there is an erasure apparent on the face of the will, and that erasure has been superinduced by other writing. Under such circumstances, the onus probandi lies upon the party who alleges such alteration to have been done prior to execution, to prove by extrinsic evidence that the words were inserted before execution, and that they had the sanction of the testator. *Id.*

As a deed cannot be altered after execution without fraud or wrong, the presumption, if an alteration appears, is that it was made before execution. But this presumption does not apply

in the case of a will which may be altered by the testator without fraud or wrong. *Doe d. Tatum v. Catomore*, 16 Q. B. 745; 8 C., nom. *Doe d. Tatham v. Cattamore*, 20 L. J., Q. B. 364.

Alterations on the face of a will are presumed to be made after the will is made, until evidence to the contrary is adduced. *Doe d. Shallow v. Palmer*, 16 Q. B. 747; 20 L. J., Q. B. 367; 15 Jur. 836.

A will contained alterations and erasures affecting the amount and objects of the testator's bounty, the existence of which, at the time of the execution, the attesting witnesses could not depose to:—Held, there being an absence of all direct evidence as to the alterations and erasures, that the presumption of law was, that such alterations and erasures were made after the execution of the will, and probate of the will was granted in its original form. *Cooper v. Bockett*, 4 Moore, P. C. C. 419; 10 Jur. 931.

Unattested alterations in the handwriting of the testator in a will made before 7 Will. 4 & 1 Vict. c. 26, s. 20, came into operation, will, in the absence of any evidence as to their date, be presumed to have been made before the act came into operation. *Streaker, In goods of*, 28 L. J., P. 50.

— **How Rebutted.**—The presumption of law, that the interlineations in a will were made after execution prevails only in the absence of evidence to the contrary, and very slight affirmative evidence is sufficient to rebut the presumption. *Duffy, In goods of*, 5 Ir. R., Eq. 506.

— **Presumption as to Date of, in Will made before Wills Act.**—A testator, by his will made in 1834, devised and bequeathed real, copyhold and personal estate upon certain trusts. Certain of the words in the declaration of trust were interlined. Probate was granted of the will by the Consistory Court of C. A question being raised, whether, with regard to the real estate, the interlineation was made before or after the execution of the will, it was held, having regard to the granting of the probate by the Consistory Court, that it was made before the execution of the will. *Cruttenden, In re*, *Davey v. Lansdell*, 45 L. T. 465; 30 W. R. 57.

**Alterations and Additions—Evidence that they were made before Execution.**—Although, when alterations are apparent on the face of a will, it cannot be presumed that they were made before execution, and they cannot be admitted to probate without some affirmative evidence that they were in fact so made, yet a court or jury trying this question of fact is not confined to any particular species of evidence, but may act upon any evidence which, having regard to all the circumstances, reasonably leads the judgment to the conclusion that the alterations were made before execution. *Moore v. Moore*, 6 Ir. R., Eq. 166.

A lawyer's holograph will settled property on his younger grandson Stephen for life, remainder to his first and other sons in tail male, then to his elder grandson Richard, remainder, &c. The word "Richard" was interlined and "Stephen" struck out in the first, and vice versa in the second case. These alterations were in the handwriting of, and initialed by, the testator, who

had previously expressed his intention of settling the property on his grandsons in priority of birth, who also knew their names, and there was no reason why the younger should be preferred. There having been a subsequent opportunity for correcting the mistake before execution, and the appearance of the wills and alterations raising the presumption, confirmed by the opinion of two experts, of contemporaneous writing, probate was decreed with such alterations. *Ib.*

A will contained several unattested interlineations, most of them of single words, each of which was required to complete the sentence to which it belonged. They were apparently written with the same ink and at the same time as the rest of the will, but at the time of execution the body of the will was covered up by the testatrix, so that the witnesses could not see whether the interlineations were there or not. The court held that it was not bound to presume that these interlineations were made after execution, and included them in the probate. *Cudge, In goods of*, 1 L. R., P. 543; 37 L. J., P. 15; 17 L. T. 484; 16 W. R. 406.

Some trifling alterations and interlineations appeared on the face of a holograph will, and there was no evidence whether they were written before or after the execution, except the affidavit of an expert, that in his opinion they were written at the same time as the rest of the will. On that evidence the court admitted them to probate. *Hindmarch, In goods of*, 1 L. R., P. 307; 36 L. J., P. 24.

— **Absence of Proof.**—In the absence of any proof that alterations in a will were made before its execution, beyond the fact that they bear an earlier date than the will in the handwriting of the testator, such alterations will not be recognized by the court, or appear in the probate. *Adamson, In goods of*, 3 L. R., P. 253.

— **Where Deliberative.**—A testator executed a will and codicil. At some time after the execution of the will, but before that of the codicil, he, with a pencil, struck through several paragraphs of his will, and made his initials on the margin; he also placed a query opposite other paragraphs. The codicil confirmed, in so far as it did not alter, the will:—Held, that the alterations so made were only deliberative, and not final, and not included in the confirmation of the codicil, and, therefore, to be omitted from the probate. *Hall, In goods of*, 2 L. R., P. 256; 40 L. J., P. 37; 25 L. T. 384; 19 W. R. 897.

— **Words in Pencil.**—A lady executed a printed form of a will. The blanks were filled up by her in her own handwriting, partly with ink and partly with a pencil. Some portion of the writing in ink extended over that in pencil, and some words of the latter had been rubbed out and obliterated. The words in ink were sensible as read with the printed part of the will. The attesting witnesses did not see the writing when they attested the will:—Held, that the words in pencil were deliberative only, and probate was granted without them. *Adams, In goods of*, 2 L. R., P. 367; 41 L. J., P. 31; 26 L. T. 526; 20 W. R. 400.

— **Partly in Ink and partly in Pencil.**—A person executed a draft will in April, 1847. In May, 1847, he executed an engrossed will. In

September, 1854, he executed a codicil purporting to be a codicil to his last will, of April, 1847. It was supposed that he really intended it to be a codicil to the will of May, 1847. The draft will contained interlineations in the testator's handwriting in ink and pencil, and cancellations. Both wills were in the handwriting of the same person, who deposed that he copied the engrossed from the draft will. The engrossed will agreed with the draft will as altered in ink, but not as altered in pencil:—Probate decreed of the draft will of April, 1847, including the alterations in ink, but not those in pencil, in so far as they agreed with the will of May, 1847, together with the codicil of 1854. *Wyatt, In goods of*, 2 S. & T. 494; 31 L. J., P. 197; 6 L. T. 694; 10 W. R. 783.

When a will seemed to have been first written in pencil and afterwards traced with ink, but not completely, words in some cases being written in ink above, and apparently in substitution for, the pencil writing, and in other parts the pencil writing standing alone, the court declined to include the pencil writing in the grant. *Bellamy, In goods of*, 14 W. R. 501.

— **Attestation of.**—The clause appointing executors was written partly on the second and partly on the third side of a will. Subsequently the testator altered the clause, but his signature and those of the attesting witnesses appeared opposite only to the alterations, which were made on the second side. The court granted probate of all the alterations. *Wilkinson, In goods of*, 6 P. D. 100; 29 W. R. 896; 45 J. P. 716.

In granting probate of a will an alteration will not be admitted to probate, either in the ordinary way or in fac-simile, unless attested in the manner required by the Wills Act, and the court will decline to entertain any argument drawn from the intention of the testator as revealed by the context. *Gausson, In re*, 16 W. R. 212.

— **Unattested presumed to be made before Wills Act.**—Unattested alterations appearing in a will executed prior to the Wills Act (7 Will. 4 & 1 Vict. c. 26) coming into operation, will, in the absence of any evidence as to their date, be presumed to have been made before the act came into operation, and are therefore entitled to probate. *Streaker, In goods of*, 4 S. & T. 192.

— **In Lithographed Form—Evidence of Intention.**—A testator made his will on a lithographed form, which he adapted to his purposes by filling up the blank spaces therein and by making certain obliterations and interlineations which appeared in the body of the will. The surviving attesting witness could give no information as to whether or not the obliterations and interlineations were on the will when he attested it; but it appeared that the testator had made certain declarations as to his intentions before the date of the execution of the will, and that to give effect to those intentions it was necessary that the alterations in question should be so made in it. In these circumstances the court came to the conclusion that the alterations were made before the execution of the instrument and decreed probate of it in its altered form. *Denoh v. Dench*, 2 P. D. 60; 46 L. J., P. 13; 25 W. R. 414.

**Unfinished Bequest indorsed on Back.**—A testator wrote his will on the first side of a half-sheet of paper. There was an unfinished bequest in the body of the will, and this he completed on the back of the page, marking by an asterisk the place where the indorsement was to be read into the will. The attesting witnesses did not see the indorsement, which was written before the execution of the will:—The court held that the indorsement formed part of the will, and ordered it to be included in the probate. *Burt, In goods of*, 2 L. R., P. 214; 40 L. J., P. 26; 24 L. T. 142; 19 W. R. 511.

**In Will of Soldier presumed to be made whilst on Service.**—Where a will in the testator's handwriting contains material alterations, about the making of which no information can be obtained, and such will was signed by the testator whilst, as a soldier, he was employed in actual military service, the alterations will be presumed to have been made during the continuance of such military service, and will be included in the probate. *Tweedale, In goods of*, 3 L. R., P. 204; 44 L. J., P. 35; 31 L. T. 799.

**When Memorandum held to Refer to all Alterations.**—A testator in the beginning of his will disposed of certain leasehold houses in trust for the benefit of his children. The words of the description of one of such houses were struck through by a pen, and the testator's signature, but not those of the witnesses, was placed near such alteration. At the end of the will a clause was interlined, by which he bequeathed the same house to his trustees for the sole benefit of his wife. Under the signatures of the testator and the witnesses at the termination of the will a memorandum was added to the effect that the above words were struck out for the benefit of his wife. This memorandum was signed by the testator and attested by the witnesses:—Held, that the memorandum referred to both alterations, the obliteration and interlineation, and that the will so altered should be admitted to probate. *Treeby, In goods of*, 3 L. R., P. 242; 44 L. J., P. 44.

**Erasure and Substitution of Words.**—A testatrix after the execution of her will erased certain parts, substituting in their places other words. Probate was granted of the will with these parts erased in blank, the original words not being discernible on the face of the paper, and there being no evidence to shew what they were. *James, In goods of*, 1 S. & T. 238.

**Name of Witness Erased and Rewritten.**—Where the name of one of the attesting witnesses to a will was written on an erasure, but it appeared that the will had been duly executed and attested, and that subsequently the attesting witness's name had been erased by the testator, and had at his request been rewritten by the attesting witness, the court granted probate to the widow on affidavit that she and two infant children were the only persons entitled in distribution, and that notice had been given to the children. *Coleman, In goods of*, 2 S. & T. 314; 30 L. J., P. 170; 5 L. T. 119.

**Interlineation in Holograph Will not Attested.**—A testator left a holograph will. One

clause was unintelligible, but an unattested interlineation in his handwriting made the clause intelligible when taken with it, and also in accordance with declarations proved to have been made by him before the execution of the will. Evidence was also given tending to prove that the will had been kept in a fastened-up envelope from five days after its date in 1867 to a couple of hours before his death in 1874; and an expert gave his opinion that the interlineation was written at the same time and with the same pen and ink as the will. The court granted probate of the will with the interlineation. *King, In goods of*, 23 W. R. 552.

**Interlineation after Execution Initiated by Witnesses and Approved of by Testatrix, though not Executed.**—Testatrix duly executed her will in the presence of two witnesses, who subscribed and attested it. Immediately after its execution an omission was discovered in the will, and this omission was supplied by an interlineation. Testatrix approved of the will as altered, acknowledging it as her "last will and testament," and the witnesses then, in her presence, placed their initials in the margin opposite the interlineation:—Held, that there had been no re-execution of the will, and that consequently the interlineation should be omitted from the probate. *Shearn, In goods of*, 50 L. J., P. 15; 43 L. T. 736; 29 W. R. 445; 45 J. P. 308.

**What will be considered to be an Interlineation.**—W. made a will which was written on the first and third pages of several sheets of note paper. At the bottom of one of these pages were the words and mark, "I leave the whole of my property to the following religious societies, viz. x to be divided in equal shares among them." On the top of the opposite page was a similar mark to that following the "viz.," and the names of four religious societies. There being no evidence that the names of the societies were written before the execution of the will, the court, considering them to be interlineations, excluded them from probate. *White, In goods of*, 30 L. J., P. 55; 6 Jur., N. S. 808.

A. produced to B. a sheet of paper, having on the first side a formal heading and ending of a codicil, and asked B. to write a codicil for her. B. not having finished the dispositive part when he reached the formal ending, turned over the page and continued the sentence and other dispositive clauses on the second side. The signatures of A. and of the attesting witnesses following the formal ending were on the first page. On motion for probate, counsel suggesting that the writing on the second side might be considered as an interlineation, the court refused to decide such a question on motion, but left the parties to propound the paper, if they thought fit. *Peach, In goods of*, 1 S. & T. 138.

**Testator and Witnesses tracing former Signatures with Dry Pen.**—A testator having made some alterations in a duly-executed will, he and the attesting witnesses traced their former signatures with a dry pen, and the attesting witnesses placed their initials in the margin opposite each of the alterations. The court refused to regard the initials in the margin as evidence that the alterations had been duly executed and attested, and declined to grant probate of the will with alterations. *Cunning-*

*ham, In goods of*, 4 S. & T. 194. See also *Mad-dock, In goods of*, post, col. 891.

**Effect of Legacy pasted over.**—When a testator has pasted over a whole legacy a piece of paper on which at some time, about which the witnesses can give no information, he has written a new bequest, the court will not order the upper paper to be removed, and will direct the probate to issue in blank as to that legacy; but if the testator has covered over the amount of a legacy only, leaving the legatee's name untouched, the court will consider it a case which comes under the principle of a dependent relative revocation, and will endeavour to discover the amount of the legacy originally bequeathed by removing the upper paper. *Horsford, In goods of*, 3 L. R., P. 211; 44 L. J., P. 9; 31 L. T. 553; 23 W. R. 211.

**"Or" and "and."**—Under a devise to A. for life, remainder to B. and her heirs, but if B. died before A., or if she died without heirs of her body, then to C. and his heirs:—Held, that the devise over to C. after B. could only take effect if B. died before A. and without issue; for that, unless "or" were read as "and," the devise over would take if B. died before A., although B. left issue; which would clearly be against the apparent intent of the deviser, which was to prefer the issue of B. to C. *Denn d. Wilkins v. Kemeys*, 9 East, 366.

A. being seised of lands, holden upon leases for lives, devised to B., his brother, all his real and freehold estates, subject to an annuity to his mother for her life; "but in case B. should die before he attained the age of twenty-one, or without issue living at his death," to his mother for ever. A. died; B. attained the age of twenty-one, and then died without issue:—Held, that the word "or," in the devise over, must be construed as "and;" and that the mother took nothing upon the death of B. *Fairfield d. Hawkenworth v. Morgan*, 2 N. R. 38. And see *Right d. Day v. Day*, 16 East, 67.

Under a devise to A. (a natural son), then under age, and the heirs of his body, and if he died before twenty-one, and without issue, then over to other relations, and ultimately to the testator's own right heirs:—Held, that A. having attained twenty-one, the limitations over did not take effect: as, by the natural sense of the word "and," they were made to depend on the happening of both events (i.e. the son's dying before twenty-one and without issue), and this construction was not varied by a codicil made after the son attained twenty-one, by which the testator confirmed every part of the will so far as his affairs were consistent. *Doe d. Usher v. Jessup*, 12 East, 288.

"And" is construed "or" where one member of the compound sentence is included in the other, and would be superfluous unless disjoined. This construction is generally made in favour of vesting, not to defeat a previously-vested gift. *Day v. Day*, Kay, 703; 18 Jur. 1013.

A testator, after certain legacies devised as follows: "In case my daughter should have no lawful issue, after her death I will that my property that shall be remaining to return to my relations, viz., to my nephew J. 100l.; likewise I leave, in case my daughter has no issue, to my nephew S. and my niece A. 80l. each; the remainder of my personalty I leave to my daughter's

disposal, if she lives to maturity. As to my real estate, if my daughter dies before she arrives at lawful age, or have no lawful issue, then I leave my real and all my other property to my brothers, equal between them; but in case my daughter shall have lawful issue, then I leave the whole of my property, real and personal, to her and her heirs."—Held, that the word "or" should be read "and," and that the daughter, on attaining twenty-one, took an estate in fee-simple. *Johnson v. Simcox*, 7 H. & N. 344; 31 L. J., Ex. 38; 8 Jur., N. S. 284; 4 L. T. 836; 9 W. R. 895—Ex. Ch.

**Omitting and Inserting Words by Court—General Powers.]**—A testator gave oral instructions for a will to his attorney, who made a memorandum of them in his presence. The residuary clause was as follows: "And the residue equally amongst all the sons, including the eldest son for the time being on attaining twenty-one." From the memorandum a draft will was drawn, which disposed of the residue in the following terms: "The trustees to stand possessed of all the residue and remainder of my real estate in trust to divide the same," &c. The draft will was left with the testator, and on his suggestion certain alterations were made in it, but not in reference to the words of the residuary clause above given. The will with such words was executed by the testator:—Held, that, however clearly an error can be established in a will, unless words have been inserted by fraud or by mistake without the knowledge of the testator, the Court of Probate cannot correct it either by the omission of words or by the insertion of other words. *Harter v. Harter*, 3 L. R., P. 11; 42 L. J., P. 1; 27 L. T. 858; 21 W. R. 341.

**— Striking out when Inserted by Mistake.]**

—A mother by her will left a portion of her furniture and household effects to her daughter, and disposed of the residue of her property, appointing trustees and executors. Subsequently she was advised that the bequest to her daughter should be secured to her separate use, and she gave directions that a testamentary paper should be prepared to that effect. The paper thus prepared purported to be her last will and testament, and in addition to a clause to the effect above mentioned, contained one revocatory of all former wills. This paper was executed by her, but was not read over to or by her, and she was not aware that it contained such words of revocation:—Held, that as the words of revocation had been introduced per incuriam and without instructions, and their presence there was unknown to her when she executed the will, they ought to be omitted from the probate. *Oswald*, *In goods of*, 3 L. R., P. 162; 43 L. J., P. 24; 30 L. T. 344.

Where a testatrix left a will dated June 3, 1868, and three codicils dated respectively January 30, 1870, April 30, 1870, and December 9, 1870, and the codicil of April 30, 1870, referred to "the last will of me which bears date the 26th day of April, 1870;" the court, having come to the conclusion that there never was any will of April 26, 1870, and that there had been a mere mistake in the date, granted probate of the will and three codicils. *Dent*, *In goods of*, 31 L. T. 552; 23 W. R. 417.

A testatrix of testamentary capacity duly

executed as her will, without, however, its having been read over by or to her, a paper writing, the contents of which she knew and approved of, except only that there had been introduced into it, without instructions from her, clauses of appointment of executors and of revocation of former wills:—Held, that those clauses ought to be omitted from the copy of will to be annexed to the letters of administration. *Wray*, *In goods of*, 10 Ir. R., Eq. 266.

A testator, in the instructions for his will, directed that all his B shares should be given to his nephews, but the word "forty" was inserted several times in the will before the word "shares," and the will was executed with that word repeated several times before the word "shares." The jury found that the word "forty" was introduced by mistake, that the clauses including the word were never read over to the testator, and that he only approved of the will upon the supposition that all his B shares were given to his nephews, and thereupon the court ordered the word "forty," wherever it occurred in the will, to be struck out. *Morrell v. Morrell*, 7 P. D. 68; 51 L. J., P. 49; 46 L. T. 485; 30 W. R. 491; 46 J. P. 328.

**— Omitting Defamatory Matter.]**—The court will not exercise its power of omitting from the probate offensive or libellous passages in a will, except in cases of a very special and definite character. It therefore refused to omit from the probate a paragraph in a will, which, though offensive, was not calculated to injure. *Honeywood*, *In goods of*, 2 L. R., P. 251; 40 L. J., P. 35; 25 L. T. 164; 19 W. R. 760.

**— Inserting Words.]**—A will, after a legacy to B., contained a gift of other legacies to S., with directions to the latter concerning the testatrix's funeral, and concluded with the words, "I appoint him, my brother B., executor of this my last will:—"—Held, that the word "with" should be understood as interposed between the words "him" and "my," and that as well S. as B. was entitled to probate. *Boardman v. Stanley*, 6 Ir. R., Eq. 590.

When a testator in his will used the words "I herewith empower and authorize my executors," and in the last clause of the will used the words "I herewith appoint and empower James Claney and Pat O'Connor," and when there was no other appointment of executors, the court supplied the words "my executors," omitted in the last clause, and gave liberty to James Claney and Pat O'Connor to apply for probate in common form as executors. *Morony*, *In goods of*, 1 Ir. L. R. 483.

**14. WHEN LOST, MISLAID, OR DESTROYED.**

**When Lost.]**—A person duly executed a paper, commencing, "This is a codicil to any will and testament of me, A. B." No will could be found, nor could evidence of any will having ever been executed be obtained:—Held, that such paper must be admitted to probate. *Cault-hard*, *In goods of*, 11 Jur., N. S. 184.

A party duly executed a will, and subsequently a paper, which purported to be a codicil to his last will and testament. This codicil referred to a bequest not contained in the will, but in a deed of gift executed after the will and before the codicil. On his death the will was not

forthcoming:—Held, that as the codicil was not revoked by any of the modes indicated by 7 Will. 4 & 1 Vict. c. 26, s. 20, it remained in full force and effect, and was entitled to be admitted to proof. *Black v. Jobling*, 1 L. R., P. 685; 38 L. J., P. 74; 21 L. T. 298; 17 W. R. 1108.

A. left a will dated and executed in 1854, and a codicil executed in 1856, which contained the following words: "I wish to add this codicil to the will I made in 1848." A draft will had in 1848 been prepared for his perusal, but there was no evidence that he had ever executed a will in that year:—Held, that the reference in the codicil to a will made in 1848 was a mere misdescription, and that the will executed in 1854 and the codicil must be admitted to probate. *Houbton, In goods of*, 11 Jur., N. S. 549.

A. executed a testamentary paper, called a codicil or an appendix to her last will, in the possession of the executor B., of London, of which will a copy was kept at Jerusalem. B. never had any will of A. in his possession, but such a will had been executed in his office, was in the possession of the executor C., of London, and a copy of it was found amongst the papers of the deceased at Jerusalem on her death:—Held, that these two papers were entitled to probate. *Cooper, In goods of*, 8 Jur., N. S. 394.

— **Proving Contents.** ]—The contents of a lost will, like those of any other lost instrument, may be proved by secondary evidence. *Sugden v. St. Leonards (Lord)*, 1 P. D. 154; 45 L. J., P. 49; 34 L. T. 369; 24 W. R. 479—C. A.

The court received parol evidence of the contents of a lost will, and admitted it to probate, upon being satisfied by the evidence, which the court deemed clear, cogent, certain and fairly free from suspicion, as to the factum of the alleged will; that its contents were substantially such as were alleged; and that the heir-at-law had, after the death of the testator, got possession of the will, and suppressed or destroyed it. *Mahood v. Mahood*, 8 Ir. R., Eq. 359.

Where probate has been asked of the substance of a lost will, as contained in the parol evidence of witnesses, the court has never acted but on the fullest and most stringent proof. *Wharram v. Wharram*, 8 S. & T. 301; 33 L. J., P. 75; 10 Jur., N. S. 499; 10 L. T. 163; 12 W. R. 889.

When a person who has himself destroyed a testamentary paper after the death of a testator asks for probate of the substance as contained in a copy or otherwise, the court will expect the fullest and most satisfactory proof of all the facts necessary to be established. *Moore v. Whitehouse*, 3 S. & T. 567; 34 L. J., P. 31; 11 L. T. 458.

A. made his will in 1855. In May, 1857, when the Indian Mutiny broke out, he escaped from Delhi, leaving his will, among other property, behind him. He died at Kussowlee, in June, 1857. On the affidavit of one of the attesting witnesses as to the due execution, and of the same witness and of his widow, as to the contents, probate was granted to the widow as sole executrix. *Gardner, In goods of*, 1 S. & T. 109; 27 L. J., P. 55.

When a will has been lost, and evidence of its contents is supplied by the production of a draft, and of the parol testimony of persons who had read the will, the parol evidence must be placed side by side with the draft, and out of

them the court will extract the contents of the will to be proved. *Burls v. Burls*, 1 L. R., P. 472.

It is not necessary for the parties seeking probate, having proved the factum of the original instrument, and given sufficient secondary evidence of its contents, to show how the original instrument was in fact destroyed or lost. *Patten v. Paulton or Poulton*, 1 S. & T. 55; 4 Jur., N. S. 341.

Where a copy of a will, the original not being forthcoming, is found in the possession or amongst the papers of the legal adviser of one of the executors, it is evidence of the contents of such will, and may be admitted as such. *Sly v. Sly, infra*.

A will was brought to the house by an executrix, in whose custody it had been, on the morning of the funeral. It was suddenly missed, and there was reason to suspect that it had been abstracted and destroyed by the only party who was interested in an intestacy, and who was cited, but did not appear. The court, under these circumstances, did not require the will to be propounded in solemn form of law, but granted, on motion, probate of the substance as proved by parol evidence. *Colman, In goods of*, 13 L. T. 682; 14 W. R. 291.

Declarations, written or oral, made by a testator, both before and after the execution of his will, are, in the event of its loss, admissible as secondary evidence of its contents. *Sugden v. St. Leonards (Lord)*, *infra*.

The contents of a lost will may be proved by the evidence of a single witness, though interested, whose veracity and competency are unimpeached. *Id.*

— **Contents not completely Proved—Probate of Part.** ]—When the contents of a lost will are not completely proved probate will be granted to the extent to which they are proved. *Sugden v. St. Leonards (Lord)*, 1 P. D. 154; 45 L. J., P. 49; 34 L. T. 369; 24 W. R. 479—C. A.

The absence of evidence as to some of the contents of a lost will will not prevent the court from granting probate, if it is satisfied that the instrument propounded contains the substantial parts of the lost will. *Id.*

A testator duly executed a holograph will and eight codicils, and deposited them in a box, the key of which he always kept in his own possession. He frequently expressed adherence to the will down to within a few days of his death. On his death the codicils were found in the box, but the will was missing, and could nowhere be found. Thereupon the testator's unmarried daughter C., who had lived with him all her life, and had frequently read the will, in the preparation of which she had assisted him, wrote out from memory the alleged contents of the will, which included a bequest to her of 6,000*l.*, and of one-third of the residuary personal estate (equivalent to 10,000*l.*). Some corroboration of C.'s account of the contents of the will was found in the codicils and in certain quasi testamentary papers of the testator. But her testimony as to the residuary bequest was not at all corroborated. C. admitted that the contents of the will as written out by her were not complete, there being some small legacies and certain ulterior limitations of real estate which she could not remember. C.'s veracity was not questioned by the persons who opposed the granting of probate:

—Held, that her statement of the contents of the will was substantially correct, and that probate should be granted accordingly. *Id.*

—**Proving Loss.**—When circumstances indicate no peculiarly likely place of deposit, searching in the drawers and boxes of a deceased person for a will, and finding none, is sufficient *prima facie* evidence that there is no will. *Reg. v. Johnson, Dears. & B. C. C. 340; 27 L. J., M. C. 52; 4 Jur., N. S. 55.*

Declarations of a deceased person, who has been in possession of property, claiming a limited interest therein under a particular will, are admissible to prove the fact that such will had a legal existence, and also that certain persons were named executors therein. *Sly v. Sly, 2 P. D. 91; 46 L. J., P. 63; 25 W. R. 463.*

The court refused to grant probate of a lost codicil, of the execution of which no proof was forthcoming. *Wilson, In goods of, 26 L. T. 405.*

In propounding a copy of a lost codicil, it was proved by A. and B. that such a paper had existed, and by C. and D., the attesting witnesses, that they had signed some paper for the deceased, but were unable to say whether it was testamentary or not. The court held that in the absence of proof identifying the paper known to A. and B., with that signed by C. and D., there was not sufficient proof of the factum and execution of the codicil, and refused probate. *Crickett v. Field, 23 L. T. 630; 19 W. R. 232.*

When the execution of a will, its contents, and the fact of its existence unrevoked at the time of the death of the testator, have to be proved by parol evidence only, that evidence must be stringent and conclusive. *Silver v. Silver, 27 L. T. 766.*

When a will was not forthcoming at the time of the testator's death, and was not found in the repositories of a deceased attesting witness in whose custody it was stated to have been last seen, and where the account given by the witnesses as to its existence at that time was confused and conflicting, the court refused probate of the contents propounded seven years after the testator's death. *Id.*

**Evidence of Improper Execution.**—Where a testamentary paper is not in existence, and all the persons present at an intended execution of it agree that it was not duly executed, the court cannot on a mere suspicion to the contrary decree probate of it. *Eckersley v. Platt, 1 L. R., P. 281; 36 L. J., P. 7; 15 L. T. 327; 15 W. R. 232.*

**Copies of.**—An officer in her Majesty's service executed a will and codicil, previously to leaving England with his regiment. The original will and codicil were deposited with his solicitor in England, but he took with him copies of these documents, which were found at his death enclosed in a sealed envelope in his desk. He never returned to England. The original will and codicil could not be found amongst the papers of the solicitor, who had died in the lifetime of the deceased, but there was evidence from which to infer that they had not returned into the possession of the deceased, or been destroyed at his request. Probate was therefore granted of the copies, limited until such time as the originals were produced. *Pechell, In goods of, 6 Jur., N. S. 406.*

When a will executed before the Wills Act

was lost, and there was no surviving witness of its execution, the court admitted as proof an entry from the ledger of the solicitor who made the will, and granted probate of a copy. *Thomas, In goods of, 41 L. J., P. 32; 25 L. T. 509; 20 W. R. 149.*

A., being resident in India, sent in 1850 to England, in a letter to his solicitor, a copy of a will which he stated he had made there. In February, 1857, he transmitted in the same way copy of a codicil, stated by him to have been made at Delhi. A. lost his life in May, 1857, in the mutiny at Delhi, and the will and codicil were not forthcoming. On motion for probate of the will and codicil, as contained in the copies sent to England:—Held, there being no proof of the execution of the original will and codicil, except the statement of the deceased himself, made after their execution, the copies were not entitled to probate. *Ripley, In goods of, 1 S. & T. 68; 4 Jur., N. S. 342.*

A will was destroyed by a testator, on the supposition that he had substituted another for it, but which was not duly executed. Probate of a copy of the first will was granted. *Scott v. Scott, 1 S. & T. 258.*

—**Will Executed by Married Woman.**—When a wife has executed a will during coverture with the consent of her husband, and the will is not forthcoming at her death, and no copy can be found, the court will make a grant of probate of the draft of the will, limited until the original will, or an authentic copy of the will, is brought into the registry, and limited also to all such personal estate and effects as she had power and a right to dispose of, and has in and by the draft appointed and disposed of. *Thrippleton, In goods of, 35 L. T. 909.*

—**Revocation of Will under Mistake.**—Where a testator by misinformation as to the effect of a subsequent deed, settling his property in his lifetime, had been induced to revoke his will by cancellation, the court refused to grant probate of a copy on motion, but compelled the parties to propound it in solemn form. *James, In goods of, 19 L. T. 610.*

**Limited Administration Granted.**—A will duly executed was on the death of the testator in the custody of the sole executor and universal legatee named in it. It was never proved, there not being at that time any property which could pass under it, and was subsequently lost or mislaid. No draft or copy of it was forthcoming. The court granted administration of the effects of the deceased, limited until the will or an authentic copy of it should be brought into the registry. *Johnson, In goods of, 11 Jur., N. S. 184.*

**Destroyed—Presumption if last seen in Testator's Possession.**—The rule of the law is, that if a will is traced to the possession of the deceased, and last seen there, and is not forthcoming on his death, it is presumed to have been destroyed by himself, and that presumption must prevail, unless there is sufficient evidence to repel it, and to raise a higher degree of probability to the contrary. The onus of proof in such cases lies upon the party propounding the will. *Welsh v. Phillips, 1 Moore, P. C. C. 299.*

A testator executed his will at his solicitor's office, and took it away with him. It was never seen afterwards, and could not be found after his death in his repositories. He had made declarations inconsistent with his testamentary dispositions shortly before his death, but the court held, that he being the last custodian of the will, and it not being forthcoming, the presumption of revocation arose and was not rebutted. *Homer-ton v. Hewett*, 25 L. T. 854.

When a will traced to the possession of the testator, cannot be found after his death, and there is no evidence what has become of it, the presumption arises that the will has been destroyed by the testator for the purpose of revoking it, but this presumption may be rebutted by parol evidence. *Sugden v. St. Leonards (Lord)*, 1 P. D. 154; 45 L. J., P. 49; 34 L. T. 372; 24 W. R. 479—C. A. See also *Moore v. Whitehouse*, ante, col. 865.

See also cases post, col. 898, et seq.

— **Partly.**—A disappointed legatee got possession of the will after it had been read over to her, and tore it in pieces. One of the pieces was missing, and was supposed to have been carried away by her. The court allowed the contents of the missing part to be proved by affidavit, and granted probate of the pieces thus supplemented. *Clift, In goods of*, 29 L. T. 249.

— **Destruction Intentional.**—A testatrix destroyed a will without stating at the time her intention in doing so. Subsequently on the same day she said that she destroyed the will with the intention that a former will should take effect. The court on motion refused to grant probate of a draft of the destroyed will. *Weston, In goods of*, 1 L. R., P. 633; 38 L. J., P. 53.

**Effect of Testator Mutilating and afterwards Repairing Will.**—Where a testator cut a piece out of his will, which had been duly executed, containing the word "witnesses," and the names of the attesting witnesses, giving his reason at the time for having so cut the same, that he had some idea of altering it and having a new will made; and subsequently, on the same day, re-fastened the piece he had so cut out, saying, "that his will would do for the present, and that if he wanted another will he could do it afterwards;" and died without making another will:—The court, with the consent of the parties interested in case of an intestacy, granted probate of the will to the executors named therein. *Eeles, In goods of*, 2 S. & T. 600; 32 L. J., P. 4; 7 L. T. 338; 11 W. R. 31.

**Reference in Codicil to Revoked Will—Mistake.**—In February, 1856, W. duly executed a will, which had been prepared for her by a solicitor. In November, 1858, she executed a copy of this will (a few legacies having been omitted), made by herself. In 1861, a codicil, which purported to be a codicil to her last will and testament, bearing date February, 1856, and which was prepared by the same solicitor, was also executed by her. On her death the will of November, 1858, and the codicil of 1861, were found together, the will of February, 1856, in another part of the house, with the signature of

the deceased partly torn off. The court, acting on the evidence of the solicitor, concluded that the reference in the codicil to the will of February, 1856, was an error, and decreed probate of the will of November, 1858, and of the codicil. *Whitman, In goods of*, 34 L. J., P. 17; 10 Jur., N. S. 1242.

**Practice on—Probate on Motion.**—As a general rule the court requires a draft or copy of a lost or destroyed will to be propounded before admitting it to probate; but where satisfactory evidence is given of the contents of a lost or destroyed will, of its due execution, of its existence at the time of the testator's death, and of its subsequent loss or destruction, the persons interested under it and the persons in whose custody it was not being in any way to blame for such loss or destruction, the court will, with the consent of the only person interested in the event of intestacy, grant probate of a draft or copy on motion; but it will not on motion grant probate of the contents of a lost or destroyed will without either the consent of or notice to the next of kin. *Callan, In goods of*, 9 Ir. R., Eq. 484.

A will was lost while in the custody of a solicitor, who had received it for the purpose of obtaining probate, and no copy or draft was known to be in existence. The solicitor who prepared it and one of the attesting witnesses made affidavits that it was entirely in favour of the widow, and made no provision for the infant child of the testator. The court refused to grant probate on motion, but ordered the widow to propound it. *Brining, In goods of*, 22 L. T. 630.

Where it was satisfactorily shewn that the destruction of a duly-executed will was not attributable to neglect or default on the part of those whose duty it was to take charge of it, the court allowed probate of the draft on motion. *Barber, In goods of*, 1 L. R., P. 267; 36 L. J., P. 19; 15 L. T. 192; 15 W. R. 231.

The court will not admit the draft of a will which has been inadvertently destroyed, to probate on motion. *Body, In goods of*, 4 S. & T. 9; 34 L. J., P. 55.

The court is always reluctant to grant probate of a document not before it, and it will not, as a rule, grant probate of such document on motion. *Kelly, In goods of*, 13 L. T. 303.

— **Party Destroying Condemned in Costs.**—The court granted probate of the draft of a lost will, being satisfied that it was in existence at the time of the death of the testatrix, and that it had been either suppressed or destroyed by the next of kin, who opposed the application for probate; and condemned the next of kin in costs. *Podmore v. Whotton*, 3 S. & T. 449; 33 L. J., P. 143; 10 L. T. 754; 13 W. R. 106

### III. DONATIO MORTIS CAUSÂ.

**Under the Wills Act.**—Donationes mortis causâ are not abolished by 7 Will. 4 & 1 Vict. c. 26, Wills Act. *Moore v. Darton*, 4 De G. & S. 517; 20 L. J., Ch. 626.

**Nature of Gift.**—The deceased must at the time of the supposed gift part with all dominion over it. *Hawkins v. Blewitt*, 2 Esp. 663.

— **Delivery of Possession.**—To constitute a good *donatio mortis causa* there must be an absolute and unconditional delivery of possession to the donee, or to a third person in trust for him, which possession must continue uninterrupted to the time of the donor's death. *Bunn v. Markham*, 2 Marsh. 532; 7 Taunt. 224; Holt, 352.

A dying person told her servant to take the keys of her dressing-case, and to deliver her watch and trinkets which it contained to the plaintiff. The servant took the keys and kept them in her possession until after the death of her mistress:—Held, not a good *donatio mortis causa*. *Powell v. Hellicar*, 26 Beav. 261; 28 L. J., Ch. 355; 5 Jur., N. S. 232.

A verbal gift of a chattel, without actual delivery, does not pass the property to the donee. *Irons v. Smallpiece*, 2 B. & A. 551.

— **Revocation.**—The gift will be revoked if the donor reserved possession. *Bunn v. Markham*, 2 Marsh. 532; 7 Taunt. 224; Holt, 352.

But the gift cannot be revoked by the will of the donor. *Jones v. Selby*, Pre. Cha. 304.

— **May be Coupled with a Trust.**—A *donatio mortis causa* may be coupled with a trust or a condition, but the expression of the trust or of the condition must form part of the donation, either by being contemporaneous with it, or so coupled with it by contemporaneous words of reference, as in effect to be incorporated with it. *Dunne v. Boyd*, 8 Ir. R., Eq. 609.

The gift may be good although coupled with a trust that the donee shall provide the funeral of the donor. *Hills v. Hills*, 8 M. & W. 401; 5 Jur. 1185.

Where a party near to her end, and on whose pillow a pocket with some money in it was lying, said, "I wish A. to bury me comfortably, and have all I have"; subsequently to which she changed the money into another pocket, and in the course of the day paid a portion of it away, and then made a declaration to the same effect as before:—Held, that it was properly left to the jury to say: first, was this meant by the deceased as a *donatio inter vivos* of the money and pocket; and, secondly, if not, whether it was a *donatio mortis causa* of those two things, or intended as a nuncupative will of her property generally. *Id.*

— **Must be made in Contemplation of Death.**—A *donatio mortis causa* must be made in contemplation of speedy death, and to take effect only in case of death. *Tate v. Hibbert*, 2 Ves. jun. 111.

To constitute a *donatio mortis causa*, the evidence must be clear that the donor gave it in contemplation of death. *Cornahan v. Grice*, 15 Moore, P. C. C. 215; 7 L. T. 81.

**Evidence of—Onus probandi.**—The burthen of proof is necessarily on the donee, as, in the first place, so many opportunities, and such strong temptations present themselves to unscrupulous persons to pretend deathbed donations, that there is always danger of having an entirely fabricated case set up; and secondly, without any imputation of fraudulent contrivance, it is so easy to mistake the meaning of a person languishing in mortal illness, and by a slight change of words, to convert the expressions of intended benefit into an actual gift of property;

and no case of this description ought to prevail, unless it is supported by evidence of the clearest and most unequivocal character. *Id.*

— **When Presumed.**—Where the circumstances are such as to indicate an intention to make a testamentary gift, and the intention fails for want of proper attestation, a *donatio mortis causa* will not be presumed. *Patterson, In re*, 33 L. J., Ch. 596; 10 L. T. 801; 12 W. R. 941—L. J.

**What Amounts to—Stock Certificates.**—A husband, two years before his death, gave to his wife a railway debenture subsequently converted into railway stock, which remained in his name, and on which the dividends were received by him, but paid to his wife. He gave the certificates to his wife, and they remained in her possession until he required them in order to replace a lost dividend warrant. While on his deathbed he handed the certificates to his wife, saying, "These are yours," and also gave her a deposit-note:—Held, that the gift of the stock failed as incomplete, and could not be supported as a declaration of trust, the intention to make an immediate gift being inconsistent with a declaration of trust. *Moore v. Moore*, 18 L. R., Eq. 474; 43 L. J., Ch. 617; 30 L. T. 752; 22 W. R. 729.

On the 20th July, 1840, M., then in extremis, executed an ordinary bank power of attorney, and delivered it to her sister E., whereby the latter was empowered to transfer into her own name government stock standing in M.'s name. M. died on the 21st of July, 1840, and on the 23rd the transfer was made under the power:—Held (the evidence shewing a clear intention on the part of M. to give the legal and beneficial interest in the stock to her sister), that the gift was valid and effectual in favour of E., as against the other next of kin of the donor. *Kiddill v. Farnell*, 26 L. J., Ch. 818; 3 Jur., N. S. 786.

A. in extremis gave all his shares in a particular bank to his son, on condition of his paying a debt which the testator owed upon the shares to the bank, and wrote a letter to the manager of the bank, directing that the shares should be transferred into the name of the son. The certificates of some of the shares were delivered to the manager as a preliminary to the preparation of the necessary deed of transfer. Before the deed was prepared, the testator died:—Held, that the transaction was incomplete, and that the shares formed part of the general estate. *Lambert v. Overton*, 11 L. T. 503; 13 W. R. 227.

— **Bonds.**—Upon the death of a testator ten Austrian bonds were found, amongst other securities, in a box at his house, with the following indorsement: "The first five numbers of these Austrian bonds belong to and are H. D.'s property," signed by the testator. H. D. was his housekeeper, and the key of the box was given into her custody:—Held, that as there had been no actual transfer or delivery of the bonds to H. D., they still remained part of the testator's assets. *Trimmer v. Darby*, 25 L. J., Ch. 424.

— **Railway Stock.**—Held, also, that railway stock cannot be the subject of *donatio mortis causa*. *Moore v. Moore*, *supra*.

— **Deposit Note.]**—Held, also, that the gift of the deposit note was a good *donatio mortis causâ*. *Id.*

— **Deposit Note with printed Cheque Form on Back.]**—A dying man, in expectation of death, stated his wish to give his wife 500*l.* out of a sum of 2,700*l.* on deposit at a bank, which was evidenced by a deposit note in his possession for 2,700*l.* on the back of which was a printed cheque form which had attached to it a notice of withdrawal. He filled up the cheque and notice of withdrawal for 500*l.* and sent the document to the bank, but died within two days of that date. The practice of the bank was to require notice to be given seven days before withdrawal:—Held, that the 500*l.* did not pass by a *donatio mortis causâ*, as the cheque for that amount was not payable till after the testator's death. *Mead, In re, Austin v. Mead*, 15 Ch. D. 651; 50 L. J., Ch. 30; 43 L. T. 117; 28 W. R. 891.

— **Bills of Exchange.]**—The same man under the same circumstances gave two bills of exchange drawn by himself to his own order, but undorsed, to a friend, and requested him to present them and give the money to his wife; the friend undertook to do so, and gave the bills of exchange to the wife, by whom they were not presented until after the testator's death:—Held, that the bills of exchange passed by a *donatio mortis causâ*. *Id.*

A gift of bills of exchange, payable to the donor or order, by way of *donatio mortis causâ*, was supported. *Rankin v. Weguelin*, 27 Beav. 309; 29 L. J., Ch. 323, n.

— **Promissory Note.]**—So a promissory note, payable to order, may be the subject of a *donatio mortis causâ*, and will pass thereby, though undorsed. *Veal v. Veal*, 27 Beav. 303; 29 L. J., Ch. 321; 6 Jur., N. S. 527.

C., in 1858, bought in the Incumbered Estates Court an estate for 3,025*l.*, and had it conveyed absolutely to his daughter, H. C. She owned 1,525*l.* of the purchase-money; C. contributed 1,500*l.* At the time of the purchase C. used some expressions as to his intention to give this sum to his daughter, but he soon after took from her a promissory note, payable seven days after date, in respect of the interest on which accounts were regularly stated and settled between the father and daughter during his life. In December, 1873, C. signed an indorsement on the note as follows:—"I direct that this promissory note be delivered up to be cancelled after my death, to the intent that my daughter H. C. shall be exonerated from payment of same. Dated 10th December, 1873.—P. C." This was attested by only one witness. There was reliable evidence that at various times, particularly when ill, the father told his daughter to take possession of the note when he was dying. He had the conveyance and the note tied together and placed in his deed-box, and he had a label on them, "These belong to H. C." C., having recovered from former illnesses, died after a few days' illness in 1876. In his last illness he said nothing as to the note. About an hour before his death, when he was insensible, the daughter got his keys and opened the deed-box, and found the conveyance and the note, as above described, and on reading the indorsement she replaced them in the box:—Held, that there was no gift of the note *inter vivos*, nor *donatio*

of it *mortis causâ*, nor any valid testamentary disposition of it in the daughter's favour, and that it still remained part of C.'s assets. *Cross v. Cross*, 1 Ir. Ch. D. 389.

— **Cheque.]**—A., four days before his death, gave to his wife a cheque for 1,000*l.*, which she immediately afterwards, by his direction, exchanged for one of B.'s cheques for the same amount, which was post-dated, and therefore void. The testator's cheque having been paid to B. about two hours before the testator's death, B. shortly after that event gave to the widow of the testator a cheque for 1,000*l.*, in exchange for that which he had previously given to her, and this second cheque was shortly afterwards paid to the widow:—Held, in effect, a good *donatio mortis causâ* from the testator to his wife. *Boute v. Ellis*, 4 De G., M. & G. 249; 17 Jur. 585.

An uncle upon his death-bed delivered to his nephew a cheque for 4,000*l.*, and with it his banker's pass-book. The cheque was not presented until after the donor's death:—Held, that the intended gift failed. *Beak v. Beak*, *Beak, In re*, 13 L. R., Eq. 489; 41 L. J., Ch. 470; 26 L. T. 281.

A husband being resident at St. Remo, in Italy, in his last illness drew his cheques on his London bankers, payable to order, and gave them to his wife, who indorsed them to her bank at St. Remo, and paid them into their bank. The cheques were not presented for payment in London till after his death:—Held, that the cheques were good *donationes mortis causâ*, and that the widow was entitled to the proceeds out of the testator's estate. *Rolls v. Pearce*, 5 Ch. D. 730; 46 L. J., Ch. 791; 36 L. T. 438; 25 W. R. 899.

A delivery of a cheque on the donor's banker, in his last illness, payable "to — or bearer," and signed by the donor, is an adequate gift of the amount, if the donee receives the money from the banker in the donor's lifetime, or before the banker has notice of the donor's death; or if the donee negotiates the cheque for a valuable consideration, or in payment of a debt; but such cheque will not operate as an appointment of so much, if the donee retains it in his possession till after the donor's death. *Tute v. Hibbert*, 2 Ves. jun. 111.

A lady, during the night in which she died, signed and handed to a trustee of a charity, established by herself, a cheque for 600*l.* for the use of the charity. The lady died before the morning, so that the cheque could not possibly be cashed before her death:—Held, that there was no *donatio mortis causâ*, and that the 600*l.* belonged not to the charity but to the residuary personal estate of the deceased. *Hewitt v. Kaye*, 6 L. R., Eq. 198; 37 L. J., Ch. 633; 16 W. R. 835.

A., being in a declining state of health, delivered to B. a locked cash-box, and told her to go at his death for the key; and that the box contained money for herself, and entirely at her disposal after he was gone, but that he should want it every three months while he lived. The box was twice delivered to A. by his desire, and he delivered it again to B., and it was in her possession at his death. The box was broken open by B. after A.'s death, and contained a cheque for 500*l.*, drawn by C. in favour of A., and inclosed in a cover indorsed with B.'s name; and the key (which A.'s son refused to

deliver to B.) had a piece of bone attached to it, with B.'s name written on it:—Held, that this was no donatio mortis causa. *Reddel v. Dobree*, 10 Sim. 244.

— **Bank Deposit Receipt.**—Assuming that a bank deposit receipt, whether indorsed or not, may, by manual delivery, be the subject of a donatio mortis causa, the evidence of the gift must be clear and unequivocal. *Dunne v. Boyd*, 8 Ir. R., Eq. 609.

On the day before his death R. stated to B.'s wife how, in the event of his death, he wished his property to be disposed of, and, on the following morning, having dictated and signed an order on the Provincial Bank to pay to B. the amount of some bank deposit receipts, attempted to indorse them, but, after indorsing the first, was unable to proceed, and very shortly afterwards died without giving any further expression of his intention:—Held, not to be a valid donatio mortis causa to B., either absolutely or as a trustee. *Ib.*

The delivery of the book of a depositor in a savings bank is not sufficient to constitute a donation of the money deposited. *M'Gonnell v. Murray*, 3 Ir. Eq. R. 460.

— **Mortgage.**—A mortgage, or a bond given as a collateral security for money due on mortgage, may be made the subject of a donatio mortis causa. *Duffield v. Hicks*, 1 Dow. & Clark, 1; 1 Bligh, N. S. 497; overruling *Duffield v. Elwes*, 1 Sim. & Stu. 239.

— **Policy of Insurance.**—So a policy of life insurance may be the subject of a donatio mortis causa. *Witt v. Amiss*, 1 B. & S. 109; 30 L. J., Q. B. 318; 7 Jur., N. S. 499; 4 L. T. 283; 9 W. R. 691; *S. P. and S. C., Amiss v. Witt*, 33 Beav. 619.

**Law in Scotland.**—In the law of Scotland, general words of disposition in a mortis causa deed are, in the absence of any proof of a contrary intention (and the law of Scotland allows such contrary intention to be proved by evidence of a kind which in England would not be admissible for that purpose), sufficient to pass heritable property vested at the date of the deed in the disposer with a special destination to heirs substitute. A. was fee simple proprietor of the estates of Kintarbert and Crossaig in Scotland. He died leaving a disposition and settlement, without prohibitory clauses, disposing these lands to B. and his heirs male, whom failing, to C. and his heirs male, whom failing, to certain cousins in succession, and their respective heirs male. B., who owned other estates, took possession, and died leaving a mortis causa deed, giving, in language entirely general, all his heritable and movable property to C. and his heirs, whom failing, to his sister D. C. entered into possession of all B.'s estates, and soon afterwards died intestate and without issue. The sister, D., then, as heiress of provision under B.'s general mortis causa deed, claimed the estate of Kintarbert and Crossaig as well as the other lands of B. E. disputed D.'s right, claiming these estates as heir of provision under A.'s settlement; contending that the general term of B.'s deed could not be held to include Kintarbert and Crossaig, lands already settled upon a destination of heirs; nor was this B.'s intention:—Held,

affirming the decision of the court below, that D. was entitled, because B. was absolute fiar, being the heir in possession under a settlement or entail without fetters, and therefore a general disposition by him passed these lands as part of the universitas of his estate, there being nothing in the mere nature of such a special destination, as here, to prevent it; and no proof of any contrary intention to limit the operation of such general words. *Campbell v. Campbell*, 5 App. Cas. 787.—H. L. (Sc.).

**Pleading.**—A statement of claim alleged that an intestate "two days before his death, made a good and valid donatio mortis causa to the plaintiff, of the whole of his moneys standing on deposit to his account at the Ellesmere Savings Bank," but did not state any facts amounting to a donatio mortis causa. Demurrer allowed, on the ground that the facts alleged in the statement of claim did not shew a valid donatio mortis causa. *Townsend v. Parton, Parton, In re*, 45 L. J. 755; 30 W. R. 287.

#### IV. EXECUTION.

##### 1. Signature of Testator.

##### 2. Attestation, 887.

#### 1. SIGNATURE OF TESTATOR.

See also cases under ATTESTATION, *infra*.

**By Agent.**—If the signature of a testator, who is too ill to write himself, is signed in his presence and that of the attesting witnesses by a third party, such signature must, nevertheless, be accompanied by some act or word on the part of the testator to shew that it was made at his request. *Marshall, In goods of*, 13 L. T. 643.

A testator at the time of the execution of his will was in such a weak state as to be unable to affix his signature and it was signed for him by the person who drew it. The court, on affidavits that the testator had frequently afterwards confirmed the will, and that the next of kin did not object, granted probate of the will. *Elcock, In goods of*, 20 L. T. 757.

**By Sealing.**—Sealing a will was not a sufficient signing of it within the Statute of Frauds, 29 Car. 2, c. 3, s. 5, regarding the execution of wills. *Smith v. Evans*, 1 Wils. 313.

— **With Initials.**—A testator, in the presence of two subscribing witnesses, affixed a seal stamped with his initials to his will, which was entirely written by himself, placed his finger on the seal, and said, "This is my hand and seal:—Held, that the will was sufficiently signed by him. *Emerson, In goods of*, 9 L. R., Ir. 443.

**By Mark.**—A will was sufficiently signed, within the Statute of Frauds, s. 5, by the deviser putting his mark instead of signing his name to it, although he was an educated person and able to write well. *Taylor or Baker v. Denning*, 3 N. & P. 228; 8 A. & E. 94; 1 W., W. & H. 148; 2 Jur. 775.

A testator, unable from illness to sign his will, had his hand guided in making his mark:—Held, a sufficient signature within the Statute of Frauds. *Wilson v. Beddard*, 12 Sim. 28.

A will, purporting to be that of "S. Clarke,"

and delivered by her as such for safe custody to one of her executors shortly before her death, was executed by mark, against which appeared the name of "S. Barrell." The former was her maiden name, and the latter the name of the husband whom she had married.—Held, that there being no doubt as to the identity of the testatrix, her execution by mark was not vitiated by another person having written the wrong name against it. *Clarke, In goods of*, 1 S. & T. 22; 27 L. J., P. 18; 4 Jur., N. S. 24.

A. put his mark to a testamentary paper, in which he was throughout described as B. The court, being satisfied, on affidavit, that A. duly executed the paper by mark animo testandi, granted probate thereof as his will. *Douce, In goods of*, 2 S. & T. 593; 31 L. J., P. 172; 8 Jur., N. S. 723; 6 L. T. 789.

A testator signed his will by putting his mark to it, and no evidence was given that it had been read over to him before its execution. An objection taken to the admissibility of the will on that ground, was unsustainable. *Clarke v. Clarke*, 2 Ir. R., C. L. 395.

A plaintiff propounded as a will a paper purporting to have been executed by a markswoman, in the presence of two attesting witnesses, who also attached their marks thereto. The whole body of the will, and the names of the supposed testatrix and the witnesses, were in the handwriting of the plaintiff, who under it took almost the entire property. This paper, although in the custody of the plaintiff, was not offered for probate until many years after the death of the testatrix. Evidence was given of the execution of this paper by some person in the presence of two witnesses, but, except by the testimony of the plaintiff, such person was not identified as the deceased. The court refused to grant probate of the paper. *Edmonds v. Lewer*, 11 Jur., N. S. 911.

—By means of a Stamp.]—B., by the direction, and in the presence, of A., who wished to execute a testamentary paper, affixed and impressed at the foot of such paper the signature of A., by means of a stamp or an engraving, which A., being paralysed, had had made for his ordinary use. A. afterwards acknowledged the signature and the codicil, and asked the witnesses to attest:—Held, that the affixing a stamp was equivalent to making a mark, at the direction of the testator, and that the making a mark was a signature. *Jenkyns v. Gaisford*, 3 S. & T. 93; 32 L. J., P. 122; 9 Jur., N. S. 639; 8 L. T. 517; 11 W. R. 854. But the court declined on motion to grant probate of the document so executed. *S. C.*, 32 L. J., P. 71; 9 Jur., N. S. 311; 11 W. R. 501.

Position of.]—A will filled the first and third pages of a sheet of foolscap paper, leaving no room at the bottom of the third page for the signature of the testator and of the attesting witnesses, which were written crossways on the second page:—Held, that the will was duly executed. *Coombs, In goods of*, 1 L. R., P. 302; 36 L. J., P. 25; 15 L. T. 363.

A testator's signature was written partly across the last line but one of the will, and entirely above the last line with the exception of one letter which touched the last line:—Held, that the will was signed at the foot or end thereof. *Woodley, In goods of*, 3 S. & T. 429; 33 L. J., P. 154.

A testator wrote a will on three sides of a sheet of note paper, the attesting clause and names of the attesting witnesses were at the bottom of the second side, a dispositive clause was written on the third side, and all the letters of the testator's signature, excepting the two last, which extended over to the third side, were on the second side:—Held, to be a good execution. *Powell, In goods of*, 4 S. & T. 34; 34 L. J., P. 107; 13 L. T. 195; 13 W. R. 696, 999.

A will ending in the middle of a third page of a sheet of foolscap paper, the lower half of the page being left blank, and the attestation clause and the signatures being written on the top of the fourth page, is duly executed. *Hunt v. Hunt*, 1 L. R., P. 209; 35 L. J., P. 135; 14 L. T. 859.

When the dispositive part of a codicil, written on a half sheet of note paper, occupied nearly the whole paper, and the names of the attesting witnesses were subscribed at the bottom of the page, and the signature of the testator was written down the lower part of the edge of the paper, the court held it to be a valid execution. *Jones, In goods of*, 4 S. & T. 1; 34 L. J., P. 41; 11 Jur., N. S. 118; 13 L. T. 210; 13 W. R. 414.

A will filled two pages of a sheet of note paper, leaving no room on the second page for the signatures of the testator and the attesting witnesses, which were written along the sides of the will upon the third page:—Held, to be a due execution. *Wright, In goods of*, 4 S. & T. 35; 34 L. J., P. 104; 13 L. T. 195.

W. wrote his will on a sheet of foolscap paper. The writing covered three-fourths of the first side (the other fourth part at the bottom being blank) and the upper half of the second side. The lower half of this side was also blank. On the third side, at one-fourth the length of such side from the top, an attestation clause was written on lines not extending quite across the side; and opposite the second line of the attestation clause was his signature. The signatures of the witnesses written at the end of the attestation clause were in a line below the last words of the will when the sheet was opened:—Held, that the will was duly executed, the signature being opposite to the end of the will. *Williams, In goods of*, 1 L. R., P. 5; 34 L. J., P. 2; 11 Jur., N. S. 982; 13 L. T. 304; 14 W. R. 111.

A will and the attestation clause to it, which was in the usual form, were written by the testatrix herself. The only signature of the deceased attached to the will was squeezed into what had been a blank space in the attestation clause. The witnesses were asked by the deceased to sign her will, but she wrote nothing in their presence, nor did they or either of them notice her signature. The court being satisfied from the circumstances of the case, that she had signed her name before the witnesses subscribed, decreed probate of the will. *Huckvale, In goods of*, 1 L. R., P. 375; 36 L. J., P. 84; 16 L. T. 434; 16 W. R. 64.

A will was written on the upper part of one side of a piece of paper with a considerable blank beneath it, and on the back of the paper was written the attestation clause and signatures of the testator and witnesses. Upon proof that the will was written before execution:—Held, that it was duly executed. *Archer, In goods of*, 2 L. R., P. 252; 40 L. J., P. 80; 25 L. T. 274; 19 W. R. 785.

The dispositive part of a will was written on and occupied the entirety of the first page of a

sheet of note paper; the signatures of the testatrix and the attesting witnesses were written upon and occupied the entirety of the fourth page, and the second and third pages were blank:—Held, that it was duly executed. *Rice, In goods of*, 5 Ir. R., Eq. 176.

The name of a testator was at the foot of a will, but below the names of the attesting witnesses. Both witnesses were dead, and there was no evidence of the order in which they and the testator signed the will, but a due execution was to be inferred from the attestation clause. The court decreed probate of the will. *Puddephatt, In goods of*, 2 L. R., P. 97; 39 L. J., P. 84.

A testatrix having obtained a form of will, lithographed on the first side of a sheet of foolscap paper, wrote her will on the second and third sides, terminating near the bottom of the third side; the fourth side was blank. The form was not filled up except as to the appointment of executors. She signed her name, in the presence of witnesses, at the foot of the lithographed form:—Held, that, as regards the position of the signature, the execution was valid as within the provisions of 15 Vict. c. 24. *Wotton, In goods of*, 3 L. R., P. 159; 30 L. T. 75; 22 W. R. 352.

A will was written on the first and third sides of a sheet of foolscap, and the attestation was on the second page. The court, being satisfied from the evidence that the signature was intended to be placed at the foot or end, under 15 Vict. c. 24, granted probate. *Stoakes, In goods of*, 31 L. T. 552; 23 W. R. 62.

A will covered four pages of a sheet of foolscap paper, and was continued on a fifth page, being the first of a second sheet. At the bottom of the fifth page was a formal attestation clause, with the signatures of the witnesses, and the signature of the testator appeared at the top of the sixth or following page, preceded by these words: "To which will and testament I hereunto annex my seal and signature:—Held, a valid execution within 15 & 16 Vict. c. 24. *Horsford, In goods of*, 3 L. R., P. 211; 44 L. J., P. 9; 31 L. T. 553; 23 W. R. 211.

A testator wrote a codicil to his will upon a sheet of foolscap paper, covering the first page and half the second. The signatures of the testator and attesting witnesses were on a separate paper, which was attached to the codicil by a string. The court being satisfied that the papers were so attached when the testator acknowledged his signature to the witnesses, and they attested it:—Held, that the instrument was duly executed. *Ib.*

A will was written on a lithographed form. The testator wrote his name in the blank space left in the attestation clause, but did not sign it in the ordinary place, which was filled by the signatures of the attesting witnesses. The latter did not remember any of the circumstances of the execution:—Held, that the will was duly executed and attested. *Harris, In goods of*, 23 W. R. 734.

A will contained as an attestation clause the words, "Signed in the presence of us." Then followed the signatures of the attesting witnesses, and beneath their signatures that of the testator. The witnesses deposed that all three were present when they signed the instrument, but they could not say in what order they signed. The court held that the circumstances

warranted it in coming to the conclusion that the will had been duly executed, and decreed probate of it. *Jones, In goods of*, 36 L. J., P. 80; 25 W. R. 215.

There being no room for the signature of the testator or witnesses at the foot of the single page on which a will was written, the testator signed by writing his name transversely along the left-hand margin, near the top, and running downwards as far as the commencement of the second line of the will. The names of the attesting witnesses were written above the will and opposite to portion of the testator's signature:—Held, to be good execution. *Collins, In the goods of*, 3 L. R., Ir. 241.

Where, from the obvious sequence and sense of the context, it appears to the satisfaction of the court that the signature of the deceased really follows the dispositive part of a testamentary instrument, though it may occupy a place in the paper literally above the dispositive parts or part thereof, such testamentary instrument will be entitled to probate. *Kimpton, In goods of*, 3 S. & T. 427; 33 L. J., P. 153.

—In Attestation Clause only.]—A person with his own hand wrote out a will, which concluded with an attestation clause, "Signed, published, and declared by the said A. B., the testator, as and for his last will and testament," &c. At the time of execution he declared the paper to be his will in the presence of two witnesses, and asked them to witness it, which they did, but he did not himself sign it in their presence, nor was there any direct evidence that the witnesses saw the signature. The only signature was in the attestation clause:—Held, that under 15 & 16 Vict. c. 24, the execution was valid. *Pearn, In goods of*, 1 P. D. 70; 45 L. J., P. 31; 33 L. T. 705; 24 W. R. 143.

A testimonium clause was as follows: "In witness whereof, I, Martin Hall Mann, have hereunto set my hand." The whole of this was in the handwriting of the testator, and his name written as he usually signed it, but the will was not otherwise signed by him:—Held, that the will was duly executed, the signature being placed "among the words of the testimonium clause," within the meaning of 15 & 16 Vict. c. 24, s. 1. *Mann, In goods of*, 28 L. J., P. 19.

A wrote out his own will, concluding with an attestation clause, in which his name appeared. He afterwards called in two witnesses, told them the paper was his will, read the latter portion of it to them, including the attestation clause, and requested that they would sign their names, which they did. His name was not written at the foot or end otherwise than in the attestation clause:—Held, the execution was valid. *Walker, In goods of*, 2 S. & T. 354; 31 L. J., P. 62; 8 Jur., N. S. 314; 5 L. T. 766.

A made his will on a printed form. After he had written his name in the attestation clause, he asked the witnesses to subscribe and attest the will, which they did in his presence. He then wrote his name underneath their signatures, and remarked that they were witnesses to his will. The court being satisfied that he intended by signing his name in the attestation clause to execute the will, ordered probate to issue without his signature written under the names of the witnesses. *Casmore, In goods of*, 1 L. R., P. 653; 38 L. J., P. 54; 20 L. T. 497; 17 W. R. 627.

**On Paper Detached from Will.]**—Where the signatures of a testator and of the attesting witnesses were made, not on the paper on which the will was written, but on a piece of paper which had been attached to the paper on which the will was written:—Held, to be a good execution. *Cook v. Lambert*, 3 S. & T. 46; 32 L. J., P. 93; 9 Jur., N. S. 258; 9 L. T. 211; 11 W. R. 401. See also cases, post, col. 892.

**Writing below Signature.]**—A testator, after signing his name to his will in the presence of two witnesses, added a clause to it, the writing being squeezed into the space above and beside the signature. Immediately afterwards the witnesses signed their names:—Held, that he did not sign or acknowledge his signature to the will as containing such clause, and that probate should issue without it. *Arthur, In goods of*, 2 L. R., P. 273; 25 L. T. 274; 19 W. R. 1016.

In a testamentary paper executed by the deceased, the last sentence commenced immediately above his signature, and was continued in three short lines to the left of it, the two last lines being somewhat below the signature. This sentence was written before the deceased signed her name:—Held, that the execution was valid, and that the last sentence would be included in the probate. *Ainsworth, In goods of*, 2 L. R., P. 151; 23 L. T. 824.

A farmer wrote his will on a sheet of paper. The attestation clause was on the third page. At the foot of the page there were the words "Turn over," and on the fourth page there was a clause bearing date the day on which the will was executed and with the signature of the testator. The will was signed by the testator and subscribed by the witnesses on the third page, but before its execution the witness saw some writing on the fourth page. The will gave legacies and annuities of considerable amount, but the debts of the testator exhausted the personalty, and the only allusion to his real estate was contained in the writing on the fourth page:—Held, that the signature to the will which the witnesses attested was the signature on the third page, and therefore that the writing on the fourth page could not be included in the probate. *Dearle, In goods of*, 47 L. J., P. 45; 39 L. T. 93.

S. signed his name on five sheets of a testamentary paper which consisted of six sheets, the names of the attesting witnesses appeared on each of the five sheets; on the sixth appeared a testimonium and attestation clause, and the names of the witnesses, but not the signature of the deceased. The writing at the end of the fifth sheet broke off in the middle of a sentence, which was continued on the sixth sheet. The court refused to grant probate of the five sheets, as containing his last will and testament. *Sweetland v. Sweetland*, 4 S. & T. 6; 34 L. J., P. 42; 11 Jur., N. S. 182; 11 L. T. 749; 13 W. R. 504.

Testatrix left a will, which extended over to the third page of a sheet of foolscap. The signatures of herself and attesting witnesses were at the bottom of the first page, but she also placed her name at the end of the second page in their presence and before execution. The court granted probate of the first two pages. *Wray, In goods of*, 31 W. R. 476; 47 J. P. 279.

**Acknowledgment of Signature—What Sufficient.]**—A. requested B. to prepare a will for

him, by which B. was appointed sole executor, and when prepared it was signed by A. in the presence of B. and two other persons. B. then sent for C. and D., and in A.'s hearing requested them to attest A.'s signature, which they did, and A. thanked them for their trouble:—Held, following *Inglesant v. Inglesant* (3 L. R., P. 172), that the signature had been duly acknowledged and probate granted. *Bishop, In goods of*, 30 W. R. 567; 46 J. P. 892.

Where a person has signed his name in the presence of witnesses at the end of several clauses of a dispositive character, apparently written at different times, the presumption is that he intended to give effect to the whole of what was written at the time he so made his signature. *Cattrall, In goods of*, 3 S. & T. 419; 33 L. J., P. 106; 10 Jur., N. S. 136.

A woman signed her will in the presence of one witness. On the entry of the second witness a person present directed him to sign his name under the testatrix's signature. He did so, and the second witness also subscribed the will. She was in the room, but said no word during the proceeding. The will was lying on the table open, and headed in large characters with the words, "This is the last will and testament of," &c. It also had a full and formal attestation clause:—Held, that she acknowledged her signature in the presence of two witnesses. *Inglesant v. Inglesant*, 3 L. R., P. 172; 43 L. J., P. 43; 22 W. R. 741.

A testatrix produced a paper to A. and B., and saying, "This is my will," asked them to witness it. The will covered three pages of a sheet of paper. Her signature was at the foot of the third page. The witnesses subscribed their names on the fourth page, but did not see her signature or any part of the writing on the paper. The court, being satisfied that the signature of the testatrix was on the will at the time she produced it to the witnesses:—Held, that there had been a sufficient acknowledgment, and that the will was duly executed. *Janaway, In goods of*, 44 L. J., P. 6; 31 L. T. 800; 23 W. R. 385.

An intending testator's name was, by his direction, and in his presence, subscribed for him to a paper writing purporting to be his will, and two other persons, who were present when his name was so subscribed, but not when the direction was given, acted as attesting witnesses, and then the intending testator made a mark immediately over his name so subscribed for him:—Held, that there being no evidence that the subscribed name had been acknowledged as his signature by the intending testator in the presence of the attesting witnesses, and his mark having been made by him after the attestation of the witnesses, the execution was invalid. *Burke v. Moore, Moore, In goods of*, 9 Ir. R., Eq. 609.

A signature made by some person, but not in the presence (though by the direction) of a testator, is not such signature as can be acknowledged by the testator under the Wills Act (7 Will. 4 & 1 Vict. c. 26), s. 9. *Kevil v. Lynoh*, 8 Ir. R., Eq. 244.

An intending testator "held a pen in his hand and put it to his name" (not written in his presence), "or placed on a mark" made on a will prepared for him by a solicitor; but no proof could be given whether any ink was in the pen or any visible trace made when he so held the pen:—Held, though the will was properly

attested, that the court could not presume a due execution. *Id.*

The attesting witnesses to a will, which purported to be executed by mark, were asked in the testator's presence to sign the will. A mark was on the will when they signed, but there was no evidence that it was made by the testator, or that he knew the contents of the will, nor did he refer to it. The court pronounced against the will on the ground that the evidence failed to shew an acknowledgment of the testator's signature or that he knew and approved of its contents. *Morritt v. Douglass* or *Douglas*, 3 L. R., P. 1; 42 L. J., P. 10; 27 L. T. 591; 21 W. R. 162.

— **Blindness of Testator.**—A testator who is so blind that he can do little more than distinguish night from day is capable of acknowledging his signature to his will. *King v. Berry*, 5 Ir. R., Eq. 309.

**Evidence of Due Execution.**—If a will appears upon the face of it to have been properly executed, according to the requirements of the 7 Will. 4 & 1 Vict. c. 26, the presumption of law is that the testator duly acknowledged it. *Lloyd v. Roberts*, 12 Moore, P. C. C. 158.

The grant of probate to a will, which was entirely in the handwriting of the testator, an attorney, without break or crowding, with an attestation clause in its proper place, and attested by two witnesses, was opposed by the wife and daughter of the testator (they having been entirely excluded from any benefit under it), on the ground that it was written after the witnesses attested the will. One of the attesting witnesses was dead; the other deposed that when he signed the will, with the exception of the testator's signature, and the signature of the other attesting witness, the paper was blank:—Held, from the appearance of the will, as well as the circumstance that the testator was a professional man, well acquainted with the necessity of a proper execution, and the presumption of law, that the will was written when attested, and had been duly acknowledged in the witnesses' presence, notwithstanding the testimony of the surviving attesting witness, who, in the opinion of the judicial committee, must have been mistaken or his memory failed him. *Id.*

The legal presumption is in favour of a will with a perfect attestation clause, and to rebut it the court requires the strongest evidence. Therefore, where a solicitor drew his will himself with a perfect attestation clause, which appeared attested by two witnesses of humble rank, and on the will being propounded, after the lapse of seven years and a half from its date, one of the attesting witnesses swore, but not very positively, that the testator signed his name to the will before the witnesses, while the other witness swore that at the time he signed the will the testator's name was not signed to it, the court not relying on the memory of the latter, acted on the presumption in favour of the due execution of the will and declared it well proved. *O'Meagher v. O'Meagher*, 11 L. R., Ir. 117.

When a testamentary paper is not in evidence, and all the persons present at an intended execution of it agree that it was not duly executed,

the court cannot, on a mere suspicion to the contrary, decree probate of it. *Eckersly v. Platt*, 1 L. R., P. 281; 36 L. J., P. 7; 15 L. T. 327; 15 W. R. 232.

In a suit concerning the validity of a will, the surrounding circumstances and the appearance of the document were in favour of its having been duly attested. The adverse evidence—viz., that of the two witnesses, who denied having attested in the presence of the testator, appeared to be of a doubtful character. The court acted on the presumption *omnia rite esse acta*, and pronounced for the will. *Bailey v. Frowan*, 19 W. R. 511.

If an attestation clause of a will more than thirty years old recites a compliance with the requisite ceremonies in respect of all the witnesses, it is enough, in order to make out a *prima facie* case, to prove the death of all, and the handwriting of one of them; because it will be presumed that everything that he thus declared by his attestation to have been done was rightly done. *Andrew v. Motley*, 12 C. B., N. S. 526.

Two persons' names appeared as attesting witnesses to a will, and the attorney who drew the will, and who was present during its execution, swore that these persons had duly signed the will as attesting witnesses, and other persons who knew their handwriting swore that the writing was theirs, but they themselves, though admitting a striking resemblance between the signatures to the will and other signatures of theirs produced, denied having signed the will, and swore that the signatures to it were forgeries. The court, being satisfied that the signatures were genuine, notwithstanding the denial of the witnesses, admitted the will to probate. *Myers v. Gibson*, 14 W. R. 901.

Two attesting witnesses contradicted one another on the point that the deceased signed his name in their joint presence. The will concluded, "In witness whereof I place my signature in the presence of two witnesses:—"Held, that it was entitled to probate. *Crogreen v. Willoughby*, 6 Jur., N. S. 590.

When there is no formal attestation clause to a testamentary paper, and no affirmative evidence that at the time of execution the testator's name was on the paper, the mere production of it to witnesses with a request that they will sign it as a paper, is not in itself sufficient to justify the court in drawing the inference that it was already signed by the testator. *Fischer v. Popham*, 3 L. R., P. 246; 44 L. J., P. 47; 33 L. T. 231; 23 W. R. 683.

A testatrix in 1869 executed a will, and in 1871 executed a codicil appointing two fresh executors, but in other respects confirming the will. She afterwards wrote at the foot of the will "I declare this will to be null and void.—E. H., 28th of May, 1873." Underneath this were the words "Turn over," and on a blank page she made fresh testamentary dispositions, followed by her signature and the date, underneath which were the words "Witness my hand," and the signatures of two witnesses, but with no formal attestation clause. At the foot of the codicil of 1871 she wrote "Null and void, E. H." The signatures both to the will and to the codicil had lines drawn across them, but were still perfectly legible. The witnesses to the writing of 1873 swore that the testatrix asked them to sign their names, but did not sign her own in their

presence, and that she did not say what the paper was. One witness did not remember whether her signature was already there. The other witness thought that it was, but that some of the other words had been added afterwards:—The court held that the later codicil was not proved to have been duly acknowledged, and granted probate of the will and first codicil. *Ib.*

On the death of the deceased a testamentary paper was found in his handwriting and with his signature at the foot or end. It had also an attestation clause and the names of two witnesses thereto. At the time of execution the deceased did not refer to the paper as a will, nor was there any evidence that the deceased's signature was on the paper at the time. The court refused, on motion, to grant probate of such paper as a codicil to the will of the deceased. *Swinford, In goods of*, 1 L. R., P. 630; 38 L. J., P. 38; 20 L. T. 87; 17 W. R. 536.

When one of the attesting witnesses to a will was dead, and it appeared that it would be difficult, if not impossible, to discover the other, and the only parties interested in the estate consented, the court granted probate of the will, though in the attestation clause it did not appear under what circumstances the attestation had been made. *Nicks, In goods of*, 34 L. J., P. 30.

A will, in the handwriting of the deceased, and having a full attestation clause, will be admitted to probate, although the attesting witnesses may not recollect whether it was signed or the signature acknowledged in their presence. *Holgate, In goods of*, 1 S. & T. 261; 29 L. J., P. 161; 5 Jur., N. S. 251; 7 W. R. 19.

When a will appears to be duly executed, and there is a complete attestation clause, the presumption *omnia rite esse acta* applies, and is not rebutted by the defective memory of the attesting witness. Where the attestation clause is incomplete, the presumption also applies, but with less force. *Vinnicombe v. Butler*, 3 S. & T. 580; 34 L. J., P. 18; 10 Jur., N. S. 1109; 13 W. R. 392.

If the attestation clause is informal, and the attesting witnesses identify their signatures and that of the testator, but have no recollection of the circumstances under which the will was executed, the presumption, in the absence of evidence to the contrary, is, that the will was duly executed. *Rees, In goods of*, 34 L. J., P. 56.

#### —Signature seen by Attesting Witnesses.]

—When the attesting witnesses to a will duly executed on the face of it did not recollect having seen the testator's signature to the will when they subscribed their names as witnesses, the court held that it was at liberty to judge from the circumstances of the case, whether it was probable that the testator's name was on the will or not at the time of the attestation, and being of opinion that it was, pronounced for the will. *Gwillim v. Gwillim*, 3 S. & T. 200; 29 L. J., P. 31.

To constitute a sufficient acknowledgment, within s. 9 of the Wills Act, the witnesses must at the time of the acknowledgment see, or have the opportunity of seeing, the signature of the testator, and if such be not the case it is immaterial whether the signature be, in fact, there at the time of attestation, or

whether the testator say that the paper to be attested is his will, or that his signature is inside the paper. *Hudson v. Parker* (1 Robert. 14) followed. *Gwillim v. Gwillim* (3 Sw. & Tr. 200) and *Becket v. Howe* (2 L. R., P. 1) disapproved. *Gunstan, In goods of, Blake v. Blake*, 7 P. D. 102; 51 L. J., Ch. 377; 51 L. J., P. 36; 46 L. T. 641; 30 W. R. 505—C. A.

A person asked two witnesses to put their mark to a paper, but did not tell them that it was his will, or make any statement in regard to it. Being illiterate, the witnesses could not say whether his signature was on the paper at the time, and there was no evidence on the point:—Held, an insufficient execution of the will. *Pearson v. Pearson*, 2 L. R., P. 451; 40 L. J., P. 53; 24 L. T. 917; 19 W. R. 1014.

The cases on execution by acknowledgment of a testator's signature reviewed. *Ib.*

When the signature of a testator is apparent on the will when it is presented to the witnesses for attestation, it is sufficient that it might be seen by them, whether they actually observed it or not. *Kelly v. Keatinge*, 5 Ir. R., Eq. 174.

The attesting witnesses were not present when the testator put his mark to his will; but the testator, being asked in their presence, "Do you acknowledge this to be your last will and testament?" answered, "I do":—Held, a sufficient acknowledgment of his signature. *Ib.*

The mere circumstance of a testator having called in two witnesses "to sign a paper for him" (which they did in his presence), but without any explanation of the nature of the instrument being made to them, or the witnesses being able to see if any signature or writing was upon it when they attested it:—Held, not to amount to an acknowledgment of the signature of the testator, so as to satisfy the provisions of the 7 Will. 4 & 1 Vict. c. 26, s. 9. *Holt v. Genge*, 4 Moore, P. C. C. 265.

A codicil was signed by a deceased, who was ill in bed in one room, and attested by two witnesses in an opposite room, but who did not see her make or acknowledge her signature, or have any conversation with her respecting it. The deceased, the doors of both the rooms being open, might, by raising herself in bed, have seen the witnesses sign; but there was no evidence that she did so:—Held, to be a bad execution, on the grounds that she did not make or acknowledge her signature in the presence of the witnesses, and that they did not attest in her presence. *Killick, In goods of*, 3 S. & T. 578; 34 L. J., P. 2; 10 Jur., N. S. 1083.

A testator requested one person to attend to his will and another to witness a paper. They both attended at the time and place appointed, when the testator produced a paper so folded that no writing on it was visible, and informed them that in consequence of his wife's death it was necessary to make a change in his affairs, and he asked them to sign their names to it, which they did. The testator did not sign in their presence, nor did they see his signature. The paper had an attestation clause upon it in his handwriting, but not quite in the ordinary form:—Held, that there had been a sufficient acknowledgment of the signature. *Beckett v. Howe*, 2 L. R., P. 1; 39 L. J., P. 1; 21 L. T. 400; 18 W. R. 75.

A. and B. subscribed a paper in the presence of and at the request of the testatrix, who had previously in their presence written something

on it, but what, they did not know. She did not explain to them the nature of the paper; nor when they signed it did they see her signature, all the writing on the paper being concealed by a sheet of blotting-paper:—Held, a valid execution. *Smith v. Smith*, 1 L. R., P. 143; 35 L. J., P. 65; 12 Jur., N. S. 674; 14 L. T. 417; 14 W. R. 648.

**By Soldiers and Sailors.**—See *ante*, col. 830.

## 2. ATTESTATION.

See also preceding cases under SIGNATURE OF TESTATOR.

**Presence of Testator and Witnesses.**—The factum of a will held under the circumstances of the case to be sufficiently proved, though one of the subscribing witnesses deposed that he did not see all that the testator wrote, only the large initial of his christian-name; and the other witness stated that she did not see what he wrote, but that he acknowledged the paper to be his will in their joint presence. *Cooper v. Bockett*, 4 Moore, P. C. C. 419; 10 Jur. 931.

The signature or acknowledgment of a testator must be made in the presence of two witnesses, present at the time, and they must, after he has so signed or so acknowledged, subscribe the will in his presence. *Hindmarsh v. Charlton*, 8 H. L. Cas. 160; 7 Jur., N. S. 611; 4 L. T. 125; 9 W. R. 521.

A will signed by the attesting witnesses in the same room where the testatrix lay in bed with the curtains closed, and her back to the attesting witnesses, who deposed to her utter inability to have turned herself so as to have drawn aside the curtains:—Held, not to have been signed by the witnesses in the presence of the testatrix. *Tribe v. Tribe*, 1 Rob. Ecc. Rep. 775.

A testatrix went to her attorney's office to execute her will; being an invalid, she executed it in her carriage, the witnesses attending her. After having seen the execution they returned to the office to subscribe it, and the carriage was put back to the window of the office, through which she might have seen what passed:—Held, that the will was well executed. *Casson v. Dade*, 1 Bro. C. C. 99; Dick, 586.

See also cases *ante*, col. 885.

**—Attestation while Testator is Insensible.**

—If a testator is in a state of insensibility when his will is attested, the will is not duly executed although he is corporally present. *Right d. Cater v. Price*, 1 Dougl. 241.

**—Testator unable to see Witnesses Sign.**

—Where the witnesses subscribed their names at a window, in a passage where they could only see a part of the bed on which the testator lay, and he could not, as he lay there, see them attest the will:—Held, not to be duly executed. *Clerk v. Ward*, 4 Bro. P. C. 71.

A testatrix signed a document in the presence of two witnesses, who twenty minutes afterwards subscribed the document in an adjoining room. The door was open, but the testatrix was not aware that they were signing:—Held, that the document was not duly executed. *Jenner v. Finch*, 5 P. D. 106; 49 L. J., P. 25; 42 L. T. 327; 28 W. R. 520.

A person executed his will by signing it in the presence of two witnesses, one of whom at once subscribed it in the same room. The deceased then noticing that the other witness was excited and nervous, suggested that the will should be taken into an adjoining room, which was done, and it was there signed by the second witness. There was evidence that the doors of the two rooms were open at the time, and that the deceased while in bed might have seen that part of the table in the adjoining room on which the will was lying when the witness signed her name:—Held, that the execution was valid. *Trimmell, In goods of*, 11 Jur., N. S. 248.

Where the attesting witnesses retired from the room where the testator had signed, and subscribed their names in an adjoining room, and the jury found that, from one part of the testator's room, a person, by inclining himself forwards with his head out at the door, might have seen the witnesses, but that the testator was not in such a situation in the room that he might, by so inclining, have seen them:—Held, that the will was not duly attested. *Doe d. Wright v. Manifold*, 1 M. & S. 294.

**—Testator Blind.**—It is not necessary to the validity of the execution of a will of lands by a blind man, that it should be read over to him in the presence of the attesting witnesses. *Longchamp d. Goodfellow v. Fish*, 2 N. R. 415.

A testator who is so blind that he can do little more than distinguish night from day is capable of acknowledging his signature to his will. *King v. Berry*, 5 Ir. R., Eq. 309.

**Position of Signature.**—A testator wrote his will on two sheets of brief paper. He affixed his name to both sheets, but the attesting witnesses only signed the first sheet. The court ordered the will to be propounded. *Morris, In goods of*, 28 L. T. 745.

A party executed his will in the presence of two witnesses, who signed their names in his presence, one opposite the word "executors," the other opposite the word "witness." There was no attestation clause to the will. The deceased intended one of the witnesses to be his executor, and asked him to sign his name in that character. The court held, that such person did not sign the will exclusively as executor; but that he also intended by his signature to affirm that the deceased executed the will in his presence, and that consequently the execution was valid. *Griffiths v. Griffiths*, 2 L. R., P. 300; 41 L. J., P. 14; 25 L. T. 574; 20 W. R. 192.

A testator signed his name at the end of his will, on the tenth sheet, and placed his initials on the first nine sheets. Two out of three witnesses signed their names on the first nine sheets, but not on the tenth:—Held, that the operative signature of the testator was not duly attested, and the execution was incomplete. *Phipps v. Hale*, 3 L. R., P. 166; 22 W. R. 742.

In 1832, B. wrote a will, of which the last sentence concluded with his name. After his death, in 1859, the will was produced, with the words, "Witness, C. D., witness, E. F., April 11, 1838," written below the signature. On proof of the deaths of C. D. and E. F., and of their handwriting, the court admitted the will to probate as of the date of April 11, 1838. *Trott v. Skidmore*, 2 S. & T. 12; 29 L. J., P. 156; 6 Jur., N. S. 760; 8 W. R. 590.

A will was written on a lithographed form, and extended over the first and second sides of a sheet of foolscap paper. The form contained attestation clauses at the foot of the first and second sides of the paper. The testatrix made a mark in the blank spaces left for the purpose in both such clauses. Two witnesses signed their names at the bottom of the first side only and before the testatrix made her mark in the attestation clause of the second side:—Held, that the only mark which could give validity to the will was on the second side, and that was not attested by the witnesses. *Dilkes, In goods of*, 3 L. R., P. 164; 43 L. J., P. 38; 30 L. T. 805; 22 W. R. 456.

A testator wrote a codicil to his will upon a sheet of foolscap paper, covering the first page and half the second. The signatures of the testator and attesting witnesses were on a separate paper, which was attached to the codicil by a string. The court being satisfied that the papers were so attached when the testator acknowledged his signature to the witnesses, and they attested it:—Held, that the instrument was duly executed. *Horsford, In goods of*, 3 L. R., P. 211; 44 L. J., P. 9; 31 L. T. 553; 23 W. R. 211.

A will was written on a lithographed form. The testator wrote his name in the blank space left in the attestation clause, but did not sign it, in the ordinary place, which was filled by the signatures of the attesting witnesses. The latter did not remember any of the circumstances of the execution:—Held, that the will was duly executed and attested. *Harris, In goods of*, 23 W. R. 734. See also cases ante, col. 877.

— **Two Papers.**—A will was written twice on different pieces of paper. The two documents were differently worded but were to the same effect. By mistake one of them was signed by the testator and the other by the two attesting witnesses:—Held, that the will was not duly attested. *Hatton, In goods of*, 6 P. D. 204; 50 L. J., P. 78; 30 W. R. 62; 46 J. P. 40.

— **Of Alterations.**—The clause appointing executors was written partly on the second and partly on the third side of a will. Subsequently the testator altered the clause, but his signature and those of the attesting witnesses appeared opposite only to the alterations which were made on the second side. The court granted probate of all the alterations. *Wilkinson, In goods of*, 6 P. D. 100; 29 W. R. 896; 45 J. P. 716.

Unattested alterations appearing in a will executed prior to the Wills Act (7 Will. 4 & 1 Vict. c. 26) coming into operation, will, in the absence of any evidence as to their date, be presumed to have been made before the act came into operation, and are therefore entitled to probate. *Streaker, In goods of*, 4 S. & T. 192.

**In what Name Witness may Sign.**—An attesting witness must himself subscribe the will. It is not essential that a witness should sign his own name, provided it is clear that his subscription is intended as an act of attestation. *Duggins, In goods of*, 39 L. J., P. 24; 22 L. T. 182.

The name of A., an attesting witness to a will, was at his request subscribed by B., who

was himself present at the execution:—Held, that as A. had not subscribed, and B.'s subscription was not intended as an act of attestation, the will was not duly executed. *Id.*

One of the attesting witnesses, by the desire of the testator, subscribed her husband's name instead of her own to the attestation clause. The will appeared on the face of it to be duly executed:—Held, that as the attesting witness did not intend the subscription to the will to represent her own signature, the attestation was invalid, and the will could not be admitted to probate. *Pryor v. Pryor*, 29 L. J., P. 114.

S. having signed his will in the presence of a servant, the latter subscribed "Servant to Mr. Sperling," without any name. A solicitor, the other attesting witness, had directed him to sign as servant to Mr. Sperling:—Held, a sufficient attestation and subscription. *Sperling, In goods of*, 3 S. & T. 272; 33 L. J., P. 25; 9 Jur., N. S. 1205; 9 L. T. 348; 12 W. R. 354.

**Form of Subscription.**—No particular form of subscription is required by 7 Will. 4 & 1 Vict. c. 26, s. 9. A mark will do, though the witness may be able to write; but whatever form the subscription may assume, it must be made animo testandi. *Enyon, In goods of*, 3 L. R., P. 92; 42 L. J., P. 52; 29 L. T. 45.

A person executed his will in the presence of two witnesses, one of whom also made a mark in attestation of his signature. The second witness then wrote the names of the testator and the witness opposite their respective marks and also the word "witness," but he did not subscribe his own name:—Held, that he did not by any word he wrote attest the signature of the testator, and that the execution was invalid. *Id.*

The initials of attesting witnesses are a sufficient subscription; they are not required to sign their names. *Christian, In re*, 2 Rob. Ecc. Rep. 110.

Under 29 Car. 2, c. 3, s. 5, the making of a mark by an attesting witness is a sufficient subscription. *Doe d. Davis v. Davis*, 9 Q. B. 648; 16 L. J., Q. B. 97; 11 Jur. 182.

A will subscribed by two attesting witnesses, capable of writing, with marks, is sufficiently subscribed by them. *Amis, In re*, 2 Rob. Rep. 116.

The subscription of an attesting witness to a will need not be placed at the foot of it; nor is any attesting clause necessary under 29 Car. 2, c. 3, s. 5. *Roberts v. Phillips*, 4 El. & Bl. 450; 3 C. L. R. 513; 24 L. J., Q. B. 171; 1 Jur., N. S. 444.

To make a valid subscription and attestation to a will there must be either the name of the witness, or some mark intended to represent it. A correction of an error in a previous writing of his name, or his acknowledgment of it, or the adding of a date to it, will not be sufficient for that purpose. *Hindmarsh v. Charlton*, 8 H. L. Cas. 160; 7 Jur., N. S. 611; 4 L. T. 125; 9 W. R. 521.

A testator produced his will to A., and signed it in his presence. A., whose name consisted of four words, the first of which began with "F.," then in the testator's presence, signed his own name, but by accident left his first initial letter uncrossed, so that it stood as if it was "T." He afterwards advised the testator that there ought

to be two witnesses to the will, and in the afternoon of the same day, B. being present, the testator produced his will, and shewed and acknowledged his signature in the presence of both A. and B. B. then wrote his name, and at his desire A. added the date, and then observed and corrected the first initial of his own name by crossing the T. and so making it F. :—Held, that the will was not duly attested. *Ib.*

**Hand of Witness guided by another Person.]**

—The attesting witnesses, not being able to write, held the top of the pen while the writer of the will subscribed their names:—Held, that, as the witnesses took some share in the act of writing, the court could not determine on the more or less, and that the attestation and subscription were good. *Lewis v. Lewis*, 2 S. & T. 153; 4 L. T. 583; *S. C.*, nom. *Lewis*, *In goods of*, 31 L. J., P. 153; 7 Jur., N. S. 688.

When the hand of one subscribing witness was guided by that of the other:—Held, a valid attestation. *Frith*, *In goods of*, 27 L. J., P. 6; 4 Jur., N. S. 288.

An attesting witness, who was unable to read or write, signed his name at the foot of the attestation, his hand being guided by another person in making the signature:—Held, a sufficient subscription. *Harrison v. Elvin*, 3 Q. B. 117; 6 Jur. 849.

An attesting witness to a will being unable to write, instead of attesting by mark, procured another person to write her name, she holding the pen "while" her name was being written:—Held, a good attestation. *Bell v. Hughes*, 5 L. R., Ir. 407.

**Intention of Witness—Tracing over Signature with Dry Pen.]**—A testatrix executed her will in the presence of two witnesses, one of whom signed his name thereto; but the other, after writing his christian-name, was unable, through feebleness, to complete his signature. Subsequently a third person was introduced, and the testatrix made her mark in the presence of such person and the witness who had signed his name. The latter traced his signature over with a dry pen, and the former signed his name:—Held, that the execution was invalid in the latter case by reason that the witnesses did not both attest and subscribe the signature of the testator; and in the former by reason that one witness had no intention, by writing his christian-name only, to subscribe the will. *Maddock*, *In goods of*, 3 L. R., P. 169; 43 L. J., P. 169; 30 L. T. 696; 22 W. R. 741. See also *Cunningham*, *In goods of*, ante, col. 861.

**Witnesses not Subscribing their Names in each other's Presence.]**—It is not necessary that the attesting witnesses to a will or codicil should subscribe their names to the instrument in the presence of each other. *Sullivan v. Sullivan*, 3 L. R., Ir. 299.

**Identification of Document.]**—A codicil was duly executed by a testator and attested by two crosses—thus x x—without the names of the marksmen being written; but one of the witnesses was only temporarily incapable of writing, and was now able to identify the document:—Held, that the document being so identified by this witness, probate of it should be granted.

*Garner*, *In goods of*, 1 Ir. L. R. 307. See also *cases ante*, cols. 842 and 843.

**Subsequent attested Codicil not referring to previous unattested Codicil.]**—A testator made a will on 3rd January, 1878. On 20th December, 1879, he made a codicil which was attested by one witness only. On 1st March, 1880, he made a second codicil, described in the attestation clause as a codicil to his will, and which codicil was attested by two witnesses, but did not refer in any way to the first codicil. All three writings were on the same piece of paper:—Held, that the second codicil did not set up the first. *Spotten*, *In goods of*, 5 L. R., Ir. 403.

**Of Interlineations by Initials.]**—The initials of a testatrix and the attesting witnesses in the margin of the will opposite interlineations are sufficient to render the interlineations valid. *Blewitt*, *In goods of*, 5 P. D. 116; 49 L. J., P. 31; 42 L. T. 329; 28 W. R. 520; 44 J. P. 768.

**On separate Pieces of Paper attached by Paste or Wafers.]**—A will was written on one side of a sheet of parchment. At the bottom, immediately at the foot or end of the will, a piece of paper bearing an impressed stamp was pasted before the execution, upon which the names of the testator and of the attesting witnesses were afterwards written:—Held, that the will was duly executed. *Gausden*, *In goods of*, 2 S. & T. 362; 31 L. J., P. 53; 8 Jur., N. S. 180; 5 L. T. 767.

A will was written on one side of a half-sheet of paper, and concluded with the words, "In witness whereto I have hereunto set my hand and seal this 9th day of July, in the year as above written." A small space at the bottom of the page was left blank, and then followed a separate piece of paper attached by wafers to the half-sheet on which the will was written. The testator's signature, the attestation clause, and the signatures of the attesting witnesses were alone written on this separate paper:—Held, that the court could not grant probate of such a document. *Lambert*, *In goods of*, 31 L. J., P. 118; 8 Jur., N. S. 158; 7 L. T. 219.

Where the signatures of a testator and of the attesting witnesses were made, not on the paper on which the will was written, but on a piece of paper which had been attached to the paper on which the will was written:—Held, to be a good execution. *Cook v. Lambert*, 3 S. & T. 46; 32 L. J., P. 93; 9 Jur., N. S. 258; 9 L. T. 211; 11 W. R. 401.

A wrote a codicil on the upper part of the first side of a half-sheet of foolscap paper doubled, and below he added the words, "For my signature and witnesses, see next side." On the fourth side, and on a line with these words, when the paper was opened, were the signatures of A. and of the attesting witnesses. The second, third, and (with the exception of the signatures) the fourth sides were blank. When the witnesses attested the signature of A., they saw no writing on the paper:—Held, that, notwithstanding the provisions of 15 & 16 Vict. c. 24, s. 1, the codicil was not duly executed. *Hammond*, *In goods of*, 3 S. & T. 90; 32 L. J., P. 200; 9 Jur., N. S. 581; 11 W. R. 639.

A wrote her will on a sheet of letter paper, and concluded at the extreme end of the fourth side, leaving no space for her signature. The attestation clause, and the signatures of A. and

of the witnesses, were written on a separate half-sheet of paper. This half-sheet was attached by three wafers to the bottom of the second side or page of the will. One of the attesting witnesses had died, and the other could give no account of the state of the papers at the time A. signed her name. No one else was present at that time:—Held, that on motion, the court could not grant probate of this paper. *West, In goods of*, 32 L. J., P. 182; 9 Jur., N. S. 1158; 12 W. R. 89.

**By Party Interested.]**—A beneficiary under a will attested the will as a third witness, and deposed that he did so at the testator's especial request as a token of approval:—Held, that the attestation invalidated the bequest. *Covens v. Crout*, 42 L. J., Ch. 840; 21 W. R. 781.

At the foot of a will signed by the testator and attested by two witnesses, there appeared subscribed beneath the signature of the testator the signature of D., who was the principal legatee and sole executrix. The court, being satisfied by evidence that her signature had not been added with any intention of attesting the execution, ordered her signature to be excluded from the probate. *Murphy, In goods of*, 8 Ir. R., Eq. 300.

A will, being already attested by two witnesses, a devisee who signs her name to the attestation clause, though not at the request of the testator, is excluded from taking any interest under the will. *Randfield v. Randfield*, 32 L. J., Ch. 668; 11 W. R. 847.

And the representatives of a legatee who had attested the cancellation of a will, and died before the period of distribution, will be excluded from participation under the will. *Gashin v. Rogers*, 2 L. R., Eq. 284; 14 W. R. 707.

Where a will has been executed in the presence of two witnesses, and, in addition to their signatures, the signature of a third person, who is also residuary legatee, appears at the foot of the will, the court will receive evidence to explain why such signature was written, and if satisfied that it was not written with the intention to attest the signature of the deceased, it will order it to be omitted in the probate. *Sharman, In goods of*, 1 L. R., P. 661; 20 L. T. 683; 17 W. R. 687.

By a will made since 7 Will. 4 & 1 Vict. c. 26, lands and houses, after the deaths of the testator's niece S. A. and her husband J. A. (to whom life interests had been given), were directed "to be equally divided among the children" of S. A. and J. A. The will purported to be attested by three witnesses, two of whom were Thomas and Sarah, children of S. A. and J. A.:—Held, that the devise to the children, although it was a devise to them as tenants in common, was a devise to a class, so that the whole was to be taken by those who, after the testator's death, came within the limits of such class, and were capable of taking, and, therefore, the shares of Sarah and Thomas, who, as attesting witnesses, were themselves incapable of taking, went to the other members of the class, and not to the heir-at-law of the testator. *Fell v. Biddulph*, 10 L. R., C. P. 701; 44 L. J., C. P. 402; 32 L. T. 864; 23 W. R. 913.

**— Husband or Wife of Witness.]**—A wife was an attesting witness to a testamentary instrument by which a legacy was given to a church, "to be disposed of as her husband

wished:—Held, that this gift was good, and did not fall within 7 Will. 4 & 1 Vict. c. 26 s. 15. *Creswell v. Creswell*, 6 L. R., Eq. 69; 37 L. J., Ch. 521; 18 L. T. 392; 16 W. R. 699.

Where a will was attested by two marksmen, and signed also by two other persons as witnesses:—Held, that the signatures of the two latter must be regarded as affixed likewise in attestation of the will, and not as merely verifying the attestation of the marksmen, and that the legacy to the wife of one of them failed. *Wigan v. Rowland*, 11 Hare, 157; 17 Jur. 910.

A mother by her will gave a bequest to her son. One of the two witnesses attesting the execution of the will was the wife of the son. By a subsequent codicil attested by two independent witnesses she confirmed her will:—Held, that the execution of this codicil was equivalent to a re-execution of the will; and since the codicil was attested by independent witnesses, the bequest to the son was valid. *Anderson v. Anderson*, 13 L. R., Eq. 381; 41 L. J., Ch. 247; 20 W. R. 313.

**— Marriage of Devisee after Attestation to Attesting Witness.]**—Under the Wills Act (1 Vict. c. 26), s. 15, the marriage, after attestation of a will, of a devisee to the attesting witness, does not affect the validity of the devise. *Thorpe v. Bestwick*, 6 Q. B. D. 311; 50 L. J., Q. B. 320; 44 L. T. 180; 29 W. R. 631; 45 J. P. 440.

**— Attestation of Codicil by Witness who takes Interest under the Will.]**—A bequest of a legacy is not void because the legatee attests a codicil which gives him nothing, nor does a residuary legatee of a share of a residue lose his title by attesting a codicil, which, by revoking legacies, indirectly benefits him by increasing the residue. *Gurney v. Gurney*, 3 Drew. 208; 24 L. J., Ch. 656; 1 Jur., N. S. 298.

**Evidence of Attesting Witnesses.]**—A. wrote out a draft will, which on his death was found completed, with the names of two attesting witnesses. On inquiry no such persons could be traced, and the writing of the names was sworn to be that of A. himself. The court granted administration of the goods of A., as having died intestate, without the parties interested under the draft will having been first cited to propound it. *Lee, In goods of*, 4 Jur., N. S. 790.

In ejectment by the heir-at-law, against the devisee, to prove the execution of the will, it is not necessary to call the subscribing witnesses. *Doe d. Stutbury v. Smith*, 1 Esp. 391.

A testamentary paper, in the handwriting of a party, concluded as follows: "In witness of this I have set my hand this 14th day of January, 1858. Signed by the testatrix, A., her last will, in our presence." There was no other signature of the deceased at the end of the writing. The surviving attesting witness could give no distinct account of the state of the paper at the time of, or the circumstances attending, the execution, and there was no direct evidence on the former point. It was admitted to probate. *Torre, In goods of*, 8 Jur., N. S. 494.

**— Both Witnesses Illiterate and Predeceasing Testator—Presumption of Due Attestation.]**—A holograph will, signed at foot by the testator, and containing an attestation

clause, appeared attested by two marksmen. Their names, as subscribed to the will, the attestation clause, and the words "mark—his," which appeared written above and below crosses opposite each of their names, were in the handwriting of the testator. At the date of the instrument, two persons of the names so subscribed as those of the attesting witnesses were in his employment, they were both illiterate, and both predeceased him. The document was found shortly after the testator's death in his house, preserved amongst others of his papers. It purported to give all his property to his widow. He stated to her the night before his death that he had left her all he had—that everything was hers. It did not appear that any fourth person was present at the execution of the will, and no direct evidence of its due execution was given:—Held, that there were reasonable grounds for presuming that the will had been duly executed and attested pursuant to the provisions of the Wills Act, and sufficient to enable the court to pronounce in favour of its validity. *Clarke v. Clarke*, 5 L. R., Ir. 47—C. A.

—To shew what included in Will at Time of Execution.]—Oral and written declarations of a testator, whether made before or after the date of execution of a will, are admissible in evidence for the purpose of shewing what were the constituent parts of the will at the time of execution. *M. R.* made and duly executed her last will on the 1st of August, 1872. On her death in 1879, the will was found in an envelope in her writing-desk. It was contained in two sheets of note-paper stitched together book-wise. The will was all in the handwriting of the testatrix (with the exception of the attestation clause, which was filled in by one of the attesting witnesses), and, commencing with the first page of the outer sheet, it ran: "I appoint my nephews, R. J. G. and R. G. L., to be my joint executors to carry my will into effect. I appoint my nephew, R. J. G., to be my executor and sole residuary legatee.—*M. R.* And placed with my will the 1st day of August, 1872." The following page was a blank, and the will was continued on the inner sheet, which was pagged 1, 2, 3, 4: "The last will and testament of me," &c., and concluded with the attestation clause on the 4th page. The next, the third page of the outer sheet, was a blank, and the last contained the indorsement, "The will of *M. R.*, August 1, 1872." The attesting witnesses were unable to say what were the contents of the will, or whether it was contained in one or two sheets of paper:—Held, that declarations of intention by the testatrix before the execution of the will, and declarations by her subsequent to the execution, shewing the belief that she had effected her intention, were admissible in evidence, with the view of shewing what were the constituent parts of the will at the time of its execution. *Gould v. Lakes*, 6 P. D. 1; 49 L. J., P. 59; 43 L. T. 382; 29 W. R. 155; 44 J. P. 698.

#### Compelling Attendance of Attesting Witness.]

—An attesting witness had refused to make any affidavit as to the execution of a will: on application under the Probate Act of 1857 (20 & 21 Vict. c. 79), s. 29, on behalf of the widow, who was desirous of obtaining administration with

the will annexed, it was ordered that she be at liberty to issue a subpoena ad testificandum against the attesting witness, requiring him to attend before the court to be examined *viva voce* touching his knowledge of the will, and his having attested the same. *Dorgan, In goods of*, 8 Ir. R., Eq. 326.

When a will was without an attestation clause, and the attesting witnesses refused to make any affidavit as to the execution, the court issued a subpoena under 20 & 21 Vict. c. 77, s. 24, to compel their attendance before the court to be examined. *Hamer, In goods of*, 25 L. T. 951; 20 W. R. 303.

—Of Next of Kin—Examination as to Family.]—The executor named in the will having determined to propound it, cited certain persons who were the next of kin to see proceedings. They appeared, and there being reason to believe that there were other next of kin, the court made an order upon them, under 20 & 21 Vict. c. 77, s. 24, to attend before the registrar to be examined as to the state of the family. *Shepherd v. Beetham*, 2 L. R., P. 384; 41 L. J., P. 44.

Examination of Witnesses.]—When an order is made on a person having knowledge of testamentary papers to attend to be examined respecting them, the examination must be in open court, or upon interrogatories. *Laws, In goods of*, 2 L. R., P. 458; 41 L. J., P. 41; 26 L. T. 530; 20 W. R. 572.

On the trial of an issue whether three codicils, set up by and in favour of the claimant, in whose handwriting it was suggested they were, there being also an interlineation in the will in his favour, also suggested to be in his handwriting; the attesting witnesses to the first codicil denying their attestations, were allowed to be examined adversely; but evidence, by comparison of the claimant's handwriting and otherwise, was received with a view to shew the probability of forgery of the attestations and of the codicils; and the jury was directed that they might find the forgery upon the circumstantial evidence alone, even against positive testimony of the attesting witnesses; that the onus was upon the party, who set up alterations and codicils against an admitted will, to satisfy the jury as to their genuineness; and that if the evidence left the jury in doubt on that question, they should find for the party who claimed under the will. *Cresswell v. Jackson*, 4 F. & F. 1.

—By Commission.]—A will purported to have been executed in the presence of two attesting witnesses. One was abroad and the other in England. The executors, who propounded the will, applied for a commission for the examination *de bene esse* of the second attesting witness, who was resident in London. The affidavit alleged no physical infirmity, but described him as an elderly person. The court ordered the commission to issue, but intimated that if it was proposed at the trial to read the evidence taken under it, strict proof of inability to produce the witness would be required. *McPherson v. Parnell*, 40 L. J., P. 30; 24 L. T. 742; 19 W. R. 784.

Practice—Calling both Witnesses.]—When a party propounding a will in a contested suit,

the only issue being due execution, and notice having been given, calls one of the attesting witnesses, who gives evidence against the due execution, he is bound to call the other attesting witness. *Owen v. Williams*, 4 S. & T. 202.

**Affidavit of Attestation and Subscription.**—When an attestation clause is insufficient, the court will not dispense with the affidavit of the attesting witnesses as to due execution. *Latham, In goods of*, 33 L. J., P. 186; 10 Jur., N. S. 620.

An attestation clause executed abroad being insufficient, the court refused to grant probate without an affidavit by the attesting witnesses as to due execution, although it appeared from a certificate of the British consul, indorsed on the will, that the attesting witnesses had on oath proved due execution. *Id.*

— **Of Execution where Witnesses Unknown.**—A testator left a will which concluded, "In the presence of the undersigned as witnesses on this the fifth day of June, 1871, I set my hand and signature." The testator's family had no personal knowledge of the persons who subscribed the will as attesting witnesses, and they had endeavoured, but in vain, to obtain intelligence of them. In these circumstances the court dispensed with an affidavit as to the due execution of the will, and decreed probate of it, the executrix, the only person who would be benefited by an intestacy, consenting to the grant. *Hus, In goods of*, 46 L. J., P. 39; 35 L. T. 909; 25 W. R. 273. And see *Benson v. Benson*, 21 L. T. 731.

**Parol Evidence to Prove Date.**—Parol evidence is admissible to prove that a will was executed on a date other than that which appears on the face of it. *Reffell v. Reffell*, 1 L. R., P. 139; 35 L. J., P. 121; 12 Jur., N. S. 910; 14 L. T. 705; 14 W. R. 647.

**Presumption of Proper Execution.**—See *ante*, col. 883.

**Evidence—Omnia esse ritè acta—How rebutted.**—Where the evidence of the attesting witnesses directly negatives due execution, such evidence not being rebutted either by direct or circumstantial evidence, and the veracity of the witnesses is unimpeached, the court cannot, by reason of a formal attestation clause, and on the presumption omnia esse ritè acta, pronounce for the will. *Croft v. Croft*, 4 S. & T. 10; 34 L. J., P. 44; 11 Jur., N. S. 183; 11 L. T. 781; 13 W. R. 526.

Where a will is written on several sheets of paper, and the last sheet only is duly executed, although the attesting witnesses did not observe the others, the *prima facie* presumption is that they all formed part of the will at the time of its execution; but where there is evidence, from the provisions and structure of the will and other sources, tending to rebut and confirm this presumption, the question must be decided upon that evidence. *Marsh v. Marsh*, 1 S. & T. 528; 30 L. J., P. 77; 6 Jur., N. S. 380.

A. made her will in 1842; at her death there appeared the names of three subscribed witnesses, but no attestation clause. The only surviving witness, whose name stood first of the three, stated that A. signed the will in his presence only; that he suggested the necessity of

two witnesses; but could remember no particular circumstances:—Held, that the presumption of due execution was not rebutted by the evidence of the surviving witness. *Thomas, In goods of*, 1 S. & T. 255; 28 L. J., P. 33; 5 Jur., N. S. 104; 7 W. R. 270.

When a will appears on the face of it to have been duly attested, and surrounding circumstances imply that this was so, the contrary evidence of one attesting witness is not sufficient to rebut the presumption omnia ritè esse acta. *Wright v. Rogers*, 1 L. R., P. 678; 38 L. J., P. 67; 21 L. T. 156; 17 W. R. 833.

**Rule as to Instruments more than Thirty Years Old.**—An unproved will, more than thirty years old, coming from the possession of one of the family of the testator, may be read without accounting for the subscribing witnesses, though the person producing it is not strictly entitled to the custody. *Doe d. Wildgoose v. Pearce*, 2 M. & Rob. 240.

A will being more than thirty years old, and attested by three witnesses:—Held, on production, that the fact of the attestation was sufficiently proved, although one witness was still alive, and was not called. *Doe d. Spilsbury v. Burdett*, 4 A. & E. 1; 6 N. & M. 259.

A will was thirty years old from the date of execution; it came from the custody of the person in whose favour it was made:—Held, that this was sufficient evidence of the fact of due execution. *Orange v. Pickford*, 3 Drew. 463; 27 L. J., Ch. 808; 4 Jur., N. S. 649.

The application of the rule, that an instrument more than thirty years old produced from the proper custody is admissible without further proof, is not affected by circumstances which may lead to an inference that the instrument had been cancelled; the only question being whether the custody of the instrument is proper. *Andrew v. Motley*, 12 C. B., N. S. 514; 32 L. J., C. P. 128.

## V. REVOCATION.

### 1. *Presumption of.*

#### 2. *Methods of.*

- a. By Marriage, 902.
- b. By other Wills, Codicils, or Writings, 903.
- c. By Destruction or Mutilation, 914.
- d. By Duplicates, 919.
- e. Dependent Relative Revocation, 920.
- f. In other Cases, 921.

### 1. PRESUMPTION OF.

**Non-production of Will known to have been in Testator's Possession.**—The presumption of fact, that a will, known to have been in the testatrix's custody, and not forthcoming at her death, was destroyed by her animus revocandi, is a *prima facie* presumption only, and may be rebutted by probable circumstances, among which declarations of unchanged affection and intention have much weight. *Patten v. Poulton or Paulton*, 1 S. & T. 55; 27 L. J., P. 41; 4 Jur., N. S. 341.

E., in 1846, made a will, which he revoked by another will made in 1855. On his death the former will was found, but not the latter:—Held, that it must be presumed the deceased destroyed

the missing will, animo revocandi. *Brown, In goods of*, 1 S. & T. 32; 27 L. J., P. 20; 4 Jur., N. S. 244.

A will was found after a testator's death, but parol evidence was given that he had executed a subsequent will, which contained a clause of revocation, and which remained in his custody until his death, and could not then be found, and that he had declared an intention to destroy it. The court pronounced for an intestacy. *Wood v. Wood*, 1 L. R., P. 309; 36 L. J., P. 34; 15 L. T. 593.

In 1856, a person duly executed a will, which remained in his custody and possession. In 1861, the draft of a new will was forwarded to him for perusal, but such will was never completed. A few months before his death, in conversation, he referred to the executed will as being still in existence, and at a later period expressed an intention to settle the terms of the new one; he died, however, without carrying out his intention. On his death the draft of the new will was found, but not the executed will:—Held, that as the executed will having been in his possession was not found on his death, the presumption arose that he had destroyed it animo revocandi; and that, as no evidence was forthcoming to rebut that presumption, he died intestate. *Mitchelson, In goods of*, 32 L. J., P. 202; 9 Jur., N. S. 360.

The presumption that a will in the testator's possession, and not forthcoming after his death, has been revoked, does not arise unless there is evidence to satisfy the court that it was not in existence at the time of his death. *Finch v. Finch*, 1 L. R., P. 371; 36 L. J., P. 78; 16 L. T. 268; 15 W. R. 797.

The only person present at the making of a will swore that it was not duly executed. The will was afterwards destroyed. Although there was reason to suspect that the will was duly executed notwithstanding the evidence, the court declined to pronounce on that mere suspicion for a will not in existence. *Eckersley v. Platt*, 1 L. R., P. 281; 36 L. J., P. 7; 14 L. T. 800.

The presumption that a will which was in the testator's custody until his death, and could not then be found, was destroyed by the testator with the intention of revoking it, must prevail unless it is rebutted by clear and satisfactory evidence. *Id.*

A testator executed his will at his solicitor's office and took it away with him. It was never seen afterwards, and could not be found after his death in his repositories. He had made declarations inconsistent with his testamentary dispositions shortly before his death, but the court held, that he being the last custodian of the will, and it not being forthcoming, the presumption of revocation arose, and was not rebutted. *Homerton v. Hewett*, 25 L. T. 854.

When a will traced to the possession of the testator cannot be found after his death, and there is no evidence what has become of it, the presumption arises that the will has been destroyed by the testator for the purpose of revoking it, but this presumption may be rebutted by parol evidence. *Sugden v. St. Leonards (Lord)*, 1 P. D. 154; 45 L. J., P. 49; 34 L. T. 372; 24 W. R. 479—C.A.

The rule of law is, that if a will is traced to the possession of the deceased, and last seen there, and is not forthcoming on his death, it is presumed to have been destroyed by himself, and

that presumption must prevail, unless there is sufficient evidence to repel it, and to raise a higher degree of probability to the contrary. The onus of proof in such cases lies upon the party propounding the will. *Welsh v. Phillips*, 1 Moore, P. C. C. 299.

When the substance of a will is propounded, the first point to be ascertained is whether such a will was duly executed. If that is established, the next point is, whether it was in existence at the death of the deceased. If it was not, then the *prima facie* presumption that it was destroyed by the deceased, with intention to revoke, arises, which may be rebutted by further evidence. *Podmore v. Whotton*, 3 S. & T. 449; 33 L. J., P. 143; 10 L. T. 754; 13 W. R. 106.

A subsequent will (the contents of which were unknown) having remained in the custody of the testator, and not being forthcoming, the presumption of law was, that it was destroyed by him animo revocandi, and did not revoke a prior will uncanceled. *Cutto v. Gilbert*, 9 Moore, P. C. C. 131.

**Non-Production of Memorandum referred to.]**—Where a codicil refers to two memorandums, and only one is found, effect must be given to that which is found; for either the ordinary presumption must prevail that the missing paper was destroyed by the testator animo revocandi, or the principle must be applied that the apparent testamentary intentions of a testator are not to be disappointed merely because he made other dispositions of his property, which are unknown by reason of the testamentary paper which contained them not being forthcoming. *Dickinson v. Stidolph*, 11 C. B., N. S. 341.

**Mutilation of.]**—See *post*, col. 914.

**Rebuttal of—Statements made by Testator before Death.]**—Where a will and a codicil (the drafts of which were produced) were proved to have been left by the attorney who drew them with the testator, after execution, but were not forthcoming after his death; declarations of the testator to various members of his family, down to a few days before his death, expressive of his satisfaction at having settled his affairs, and intimating that his will was left with his attorney, are properly admitted, in order to rebut the presumption that the will and codicil had been destroyed by the testator animo revocandi. *Whiteley v. King*, 17 C. B., N. S. 756; 10 Jur., N. S. 1079; 11 L. T. 342; 13 W. R. 83.

**—Subsequent Insanity of Testator.]**—The presumption that a will which was in the testator's custody up to the time of his death, and cannot be found after his death, was destroyed by him animo revocandi, does not apply where the testator became insane after the execution, and continued insane until his death. In such a case the burden of shewing that the will was destroyed whilst he was of sound mind lies on the party setting up the revocation, and in the absence of evidence as to the date of the destruction, the contents of the will are entitled to probate. *Sprigge v. Sprigge*, 1 L. R., P. 608; 38 L. J., P. 4; 19 L. T. 462; 17 W. R. 8.

**—Other Circumstances.]**—L. duly executed a will, dated the 19th August, 1857, whereby her

property was almost equally divided amongst her nephews and nieces. This will was left in her possession, and was not found at her death. On the day before the funeral, P., the deceased's maid, produced a document, dated the 3rd August, 1857, which she alleged to be the deceased's will. It was written in large awkward characters, and was very ill spelt. By it the nephews and nieces, with two exceptions, would have received 1s. each, and P. have been materially benefited. This paper was not propounded:—Held, that the presumption that a will left in the custody of a testator, and not found at his death, has been destroyed by the testator, was rebutted in this case, by reason of the suspicious conduct of the maid, as connected with the document dated the 3rd August, 1857. *Battyll v. Lyles*, 4 Jur., N. S. 718.

A. made her will in March, 1854, and a codicil in June, 1854, one of the legatees under the will having died since its execution. In May, 1856, she executed another codicil, among other things appointing one of the parties benefited by the codicil of 1854 to be executor, in the room of one appointed in the will. At her death in December, 1857, the will and second codicil were found in a tin box, at the Bank of England, in which she kept her papers; but the first codicil, of which the testatrix took possession immediately after its execution, was nowhere to be found. On motion for probate of the draft of the first codicil, with the consent of the residuary legatees:—Held, that the *prima facie* presumption of revocation was strengthened rather than rebutted by the circumstances, and probate of the draft was refused. *Shaw, In goods of*, 1 S. & T. 62.

A. executed a will in 1858, which at the time of his death, in December, 1860, was found in a box torn into several pieces. A woman, who cohabited with him for some years, deposed, that in August, 1860, at his request, she took the will from a box and gave it to him, and that he then tore it in pieces, and returned it to her, with directions to put the pieces behind the fire, but that the pieces were replaced in the box with his sanction. Her statement was confirmed by her brother-in-law, who pretended to have been present:—Held, that notwithstanding the direct evidence thus given, the incredibility of the story, the probabilities of the case, and the letters of the deceased, raised a counter-presumption that the will was not revoked by or with his knowledge. *Staines v. Stewart*, 2 S. & T. 320; 31 L. J., P. 10; 8 Jur., N. S. 440.

**Burden of Proof.**—After the due execution of a will has been proved, the burden of proving that it was revoked lies upon those who set up the revocation, and, in the absence of evidence, revocation will not be presumed. *Benson v. Benson*, 2 L. R., P. 172; 40 L. J., P. 1; 23 L. T. 709; 19 W. R. 190.

A will duly executed before the passing of the Wills Act, and remaining in the testator's custody until his death, after the passing of the act, was found with his signature crossed out. In the absence of evidence as to the date when the act of crossing out was done, the court refused to presume that it was before 1838, and therefore pronounced for the will. *Id.*

The facts that the second will was last seen in the custody of the deceased, and could not be found, raised a presumption that he destroyed it,

*animo cancellandi*, and cast on those seeking to establish the will the onus of rebutting that presumption. *Brown v. Brown*, 8 El. & Bl. 876; 27 L. J., Q. B. 173; 4 Jur., N. S. 163. See *S. C.*, 1 S. & T. 32; 27 L. J., P. 20; 4 Jur., N. S. 244.

A woman having duly executed her will, subsequently became insane. Shortly before her death, it was discovered that the will had been mutilated by her; but it was proved to have been in her custody for a short time, subsequent as well as prior to her insanity:—Held, that there being satisfactory evidence of the due execution of the will, the onus of shewing that it had been mutilated by the testatrix when of sound mind, was upon the party alleging its revocation. *Harris v. Berrall*, 1 S. & T. 153.

## 2. METHODS OF.

### a. By Marriage.

**Void Marriage.**—A will is not revoked under 1 Vict. c. 26, s. 18, by a marriage which is absolutely void by the law of this country, and there is no distinction in such a case between a testator who is a natural-born subject and one who is a naturalized British subject. *Mette v. Mette*, 1 S. & T. 416; 28 L. J., P. 117.

**Birth of Issue.**—Marriage, and the birth of a posthumous child, amounted to an implied revocation of a will of lands made before marriage. *Doe d. Lancashire v. Lancashire*, 5 T. R. 49.

But the birth of a child was not alone a revocation. *Sheppard v. Sheppard*, 5 T. R. 51 n.

A man married, and afterwards made his will and devised to his niece, and afterwards died, leaving his wife enceinte with a daughter, which was unknown to him:—Held, that the birth of the daughter was not a revocation of the will. *Doe d. White v. Barford*, 4 M. & S. 10.

**Power of Appointment exercised by Will.**—A will made in the exercise of a power of appointment is not revoked by a subsequent marriage, when in default of appointment the property of which it disposes passes under the settlement containing the power, although the same persons would take under such settlement as would have taken in case of intestacy under the Statute of Distributions. *Fenwick, In goods of*, 1 L. R., P. 319; 16 L. T. 124.

A will made in the exercise of a power of appointment is not revoked by a subsequent marriage, when in the event of certain contingencies happening, the property thereby appointed will not in default of appointment pass to the persons who would have taken in case of intestacy under the Statute of Distributions. *Id.*

A., under his marriage settlement, had in the event of his surviving B. (his wife), a power of appointing by deed or will amongst his children certain trust moneys, and in default of such appointment, the moneys were to be equally divided amongst them. A. survived B., and by a will, executed in 1847, he, being then a widower, directed the then unappropriated portion of such moneys to be equally divided amongst his sons (a portion having been previously assigned to his daughter on her marriage). A., in 1855, contracted a second marriage and died in 1858, without having executed any other will or any further appointment of the trust moneys:—Held, that the will of 1847, so

far as it was an execution of the power of appointment, was not revoked by A.'s second marriage, though the same persons would take under the settlement, in default of appointment, as would have taken in case of an intestacy under the Statute of Distributions. *Fitzroy, In goods of*, 1 S. & T. 133.

A., by his will, gave a power to B. to dispose by will of property, which in default of appointment by her was to devolve on the person or persons who, at her decease, should be her next of kin. B., in pursuance of such power, executed a will in favour of C., whom she afterwards married, but who died in her lifetime:—Held, that B.'s will fell within the exception of the 7 Will. 4 & 1 Vict. c. 26, s. 18, and was therefore not revoked by her subsequent marriage. *McVicar, In goods of*, 1 L. R., P. 671; 38 L. J., P. 84; 20 L. T. 1013; 7 W. R. 832.

By a deed of settlement executed between a wife and her intended husband, property was conveyed to trustees to pay the income to the wife herself during her life, and if she predeceased her husband, then to him for life, if she should so appoint by will, but not otherwise, and if she did not so appoint, then it was to go to the issue of the marriage. The same day she made a will exercising her power of appointment in favour of her intended husband:—Held, that the will came within the exception of the 7 Will. 4 & 1 Vict. c. 26, s. 18, and was not revoked by the subsequent marriage. *Worthington, In goods of*, 25 L. T. 853; 20 W. R. 260.

**Subsequent Will reviving prior.**—A testator executed a will and afterwards married. He subsequently executed a second will, and by it he revived and brought into force again the first will in the event of there being no child of the marriage living at the time of the death of his wife. The same executors were appointed in both wills. The testator died leaving surviving him his widow and one child. The court allowed the first will to be included in the probate of the second will. *Bangham, In goods of*, 1 P. D. 429; 45 L. J., P. 80; 24 W. R. 712.

A testator made his will in 1871. He married in 1872, and on the day of the marriage, but after the ceremony, he executed a codicil by which he made provision for his wife, and revived his will. His wife predeceased him, and on his death the will only was found among his papers. The court being satisfied that in destroying the codicil he had no intention of thereby revoking the will, decreed probate of both papers. *James v. Shrimpton*, 1 P. D. 431; 45 L. J., P. 85; 35 L. T. 428; 24 W. R. 740. *See also cases post*, col. 924.

**Will made in Contemplation of Marriage.**—A., in 1828, made his will in contemplation of his intended marriage, providing for his intended wife and for the children of such marriage, and making his intended wife executrix:—Held, that the marriage which ensued, together with the birth of a child, operated as a total revocation of the will. *Cadywold, In goods of*, 1 S. & T. 34; 27 L. J., P. 36.

#### b. By other Wills, Codicils, or Writings.

**Execution of Instrument Revoking Will.**—The Wills Act (7 Will. 4 & 1 Vict. c. 26), s. 20,

does not alter the law as to revocation of wills, except by requiring that the instrument of revocation shall be executed in the same manner as a will. *Baker v. Story*, 31 L. T. 631; 23 W. R. 147.

**By unattested Writing.**—A testatrix left a will and a codicil prepared by her solicitor and duly executed, and a third paper purporting to be a second codicil. At her death there appeared at the foot of the will in her handwriting, "I declare this to be null and void," with her signature annexed. The first codicil also contained the words "null and void." The third codicil was in her writing; it contained no attestation clause, but two witnesses had signed it, who could say no more than that the paper had writing on it. They did not know that it was a will, nor could they say that her signature was on the paper:—Held, that the second codicil was not duly attested, and therefore that the will and first codicil remained unrevoked. *Fischer v. Popham*, 3 L. R., P. 246; 44 L. J., P. 47; 33 L. T. 231; 23 W. R. 683.

**By attested Writing.**—A testator duly executed his will. On the day of his death he wrote to his brother the following letter: "Enclosed I hand you an order to get my will from Mr. D., which please burn as soon as you receive it without reading it. I will leave you my share as a deed of gift, leaving it to your honour to pay out of it 100*l.* each to each of my two sisters, and 100*l.* to P." His signature was attested by two witnesses, and the paper was valid as a testamentary paper:—Held, that it was a writing declaring an intention to revoke, within 7 Will. 4 & 1 Vict. c. 26 (the Wills Act), s. 20, and that it revoked the will. *Durance, In goods of*, 2 L. R., P. 406; 41 L. J., P. 60; 26 L. T. 983; 20 W. R. 759.

At the foot of his will the deceased wrote a memorandum to the effect: "This will was cancelled this day;" and he duly executed such memorandum in the presence of two witnesses:—Held, that such memorandum was not a will or a codicil, but only a writing, which could not be admitted to probate. *Fraser, In goods of*, 2 L. R., P. 40; 39 L. J., P. 20; 21 L. T. 680; 18 W. R. 263.

**By Will.**—A wife executed a will, in which, referring to a power to that effect given to her under her marriage settlement, she disposed of all her property in favour of her husband. She subsequently made a second will, in which she referred to the same power, and bequeathed the greater portion of the property affected by the settlement to certain persons. This will contained words revoking all former wills made by the testatrix:—Held, that the first will was revoked thereby. *Eustace, In goods of*, 3 L. R., P. 183; 43 L. J., P. 46; 30 L. T. 909; 22 W. R. 832.

A testator executed two wills, the first in England, and the second in Italy where he was domiciled at the time of his death. The English will disposed of realty and personalty, and nominated an executor. The second, or Italian will, disposed of the personalty only, but contained a general revocatory clause:—Held, that the second will revoked the first, including the

appointment of the executor. And the executor, who resisted revocation of the probate of it, granted to him in common form, was condemned in costs. *Cottrell v. Cottrell*, 2 L. R., P. 397; 41 L. J., P. 57; 26 L. T. 527; 20 W. R. 590.

One devised his personal estate to A. and the real estate to B., and after A.'s death, and the deviser having acquired other real property, some by devise and some by purchase, he made a second will, disposing by name of his after-acquired testamentary estate to C., and then added, "as to the rest of my real and personal estate, I intend to dispose of it by a codicil, hereafter to be made, to this my will;" this is no revocation of the first will, whether considering that he meant to include the same property therein devised, because it is a mere declaration of an intent to dispose of it in future; and non constat that such disposition would be inconsistent with the first will; nor is it any revocation, considering that he meant only to include his after-purchased property not before devised, and his personal estate, the bequest of which had lapsed by the death of A. *Thomas d. Jones v. Evans*, 2 East, 488.

— **By Lost Will.**—A. executed a will, and afterwards executed a second will, which he took away with him. On his death the earlier will was found, but the second will could not be found. The solicitor who prepared the second will gave evidence, from recollection, of its contents, which were inconsistent with the first will, and revoked it:—Held, that secondary evidence might be given of the contents of the last will, and that the evidence given sufficiently shewed that it revoked the first will. *Brown v. Brown*, 8 El. & Bl. 876; 27 L. J., Q. B. 173; 4 Jur., N. S. 163. See *S. C.*, 1 S. & T. 32; 27 L. J., P. 20; 4 Jur., N. S. 244.

Declarations of a deceased that he has revoked a certain will, by a subsequent will, not forthcoming, cannot be admitted as evidence of revocation, neither can they as to revocation by any other means, as by burning, tearing, or by cancellation. *Staines v. Stewart*, 2 S. & T. 320; 31 L. J., P. 10; 8 Jur., N. S. 440.

A vague declaration that he had destroyed a will, not specifying by what means or for what purpose, is still more objectionable. *Id.*

— **By Invalid Will.**—A testator destroyed his will, believing that it had already been revoked by a later will, which was, in fact, invalid; and the only evidence of his object in destroying it was a declaration made at the time that it was no use to keep it, as he had another:—Held, that the will was not revoked. *Clarkson v. Clarkson*, 2 S. & T. 497; 31 L. J., P. 143; 6 L. T. 506; 10 W. R. 781.

A domiciled Englishman, married in 1822, an Englishwoman in England. In 1839, in consequence of differences, they separated, and a deed was executed, under which a power of appointment was given to the wife, which she executed by a will and codicil in 1854. A decree for a divorce, on the ground of adultery, was subsequently obtained by the wife in Scotland, and she shortly afterwards was married to a Frenchman in Scotland, and went to reside with him in France, where she died, having previously made a will in the words following: "I revoke all foregoing wills made by me up to this date, the

23rd day of June, 1856. Paris:"—Held, that there was no revocation of the will and codicil of 1854. *Dolphin v. Robins*, 7 H. L. Cas. 390; 29 L. J., P. 11; 5 Jur., N. S. 1271; 7 W. R. 674.

**Of Codicil by Re-execution of Will.**—Where a testator made and duly executed a codicil to his last will, and afterwards re-executed the original will without referring in any way to the codicil:—Held, that although the original will contained a clause revoking "all other wills," &c., yet in the absence of any evidence of an intention to revoke the will, the inference from the wording of the attestation clause being that the will was re-executed for the purpose of giving effect to certain alterations that had been made in it, the codicil was not revoked by such re-execution. *Rawlings, In goods of*, 41 L. T. 559; 44 J. P. 60.

**Of Will by Codicil.**—In interpreting a will and a codicil the general rule is, that the whole will takes effect so far as it is not inconsistent with the codicil. *Robertson v. Powell*, 2 H. & C. 762; 33 L. J., Ex. 34; 10 Jur., N. S. 442; 12 W. R. 623.

If a devise in a will is clear, it is incumbent on the party who contends that it is not to take effect by reason of a revocation in the codicil, to shew an intention to revoke equally clear with the original intention to devise. *Id.*

A testator devised nine houses to his son A. for life; and after his death, to his children who should attain a certain age; but in case all such children should die under that age, then to trustees to permit his three daughters, B., C. and D., to receive the rent during their lives, in equal shares; and after their decease, to their children in fee. He afterwards made a codicil in these words:—"I hereby revoke that part of my last will and testament whereby I give the nine houses unto my son and to his heirs; and my will is, that my daughters C. and D. should enjoy them. I give and bequeath the freehold ground and houses to my daughters C. and D., equally and jointly between them, and to the survivor of them; and after their decease to their child or children equally; and if they should both die leaving no child or children, then the freeholds to go as ordered by my will." C. and D. died, leaving no child. A., the son, died, leaving a daughter, his only surviving child, who was born in the lifetime of the testator, and attained the required age; but A. had had another daughter born in the lifetime of the testator, who had married, and had a son, but both she and her son died in the lifetime of her father. The testator's daughter B. was also dead, but leaving two children:—Held, that notwithstanding the general words of the commencement of it, the codicil operated only as a partial revocation; that it operated as a revocation only so far as to effectuate the intention of the testator, as declared in the codicil, to prefer his daughters C. and D. and their children, to his son A. and his children; that it operated nothing more; and that, failing the objects of the preference, the testator's declared intention was, that the will should operate as if there had been no revocation; and therefore that the daughter of A. was entitled to a moiety of the houses. *Doe d. Evers v. Ward*, 18 Q. B. 197; 21 L. J., Q. B. 145; 16 Jur. 709.

A. bequeathed leasehold premises to his daughter M., for her life; and after her death, to and amongst her lawful issue equally, share and share alike, with benefit of survivorship; and "in default of such issue," to his son G. for life; and after his death to his children equally, share and share alike, with benefit of survivorship. By a codicil, the testator recited that he had by his will bequeathed to his son G., after the decease of his, the testator's, daughter M., "and in default of her leaving lawful issue," the leasehold premises; and stated, that in case his son should not indemnify his estate from a debt incurred by the testator for the accommodation of his son, such bequest in the will in favour of the son should be revoked:—Held, that the codicil did not revoke the will, but shewed the sense in which the testator used in the will the words "in default of such issue." *Darley v. Martin*, 13 C. B. 683; 22 L. J., C. P. 249; 17 Jur. 1125.

A testator executed a codicil to his last will, and by such codicil absolutely revoked and made void all bequests and dispositions in the will, and nominated executors, but did not in direct terms revoke the appointment of executors and guardians in the will:—Held, that the will was not revoked. *Huward, In goods of*, 1 L. R., P. 636; 20 L. T. 230.

When there is a clear and manifest intention to devise, it is incumbent on a party alleging a revocation by a codicil to prove that the intention to revoke was equally clear and manifest; if there was only a reasonable doubt, the first devise ought to stand. *Hearle v. Hicks*, 1 C. & F. 20; *S. C.*, in C. P., *Doe d. Hearle v. Hicks*, 8 Bing. 475; 1 M. & Scott, 759; and Ex. Ch., 1 Y. & J., affirmed.

A testator devised a copyhold messuage, called Plomer Hill House, with the appurtenances, to trustees for his wife for life, and subsequently, by one of several codicils, revoking several of the dispositions made by his will of all his freehold, copyhold, and personal estate, he instead of such dispositions devised all his freehold, copyhold and personal estate to his daughter:—Held, that the devise of the estate to his wife for life was not affected by this codicil. *Id.*

By a will a testator in one cause devised all real estate whatsoever in Ireland of or to which he should be seised or entitled (subject to a trust term to raise moneys in aid of the personalty for payment of debts and legacies) to H. for life, with remainders over, and in another, he left all personal estate whatsoever and wheresoever after payment of debts and legacies to H. absolutely. By a codicil he revoked "the bequest contained in my will of the residue of all my real and personal estates to my brother H.," and gave such residue to W. "absolutely:—Held, that the devise to H. of the Irish estate was revoked by the codicil. *Wallace v. Seymour*, 6 Ir. R., C. L. 219, 343; 20 W. R. 634—Ex. Ch.

A testator devised his freehold estates to certain uses, and provided that any person becoming entitled thereto should take and use his name and arms. He then devised his copyhold estates (upon which stood his principal mansion house) and his leasehold estates to trustees, to be held by them upon trusts, as far as the nature of the several estates would allow, to correspond with the uses before declared as to his freehold estates. Subsequently, by a codicil, which he stated was to be taken as part of, and added to, his will, he altered the uses declared in his will

as to his freehold estates, and declared that the proviso respecting the use of his name and arms should follow the new limitations. No mention was made in the codicil of the copyhold and leasehold estates:—Held, that though it was probable, from the circumstances, that he intended his copyhold and leasehold estates to follow the limitations of his freeholds as declared in the codicil, still as there were no words therein which affected it, the court would not supply them, and that the copyhold and leasehold estates passed according to the trusts originally declared in the will. *Langdale v. Briggs, Bacon, Ex parte*, 28 L. T. 467; 21 W. R. 620.

A testator, having executed a will and codicil, signed a second codicil, in which he expressed a desire to cancel his will, and that a document which he described as a will of earlier date, and the first and second codicils, should together stand as his last will and testament. The only document executed at the earlier date was a settlement on his marriage, which was not of a testamentary character:—Held, that the revocation of the will was absolute, and not dependent on the incorporation of the settlement in the papers admitted to probate. *Gentry, In goods of*, 3 L. R., P. 80; 42 L. J., P. 49; 28 L. T. 480; 21 W. R. 888.

A testator devised freeholds in Dorsetshire upon certain trusts, and bequeathed 3,000*l.* to his trustees to purchase lands in Dorsetshire to be held upon the same trusts. By a codicil he revoked the devise of his freeholds, and declared other trusts, without alluding to the 3,000*l.*:—Held, that there was no implied revocation of the bequest of 3,000*l.* which would pass under the will as if no codicil had been made. *Bridges v. Strachan*, 8 Ch. D. 558; 38 L. T. 502; 26 W. R. 691.

**Codicil by Codicil.**—An aunt by her will gave shares in her residue to her nephew. By a codicil she revoked all devises and bequests to her nephew. By a second codicil she devised after-purchased property to the trustees of her will and confirmed her will:—Held, that the second codicil did not revoke the first, and that the after-purchased property went according to the will and first codicil together, and not according to the will alone. *Green v. Tribe*, 2 Ch. D. 231; 47 L. J., Ch. 783; 38 L. T. 914; 27 W. R. 39.

A prior codicil, operative in itself, is not revoked by a subsequent codicil which refers to the will by its date and confirms it without mentioning the prior codicil; but a prior codicil inoperative in itself, will not be set up by such a subsequent codicil. *Id.*

The words "I give, devise and bequeath to A. and B. all the residue of my real and personal estate whatsoever and wheresoever undisposed of by my will and this codicil thereto," revoked an intermediate codicil. *Hastings, In goods of*, 26 L. T. 715; 20 W. R. 616.

A testator made a will (dated before the Wills Act), by which he directed his residuary real estate to be sold and the proceeds to be divided (in the events which happened) among twelve persons, of whom A. and B. were two. He made a first codicil (dated after the Wills Act), by which he directed certain real estate acquired subsequently to the date of the will to be sold, and the proceeds divided in the same way as the proceeds of his other real estate. This codicil was attested by A. and B. He then made

another codicil, described as a codicil to his will of a certain date, but not referring to the prior codicil:—Held, that the second codicil did not operate as a republication of the first codicil; that the gifts to A. and B. of two twelfth shares of the proceeds of the property comprised in the first codicil failed; and that these shares fell into the residue, and were divisible between A. and B. and the other ten residuary legatees. *Burton v. Newbery*, 1 Ch. D. 234; 45 L. J., Ch. 202; 34 L. T. 15; 24 W. R. 388.

— **Codicil revoking Will does not revoke prior Codicil.**—A codicil revoking a will does not necessarily revoke a prior codicil. *Farrer v. St. Catharine's College, Cambridge*, 16 L. R., Eq. 19; 42 L. J., Ch. 809; 28 L. T. 800; 21 W. R. 643.

A testator made a will and two codicils, by none of which he gave anything to St. Catharine's College, and many years afterwards he made another codicil, describing it as a codicil to his last will; and thereby, after reciting that by his will he had bequeathed 1,000*l.* to St. Catharine's College, he confirmed the bequest, but in all other respects he revoked his will; and he gave to St. Catharine's College (in addition to the bequest of 1,000*l.*) 5,000*l.*, and appointed executors of his will and codicil:—Held, that the last codicil revoked the will of the testator, but not the codicils of prior date. *Id.*

**Of Codicil by Revocation of Will.**—T. M. B. having executed a codicil at the foot of his will, cut off his signature to the will. Upon proof that he thereby intended to revoke the codicil the court held that the codicil was also revoked. *Bleakley, In goods of*, 8 P. D. 169; 52 L. J., P. 102; 31 W. R. 171; 47 J. P. 663.

A. made a will and a codicil thereto which he retained in his own possession. He subsequently executed a second testamentary paper, which he also called a codicil, and this paper he gave to one of the legatees named therein. The will and first codicil were not forthcoming at his death:—Held, that as the second codicil had not been revoked by any of the modes indicated by 7 Will. 4 & 1 Vict. c. 26, s. 20, it was entitled to proof. *Black v. Jobling*, 1 L. R., P. 685; 38 L. J., P. 74; 21 L. T. 298; 17 W. R. 1108.

A testamentary paper purporting to be a codicil to a will, but being substantially independent of it, is not necessarily revoked by the revocation of the will. *Ellice, In goods of*, 33 L. J., P. 27; 12 W. R. 353.

A testamentary paper in the form of a codicil to a will is not revoked by the revocation of the will. It can only be revoked by one of the modes indicated by the Wills Act (7 Will. 4 & 1 Vict. c. 26), s. 20. *Savage, In goods of*, 2 L. R., P. 78; 39 L. J., P. 25; 22 L. T. 375; 18 W. R. 766.

A person executed a will and codicil. In the latter she referred in several paragraphs to the dispositions contained in her will, and more particularly she bequeathed a legacy to be held under conditions stated in her will. She subsequently destroyed the will by burning it, but preserved the codicil:—Held, that as the codicil was not revoked by any of the methods prescribed by the 7 Will. 4 & 1 Vict. c. 26, s. 20, it must be admitted to probate. *Turner, In goods of*, 2 L. R., P. 403; 27 L. T. 322; 21 W. R. 38.

A codicil is *prima facie* dependent on the will. Where a will and a codicil to it have been in existence, and the will has been subsequently destroyed by the testator, the burden of proof is on the party setting up the codicil, to show that it was the intention of the testator that it should operate separately from the will, otherwise the presumption is, that by the destruction of the will the codicil was revoked. *Grimwood v. Cozens*, 2 S. & T. 364; 5 Jur., N. S. 497. See *Black v. Jobling*, 38 L. J., P. 74; 17 W. R. 1108.

**Implied Revocation of Intermediate Codicil.**—A testator by will gave legacies to three of his daughters, and devised and bequeathed his residuary real and personal estate upon trusts for his wife and children. By a first codicil in 1878 he revoked one of the legacies in his will and increased another, concluding, "In all other respects I confirm my said will." By a second codicil, after reciting that he was desirous of altering the residuary devise contained in his will, he made a specific devise, and in all other respects confirmed his will. He afterwards made a third codicil, by which, after referring to his will by date and reciting a promise to that effect, he directed his trustees to grant an underlease of a house to his daughter-in-law, and gave his wife a pecuniary legacy in addition to the benefit she derived under his said will, and concluded, "In all other respects I confirm my said will except as altered by a certain codicil made thereto in 1878, whereby I revoked a legacy to my daughter Mary:—Held, that the words of confirmation in the first and third codicils were to be read as meaning that the testator did not intend to alter his general testamentary dispositions further than in the specific way mentioned in those codicils; and that the devise in the second codicil being clear, no intention to revoke it had been shewn with sufficient clearness to enable the court to reject that devise. *Follett v. Pettman*, 23 Ch. D. 337; 52 L. J., Ch. 521; 48 L. T. 865; 31 W. R. 779.

**General Revocatory Clause—Effect of.**—A general clause in a will revoking all former wills revokes a prior testamentary appointment. *Merritt, In goods of* (1 Sw. & Tr. 112) and *Joys, In goods of* (4 Sw. & Tr. 214) considered. *Sotheman v. Denning*, 20 Ch. D. 99—C. A.

A married woman having a general power of appointment by will over real estate executed a will appointing the estate. After the death of her husband, she made another will revoking all former wills and containing a general devise and bequest of all her real and personal estate. She afterwards made a third will, also revoking all former wills, and bequeathing her personal estate, but not devising or appointing her real estate. She had no real estate except that subject to her power of appointment:—Held, that the testamentary appointment under the first will was revoked by the second will, and the second will by the third, and that the real estate went as in default of appointment. *Id.*

The testatrix duly executed a power of appointment under her father's will in the form of a "testamentary appointment." Some years later she made a will, and in it exercised fully all powers of appointment under her control, but did not refer in any way to the power of appointment she had under her father's will, or to her previous exercise of it in the "testa-

mentary appointment" already made by her:—Held, that as the will contained a complete execution of all the powers at the deceased's disposal, that instrument revoked all preceding wills, and was therefore entitled to probate alone. *Tenney, In goods of*, 45 L. T. 78.

A married woman made a will in 1848, in execution of a power of appointment, and in 1857 made another in execution of another power of appointment. The later will contained a general revocatory clause, but it did not refer to the will of 1848, or to the power in execution of which it was made, or to the property thereby appointed:—Held, that the will of 1848 was not revoked. *Joy, In goods of*, 4 S. & T. 214; 30 L. J., P. 169.

A general revocatory clause of "all former wills," leads to the inference that the deceased at that time intended to leave a subsisting will. *Marsh v. Marsh*, 1 S. & T. 528; 6 Jur., N. S. 380.

General revocatory words are not included in the expression, "any bequest of personal property described in a general manner," in 7 Will. 4 & 1 Vict. c. 26, s. 27, so that they can operate upon "any personal estate which the testator may have power to appoint in any manner." *Merritt, In goods of*, 1 S. & T. 112; 4 Jur., N. S. 1192; *S. P., Meredith, In goods of*, 29 L. J., P. 155.

A married woman, having duly executed a will, by which she disposed of stock over which she had a power of appointment, subsequently, with an intention of disposing of other stock held in trust for her under her marriage settlement, made and executed a second will, which concluded with a clause of revocation of all former wills. This last was not valid for the purposes intended, nor was it rendered valid by any consent on the part of her husband:—Held, that this last will could not, merely by its general revocatory clause, operate as an execution of the first-named power, and so revoke the will already made in execution of such power. *Id.*

**Effect of two Wills of different Purport—But no revocatory Clause.**—*G. H.* made two wills. By the first of such wills he gave the whole of his real and personal estate and effects to his wife E. H., absolutely, and appointed her sole executrix thereof, and revoked all former wills. By the second will he gave his household furniture and effects and all moneys whatsoever deposited or invested to his wife for life, and after her decease to his wife's sister, M. B., absolutely, whom he also appointed joint executrix with his wife. The said will contained no disposition of the real estate or the residue of the personal estate, and no clause revocatory of previous wills. The court granted probate of both papers as together constituting the will of the testator, but before doing so required that notice of the application for such probate should be served on the heir-at-law. *Hartley, In goods of*, 50 L. J., P. 1; 29 W. R. 356.

When a later will does not expressly revoke an earlier one, and the two may stand together in several important matters, it lies on the party impugning the earlier will to prove the intention of the testator to revoke it by the later; and, in deciding such a question, conjecture or slight probabilities are not sufficient, and the words "this is my last will," are not entitled to any

weight whatever. *Leslie v. Leslie*, 6 Ir. R., Eq. 332.

A mother bequeathed the residue of her estate, after payment of debts and certain legacies, to her daughter absolutely, and appointed her sole executrix. By a subsequent testamentary paper which purported to be her last will, but contained no revocatory clause or bequest of the residue, she gave all her estate to her daughter for life and appointed her sole executrix, and then gave certain legacies payable after her daughter's decease:—Held, that as the second will did not dispose of the residue, it did not revoke the residuary bequest in the earlier will, and that both instruments were therefore entitled to probate. *Petchell, In goods of*, 3 L. R., P. 153; 43 L. J., P. 22; 30 L. T. 74; 22 W. R. 353.

A husband made a will, devising his real estate to his wife absolutely; afterwards he executed another will giving his real estate to trustees upon trust after his wife's death for the Bristol General Hospital, and he devised to his trustees all the residue of his real estate, and "the proceeds which by any law to the contrary might not by that will pass to the hospital, fully relying upon my trustees to carry out my wishes and desires." The gift to the hospital was void, and the trustees claimed to take the real estate beneficially under the ultimate gift. The court held that they did not take beneficially. The question then arose as to whether the first will was revoked by the second:—Held, that the first will was revoked by the devise in the second, notwithstanding that these devises were invalid. *Baker v. Story*, 31 L. T. 631; 23 W. R. 147.

If it can be collected from the language of the will, taken in connexion with the facts with which it was used, that it was the intention of the testator to dispose of his property in a different manner to that in which he disposed of it by an earlier will, the earlier will will be revoked, and this although in some particulars the later will does not completely cover the whole subject-matter of the earlier will. *Dempsey v. Lawson*, 2 P. D. 98; 46 L. J., P. 23; 36 L. T. 515; 25 W. R. 629.

A person executed a will in 1858, by which she disposed of the whole of her property. In 1860 she executed another will, which commenced "This is the last will and testament of me," &c. It varied and repeated several bequests given in the first will, appointed the same executors for England as in that document, but contained no residuary nor revocatory clauses:—Held, that, from the general tenor of the last will, it was clear that the testatrix did not intend the first will to remain in force, and that it therefore was revoked. *Id.*

The doctrine that a will disposing of the whole property of a testator is *ex necessitate* a revocation in toto of a former will, also disposing of the whole, only applies where the dispositions are so inconsistent that the papers cannot stand together. *O'Leary v. Douglass*, 1 Ir. Ch. D. 45.

A will disposing of the whole of the testator's property will act as a revocation of a will disposing of a part only of the property of the testator. *Moorhouse v. Lord*, 10 H. L. Cas. 272; 32 L. J., Ch. 295; 9 Jur., N. S. 677; 8 L. T. 212; 11 W. R. 637.

If a subsequent testamentary paper is only partly inconsistent with one of an earlier date, the last mentioned instrument is only revoked

as to those parts where it is inconsistent, and both of the papers are entitled to probate. *Lemage v. Goodban*, 1 L. R., P. 57; 35 L. J., P. 28; 12 Jur., N. S. 32; 13 L. T. 508.

Where there are two testamentary papers, each professing in form to be the last of the deceased, the court, in determining whether one is or both are entitled to probate, must be guided by the consideration, not whether the testator intended them both together to form his will, but what dispositions of his property he designed to revoke or to retain. *Id.*

A., by will, made in 1853, gave all his real and personal estate to B. and appointed B. sole executor, and by a subsequent will, which contained no clause of revocation, he gave two houses to C., and appointed C. sole executor:—Held, that the latter will was not inconsistent with the earlier, and therefore did not revoke it, and that B. and C. were entitled to probate of both instruments. *Geaves v. Price*, 32 L. J., P. 113; 11 W. R. 809.

—**Onus Probandi.**—A testator executed a will in 1825, which was found uncanceled at his death, which event took place in 1853. In 1852, he executed another testamentary paper, the contents of which were wholly unknown, except the circumstance of the paper commencing with the words, "This is the last will and testament." This latter instrument was not forthcoming at his death, but there was no evidence of its destruction. The prerogative court held that the instrument, executed in 1852, was not to be considered as a codicil, but as a substantive will, which operated as a revocation of the prior will of 1825, and that under 7 Will. 4 & 1 Vict. c. 26, s. 22, the deceased must be considered to have died intestate, as the former will was not revived by the destruction of the latter:—Held, first, that the onus probandi lies upon the party setting up the subsequent instrument as a revocation of the former will. *Cutto v. Gilbert*, 9 Moore, P. C. C. 131.

Held, secondly, that to establish a revocation of a former will relating to personalty, by a subsequent testamentary paper not forthcoming, by parol evidence of execution only, in the absence of any draft or instructions for such instrument, such evidence must be strong and conclusive as to its contents. *Id.*

Held, thirdly, that the mere fact of such an instrument, commencing with the words, "This is my last will and testament," does not render it a revocatory instrument, as those words do not necessarily import that such instrument contained a different disposition of the property, and that to make it operate as a revocation of a former will, it must be proved that the contents of the latter instrument were different from the former. *Id.*

When the revocation of an existing will is sought to be established by the proof of the execution of a subsequent will not forthcoming, the evidence should be clear and conclusive, not only as to the execution of such subsequent will, but also as to its contents. *Berthon v. Berthon*, 18 L. T. 301; 16 W. R. 673.

**Inconsistent Clauses in same Will—Effect of.]**—A testator devised different estates, consisting of houses and land, to different devisees, some of whom were of his own name, to some in fee, and to others for life only; and, by a residuary clause, devised all the rest, residue, and re-

mainder of his messuages, lands, &c., not therein before disposed of, to his wife, her heirs, executors, administrators and assigns, for ever. The following clauses were added by the testator, immediately before executing the will: "I do further give to my wife the house wherein I now live, also the cottage, and all the buildings, cattle, and everything belonging to me in and about this house." "I also entail my land to the Spencers' male heir, so long as one shall remain." The testator's own name was Spencer:—Held, that the devise to the wife of the residue was not affected by the subsequent specific devise, or the devise to the Spencers' male heir; that the devise of the residue, and the specific devise to the wife, were not inconsistent, and might both stand together; and that the clause as to the entail was either unintelligible or inapplicable to the property devised to the wife. *Doe d. Spencer v. Pedley*, 1 M. & W. 662.

A testator seized of freehold and copyhold property, made his will, ordering, first, that his debts should be paid, and then devising to his wife for her life his house, croft, and garden, part of the freehold, with remainder over. The will then proceeded: "Also I give unto my wife, her heirs and assigns, for ever, all my real and personal estate whatsoever and wheresoever unto me belonging, both freehold and copyhold, and now surrendered to uses of my will, and to have the same at my decease; but if my personal estate should not be sufficient to discharge my debts, then I charge my copyhold estate with the payment of the same." And he appointed his wife and others executors:—Held, that the latter clause of the will did not revoke the former, but gave the wife, in addition to her life estate in the freehold house, croft and garden, an estate in fee in the copyhold and the other freehold property, leaving untouched the remainder created by the first clause. *Roe d. Snape v. Nevill*, 11 Q. B. 466.

**Revocation of prior Will obtained by Fraud—Effect on later Will.]**—A later will is not necessarily invalid, upon the ground, per se, that the revocation of a former will had been procured by fraud. *Longford (Earl) v. Purdon*, 1 Ir. Ch. D. 75.

#### c. By Destruction or Mutilation.

**By Tearing.]**—In 1879, after the decease of W., who had made his will in 1863, there was found among his papers a portion of it torn off, and containing (besides the date as of 1863 and the signature duly attested) only the words, "and appointed the said William Domville Handcock to be executor of this my will;" and at the foot, in the handwriting of the deceased, "as some circumstances have changed:"—Held, that W. must be taken to have revoked his will, and accordingly, that the mutilated document could not be admitted to probate. *White, In goods of*, 3 L. R., Ir. 413.

If a testator tears off that which he has made a substantial, though by law it is not an essential, portion of his will, such tearing is a sufficient tearing within 7 Will. 4 & 1 Vict. c. 26, s. 20. *Williams v. Tyley*, Johns. 530; 5 Jur., N. S. 35.

A paper writing, inclosed in a half sheet of foolscap paper, and indorsed in the handwriting of the deceased, "Will of Major J. S.," was found with other papers in a locked drawer. It had been

cut in two pieces immediately above the signatures of the deceased and the attesting witnesses, but both pieces were preserved:—Held, that the court could not grant probate of such a document. *Simpson, In goods of*, 5 Jur., N. S. 1366.

A, having an intention to make a new will, and thereby to revoke a legacy contained in his then existing will, requested this last to be brought to him. As soon as he had it in his hand, he tore it as it was doubled, from the edges, very nearly through, so that only a small portion of each sheet, where it was doubled, held the two parts together. He stopped, however, on being reminded that a party whom he wished to benefit would lose everything if he destroyed that will and did not make another, and dropped the paper on the floor. With his knowledge it was taken from thence, and carried up stairs. He frequently expressed an intention to make a new will, but did not do so:—Held, that it was not necessary, to constitute a revocation by tearing, that the testator should rend the will into more pieces than it originally consisted of, but in order to make the act effectual he must have intended that which he actually did of itself to have the effect of revocation, without more. *Elms v. Elms*, 1 S. & T. 155; 27 L. J., P. 96; 4 Jur., N. S. 765.

A testatrix executed a will which revoked an earlier will. Two years subsequently, while alone in her bed-room, she destroyed such will, and immediately afterwards told her daughter that she had done so with the intention that the earlier will might take effect:—Held, that the destruction of the instrument under the circumstances amounted to an absolute revocation. *Weston, In goods of*, 1 L. R., P. 633; 38 L. J., P. 53; 20 L. T. 330.

**By Cutting out Signature.**—H. executed a will by signing her name at the foot of the first five sheets, and at the end. The testimonium clause stated that she had done so. A codicil was also executed, which was written at the foot, and on the back of the last sheet of the will. Subsequently the deceased cut off her signature at the bottom of the five sheets, and drew a pen through the name at the end, adding the words, "Cancelled, A. D. H.—15th September, 1857." There was evidence that she intended by the act done to revoke her will, and to preserve the codicil:—Held, that the deceased had cut off a substantial part of the will and had torn it in a manner sufficient to satisfy the statute. *Harris, In goods of*, 3 S. & T. 485; 33 L. J., P. 181; 10 Jur., N. S. 684; 11 L. T. 276.

**Mutilation.**—The will of a testatrix was found after her death with the signature and attestation clause cut off and folded inside the will. There was no other evidence of intention:—Held, that this was a sufficient evidence of an animus revocandi. *Magnesi or Maynes v. Hasleton*, 44 L. T. 586; 45 J. P. 816.

G. duly executed a will on six or eight detached sheets of paper. At the time of execution he subscribed his name at the foot of each sheet, in the presence of the attesting witnesses, who thereupon also subscribed in his presence each sheet. On his death, two of the middle sheets of the will were found among his papers, and there was no trace of the remaining sheets. On motion to decree letters of administration with these sheets annexed as the will of G.:—Held, that the signatures at the end of the will, being the only

ones that satisfied the 7 Will. 4 & 1 Vict. c. 26, having been destroyed, the will must be presumed to have been revoked. *Gullan, or Gullon, In goods of*, 1 S. & T. 23; 27 L. J., P. 15; 4 Jur., N. S. 196.

Seven days before his death, A. caused a will to be prepared for him; it was left in the custody of his mother. The day before his death he took possession of it at his own request. After his death it was found in his bed, with the signature and attested clause torn off:—Held, that there was a presumptive revocation of it. *Lewis, In goods of*, 1 S. & T. 31; 27 L. J., P. 31; 4 Jur., N. S. 243.

#### **Partial Cancellation — Proof in fac-simile.**—

Where a will, on the face of it, had been executed in 1858, and subscribed by two legatees named in it as witnesses, and was re-executed in 1860, and attested by different witnesses, and after the death of the testatrix, was found, with the first attestation clause and the names of the witnesses to it cancelled; but there was no evidence to shew the date of the cancellation:—The court refused to exclude the part cancelled from probate, and directed the probate to go in fac-simile. *Smith, In goods of*, 3 S. & T. 589; 34 L. J., P. 19; 10 Jur., N. S. 1243; 11 L. T. 684.

R. executed his will and a codicil thereto in the presence of three witnesses, two of whom subscribed their names as such to both instruments. Immediately afterwards, before any person had left the room, R., having been informed that one of such subscribed witnesses would forfeit her interest under the will, ordered her name to be struck through, and the third witness to sign the will and codicil, which was done:—Held, that the court could not allow the probate to issue with the omission of the name struck through, but might permit it to be taken in fac-simile. *Raine, In goods of*, 34 L. J., P. 125; 11 Jur., N. S. 587.

**By Tearing off Seal.**—A person having made his will, executed under seal, and published and attested as a sealed instrument, afterwards, for the purpose of revoking it, tore off the seal, and with it part of a word:—Held, that the act of tearing off the seal was sufficient, and that the will was thereby revoked. *Price v. Powell*, 3 H. & N. 341; 27 L. J., Ex. 609.

**Cutting off Name of Second Attesting Witness, but Piece Preserved.**—Testator cut from the will the portion of the document on which the name and address of the second attesting witness were written. The excised part was also mutilated, but the name and address of the witness remained legible upon it, and it was found with the will in the testator's writing-desk. The court being satisfied that the name had not been removed animo revocandi, decreed probate of the instrument. *Wheeler, In goods of*, 49 L. J., P. 29; 42 L. T. 60; 28 W. R. 476; 44 J. P. 285.

At A.'s death his will and codicil were found in this condition—the names of the attesting witnesses and the attestation clauses were torn away from the last sheet of the will and the foot of the codicil, but his signature remained intact both at the end of the will and codicil, and at the foot of each sheet of the will. Certain lines and parts of lines in the will were also struck through with blue ink:—Held, that the act of tearing was sufficient to revoke the will, when

combined with the presumption, arising from the circumstances, that it was strongly against A's intention that this will should stand. *Abraham v. Joseph*, 5 Jur., N. S. 179.

A person, besides a will, left a second testamentary paper, to which his signature was attached. The place, however, in which the names of the attesting witnesses should have appeared was scratched over with a pen and ink, so that no letter of a name could be deciphered:—Held, that this latter paper was revoked. *James, In goods of*, 7 Jur., N. S. 52.

— **Names of Witnesses Essential.**—Semble, that the names of the attesting witnesses are an essential part of the will, and that their removal from the will *animo revocandi* will render it inoperative. *Wheeler, In goods of, supra.*

**Striking out Words of Limitation.**—J. E. made a will, in which he devised his house, lands, and tenements to his mother, "Elizabeth E., her heirs and assigns, for ever;" he afterwards struck his pen through the words, "her heirs and assigns for ever":—Held, that this was, under the 6th section of the Statute of Frauds (29 Car. 2, c. 3), a valid revocation, by obliteration, of a clause in his will; the mother took only an estate for life. *Swinton v. Bailey*, 4 App. Cas. 70; 48 L. J., Ex. 57; 39 L. T. 581; 27 W. R. 293.

The 6th section of the statute was satisfied by this act of obliteration of the words in question, which amounted to an actual revocation, and not a mere alteration. *Id.*

The word "clause" in the first portion of the section may properly be read "part." *Id.*

Per Lord Penzance:—"Devise" in the statute means a disposition of lands, in writing, and when the statute says the testator may revoke any "clause thereof," it means any intelligible portion of the devise, whether the effect is to increase the beneficial interest of the taker or the reverse. *Id.*

**Presumption as to Date of Mutilation, &c.]**—The same principles apply to mutilations as to alterations and interlineations, so that if no evidence can be given as to the time at which they were made, it will be presumed that they were made after the execution of the document in which they appear, and, if there is a subsequent testamentary paper to that, after the execution of such testamentary paper. *Christmas v. Whinyates*, 3 S. & T. 81; 32 L. J., P. 73; 9 Jur., N. S. 283; 8 L. T. 801; 11 W. R. 371.

**Animus revocandi.]**—A testator being led to believe by a friend that his will was invalid, tore it and told his wife to put it in the fire. The fire had not been lighted, but the wife placed the pieces in the grate. A few minutes afterwards the testator bethought himself that his friend might possibly be wrong, and he took the pieces from the grate and preserved them:—Held, that there had been no revocation, the act of tearing not having been accompanied by the *animus revocandi*; and probate was granted of the will as contained in the pieces. *Giles v. Warren*, 2 L. R., P. 401; 41 L. J., P. 59; 26 L. T. 780; 20 W. R. 827.

Where a will of which the testator has the custody is found mutilated after his death, the

presumption is, that the mutilation was the act of the testator, done *animo revocandi*. *Dallow, In goods of*, 31 L. J., P. 128.

A testator, having duly executed his will, subsequently, when suffering under an attack of delirium tremens, tore it in pieces. The pieces were preserved, and on his recovery, he was informed of what he had done, and he answered he must have been mad when he did the act, and that he would make a fresh will, which intention he did not carry out:—Held, that the will was not revoked. *Brunt v. Brunt*, 3 L. R., P. 37; 28 L. T. 368; 21 W. R. 392.

A will was found, the signature to which had been cut out, but gummed on to its former place. The will had been in the custody of the testator up to the time of his death. Declarations of the testator made subsequently to the date of the will were proved of an intention to benefit his wife by will. No other will was forthcoming:—Held, that the presumption that the testator had cut out the signature *animo revocandi* was not rebutted, and that the gumming on the signature in its original place did not revive the will. *Bell v. Fothergill*, 2 L. R., P. 148; 23 L. T. 323; 18 W. R. 1040.

On the death of a party a will was found in an iron chest, in which he kept important papers. It had been written on the first side of seven sheets of brief-paper, and had been signed by the deceased and witnesses on each sheet and at the end. The first seven or eight lines had been cut and torn off, but in other respects the will was complete:—Held, that from the mere cutting or tearing off the beginning of the will without other circumstances, it could not be inferred that the testator intended to revoke the whole will, and that it must be admitted to probate in its incomplete state. *Woodward, In goods of*, 2 L. R., P. 206; 40 L. J., P. 17; 24 L. T. 40; 19 W. R. 448.

**By Mistake.]**—Where a testator by misinformation as to the effect of a subsequent deed, settling his property in his lifetime, had been induced to revoke his will by cancellation, the court refused to grant probate of a copy on motion, but compelled the parties to propound in solemn form. *James, In goods of*, 19 L. T. 610.

**Before 7 Will. 4 & 1 Vict. c. 26.]**—A slight tearing of a will, and throwing it on the fire, with a deliberate intent to consume it, by the testator, though it fell off and was preserved by a bystander, without his consent or knowledge, was a sufficient revocation. *Bibb d. Mole v. Thomas*, 2 W. Bl. 1043.

The mere act of cancelling a will was no revocation unless done *animo revocandi*. *Burtenshaw v. Gilbert*, Cowp. 52; Lofft, 465.

A testator, having quarrelled with one of the devisees named in his will, began to tear it in a fit of passion, with the intention of destroying it, and having tore it into four pieces, he was prevented from proceeding further, partly through the efforts of a bystander, and partly by the entreaties of a devisee: he afterwards became calm; and having put by the several pieces, expressed his satisfaction that no material part of the writing had been injured, and that it was no worse:—Held, that it was properly left to the jury to say whether he had completely finished all that he intended to do for the purpose of destroying the will; and the jury having found

that he had not, the court refused to disturb the verdict. *Doe d. Perkes v. Perkes*, 3 B. & A. 489.

To cancel a will by burning, some part of the body of the will must be burnt. A mere intent, though the will was thrown on the fire, was not sufficient. *Doe d. Read v. Harris*, 1 N. & P. 405; 6 A. & E. 209; W., W. & D. 106.

**Evidence.**—A will, which had remained in the custody of the testator since the time of its execution, was not forthcoming at his death. A draft was propounded, and evidence of declaration was admitted to shew an intention to adhere to the will. On the other side evidence was offered to shew that the testator did not intend to leave his property in the manner in which it was disposed of by his will, and that he had destroyed it by burning it:—Held, that such declarations were admissible, not as evidence of destruction, but of intention not to adhere to the will. *Keen v. Keen*, 3 L. R., P. 105; 42 L. J., P. 61; 29 L. T. 247.

In order to revoke a will under s. 20 of the Wills Act, there must be a positive act of destruction, together with an intention to revoke. No symbolical act of destruction is sufficient. *Cheese v. Lovejoy, Harris, In re, post*, col. 922.

The words of s. 20, "otherwise destroying," must be construed as intending some mode of destruction ejusdem generis with the preceding words, not an act which is not a destroying in the primary sense of the word. *Id.*

Striking through words with a pen, unless initialed as required by s. 21, is not valid, and the will stands as though the alterations had not been made. *Id.*

#### d. By Duplicates.

S. executed a will in 1776, and in 1778 he executed a copy of the will, and a codicil in duplicate on the same day. The object of the codicil was to provide for his youngest son, who was born in 1777. In 1808, S. died, leaving four sons him surviving. After his death the will of 1776, with the duplicate codicil annexed, was found in his portfolio, and the will executed in 1778, with the duplicate codicil annexed, in a box in the same room. The will and codicil in the portfolio contained erasures which diverted the limitation of certain estates from the younger sons to the eldest son. The altered will and codicil were proved by the executrix, and acted upon until the death of all the sons of S., except the youngest son, who, when his turn to inherit, according to the unaltered will, arrived, brought ejectment against the successor of the eldest son of S. The judge asked the jury whether the two wills, with the duplicate codicils annexed to each, formed the last will of S., and whether the erasures in the will and codicil in the portfolio were intended to be final or deliberative only; and he directed the jury, that if their opinion on these two questions was in the affirmative, then the cancellation of one part was the cancellation of the other part, and the passage uncanceled was the last will of S.:—Held, that the questions left to the jury, and the direction in point of law, were correct. *Doe d. Strickland v. Strickland*, 8 C. B. 724; 19 L. J., C. P. 89.

Where there are duplicates of a will, one in the custody of the testator and the other not, and the testator cancels that which is in his cus-

tody, it is an effectual cancelling of both. *Burshaw v. Gilbert*, Cowp. 52; Lofft, 465.

A testatrix executed a will in duplicate, and retained one copy herself, but placed the other in independent keeping. Subsequently she revoked the copy in her own possession, tearing off the signature. The court declined to grant probate on motion of the unutilized paper which had remained out of her possession. *Slade, In goods of*, 20 L. T. 330.

#### e. Dependent Relative Revocation.

**Generally.**—In order to establish a case of dependent relative revocation, it must be shewn by the evidence of disinterested witnesses that the act of destruction of a will was referable wholly and solely to an intention to set up some other testamentary paper. *Eckersley v. Platt*, 1 L. R., P. 281; 36 L. J., P. 7; 15 L. T. 327; 15 W. R. 232.

A will destroyed by the testator, on the supposition that he had substituted another for it, will be valid, and probate of a copy of it will be granted, if the latter will is not duly executed. *Scott v. Scott*, 5 Jur., N. S. 298.

A testatrix duly executed a will in 1855, and in 1862 she signed another will, being a copy of the former one, with the exception of bequests to a niece, but which was not duly attested. In 1864 she cut out the names of the attesting witnesses to the earlier will, in the presence of a fellow-servant. Both documents were retained in her possession until her death:—Held, that the doctrine of dependent relative revocation applied, and that the will of 1855 was entitled to probate. *Middleton, In goods of*, 3 S. & T. 583; 34 L. J., P. 16; 10 Jur., N. S. 1109; 11 L. T. 684.

The court will not apply the doctrine of dependent relative revocation to a case where the testator has destroyed a will through a mistaken notion of the legal effect of its destruction, if it is satisfied that he intended entirely to revoke that will. *Dickinson v. Svatman*, 4 S. & T. 205.

A testator executed a will bequeathing a number of legacies, the amounts of which were stated in words, and afterwards erased some of those words and inserted others, the alterations being unattested; and he also cut out a portion of the will:—Held, first, that the doctrine of dependent relative revocation applying, the substituted words should be struck out, and the original amounts stand part of the will. *Nelson, In goods of*, 6 Ir. R., Eq. 569.

Held, secondly, that where no words were substituted, the original words, where apparent, but not otherwise, should be admitted to probate. *Id.*

Held, thirdly, that the part cut out should be rejected. *Id.*

A testatrix, having her will in her hand, dictated the alterations she desired to be made in the first part of it to a friend, who wrote them down. Feeling unwell, she desired her friend to stop there, and then tore off and burnt so much of her will as had been covered by the memorandum written at her dictation. This memorandum, together with the rest of the will, which contained the residuary clause and the signatures of the testatrix and witnesses and the attestation clause intact, was placed in a desk by her and locked up, and she believed when she did so that these papers constituted a new will, and were

not merely instructions for such a will:—Held, that it was a case of dependent relative revocation, a revocation dependent upon the papers locked up constituting a new will, and probate was granted of the original will as contained in the portion which remained and the draft of the part which was destroyed. *Dancer v. Crabb*, 3 L. R., P. 98; 42 L. J., P. 53; 28 L. T. 914.

The court will not apply the principle of dependent relative revocation except there is proof of the actual destruction of the instrument. *Homerton v. Hewett*, 25 L. T. 854.

A., having a will and a codicil, cut off the last page of the will, on which were the names of A. and the witnesses, and desired B. to burn the page so cut off. A. then made some alterations in the remaining pages of the will; desired B. to write out a new will, and send for A.'s solicitor. B. wrote the new will, but did not burn the part cut off, as A. knew. A. died before executing the new will:—Held, that the former will was entitled to probate, there being no intention to revoke, except in connexion with the completion of a new will. *Cockayne, In goods of*, Deane Ecc. Rep. 177; 2 Jur., N. S. 454.

**Where Condition Unfulfilled.**—A testator executed a will in 1864, revoking all former wills. In 1865 he destroyed this will, with an intention, expressed at the time, that he wished to substitute for it a will of 1862, which he held in his hand:—Held, that the act of destruction by the testator was referable solely to his intention to validate the will of 1862, and that act being conditional, and the condition being unfulfilled, there was no revocation. *Powell v. Powell*, 1 L. R., P. 209; 35 L. J., P. 100; 14 L. T. 800.

**Evidence.**—The principle of dependent relative revocation applies to the case where a testator has so entirely erased the name of a legatee that it is no longer apparent, and has substituted another name for it. The court will receive evidence to shew what the original name was, and restore it to the probate if satisfied that the testator only revoked the first bequest on the supposition that he had effectually substituted a new legatee. *McCabe, In goods of*, 3 L. R., P. 94; 42 L. J., P. 79; 29 L. T. 249.

## 2. In other Cases.

**By Purchase.**—W., in 1824, became mortgagee in fee of Blackacre. The form of the conveyance was to him on trust to sell, and out of the proceeds to retain the debt, and pay the surplus, if any, to the mortgagor. In February, 1826, he made his will, whereby he devised all his real estate (except mortgage and trust estates) and all his personal estate to trustees, upon trust for Y. and H. He also devised to the same trustees all his mortgage estates upon trust, on payment of the moneys due, to convey the same to the person who should be entitled to the equity of redemption, and directed the moneys to form part of his personal estate. In March, 1826, the mortgagor of Blackacre became bankrupt, and in June, 1826, W. contracted with the assignees in bankruptcy for the purchase of the equity of redemption. The purchase-money was paid by W., but no conveyance from the assignees was ever executed. In October, 1826, W. died, leaving Y. and C. his co-heirs. C. by deed renounced to the trustees of the will all claim under the contract of June, 1826. The trustees

under the will entered into receipt of the rents of Blackacre, and administered the same as part of the testator's estate until 1869. Y. then claimed the right to a conveyance of one moiety of Blackacre as co-heir of W.:—Held, that the purchase of the equity of redemption by the testator revoked the devise by his will, not only of the beneficial interest, but of the legal estate in the mortgaged property; that no dry legal estate in Blackacre was remaining in the trustees of the will at the testator's death; that the mortgage estate had by the contract ceased to be a mortgage, and had become a new absolute interest; and that Blackacre was undisposed of by the will. *Yardley v. Holland*, 20 L. R., Eq. 428; 33 L. T. 301.

Held, also, that the claim of Y., as co-heir, against the trustees had become barred by the Statute of Limitations. *Id.*

**By Abandonment.**—A will is not revoked by mere abandonment; in order to operate as a revocation, there must be some unequivocal act of cancellation or obliteration by the testator himself, or by some person in his presence and by his direction. *Andrew v. Motley*, 12 C. B., N. S. 514; 32 L. J., C. P. 128.

A testator drew his pen through the lines of various parts of his will, wrote on the back of it "This is revoked," and threw it among a heap of waste papers in his sitting-room. A servant took it up and put it on a table in the kitchen. It remained lying about in the kitchen till the testator's death seven or eight years afterwards, and was then found uninjured:—Held, that the will was not revoked, the words "or otherwise destroyed" in 7 Will. 4 & 1 Vict. c. 26 (Wills Act, 1837), s. 20, not being satisfied, as, whatever the testator intended, the will had not been actually injured. *Cheese v. Lovejoy, Harris, In re*, 2 P. D. 251; 46 L. J., P. 66; 37 L. T. 294; 25 W. R. 853—C. A.

**By Act showing Intention to Revoke.**—At common law, a will might be revoked by any act of the testator which shewed his intention, without the use of any words whatever. *Doe d. Reed v. Harris*, 2 N. & P. 615; 8 A. & E. 1; W., W. & D. 684.

A testator duly executed his will by signing his name at the foot of each sheet, and at the end of the will. On his death it was found that he had written "Cancelled—Wm. B." across each signature, and at the end of a memorandum of a date subsequent to the date of the will, which, after declaring the will revoked, concluded—"I intend to make another will, whereupon I shall destroy this." This memorandum was signed by him, but not in the presence of witnesses. No other will could be found:—Held, that he had done no sufficient act in law to revoke his will. *Brewster, In goods of*, 29 L. J., P. 69; 6 Jur., N. S. 56.

## — Parol Evidence of Intention of Testator.]

—If upon the face of a testamentary document and the facts known to the testatrix at the time of its execution, it is doubtful whether the testatrix intended altogether to revoke a former will, the court will admit parol evidence to ascertain the intention. *Jenner v. Finch*, 5 P. D. 106; 49 L. J., P. 25; 42 L. T. 327; 28 W. R. 520.

**Of Will Exercising Power of Appointment.**—A widow, under the powers given her by her mar-

riage settlement, executed a will in favour of B., without having executed any fresh settlement of the property included in her first marriage settlement:—Held, that she had a right to revoke the will so made by any of the methods prescribed by the Wills Act. *Hawkesley v. Barrow*, 1 L. R., P. 147; 38 L. J., P. 67; 14 L. T. 672; 14 W. R. 822.

## VI. REVIVAL AND REPUBLICATION.

**By Codicil.]**—A codicil may, by referring in adequate terms to a revoked will, revive that will, if it is in existence, but the codicil must "shew an intention to revive the same." *Steele, In goods of*, 1 L. R., P. 575.

In order to satisfy those words the intention must appear on the face of the codicil, either by express words referring to a will as revoked and importing an intention to revive the same, or by a disposition of the testator's property inconsistent with any other intention, or by some other expression conveying to the mind of the court with reasonable certainty the existence of the intention. *Id.*

Since the passing of 7 Will. 4 & 1 Vict. c. 26, a will cannot be revived by mere implication. *Id.*

References in codicils to revoked wills by their dates are insufficient to revive them, there being no evidence on the faces of such codicils of an intention to revive the wills so referred to. *Id.*

By 7 Will. 4 & 1 Vict. c. 26, s. 22, in order that a codicil should revive a will which in any manner has been revoked, it must shew an intention to revive the same:—Held, that such intention will not be shewn by a mere reference to such will by date, but the codicil must contain express words referring to a will as revoked, and importing an intention to revive the same or a disposition of the testator's property inconsistent with any other intention, or some other expression conveying to the mind of the court with reasonable certainty the existence of the intention in question. *May, In goods of*, 37 L. J., P. 68; 19 L. T. 91; 17 W. R. 15.

A codicil referring by date only to a revoked will does not revive the will. *Ince, In goods of*, 2 P. D. 111; 46 L. J., P. 30; 36 L. T. 519; 25 W. R. 396.

A testatrix made a will on the 26th of January, 1876, and added a codicil thereto on the 21st of February following. On the 18th of January, 1877, she executed a new will, by which she revoked all previous wills, and on the same day executed also a codicil to the will. The documents were prepared in a hurry, and an erroneous reference to the will was given in the codicil, which purported to be a codicil to "her last will, dated the 26th of January, 1876." The court being satisfied that she had no intention of reviving the will of January, 1876, and that the reference to it was a mistake, decreed probate of the will and codicil of February, 1877. *Id.*

The testator made a will on the 13th of March, 1876, and a second will on the 29th of April, 1876, by which he revoked the former will, and made some changes in the disposition of his property, and a codicil, dated the 9th of June, 1880, commencing thus, "I make and publish this codicil to my will, dated 13th March, 1876. I cancel the gift of 400l., willed to my son, W. J., having paid him that amount since I made said

will:—Held, that the codicil revived the first will, and that the three documents should be admitted to probate. *Edge, In goods of*, 9 L. R., Ir. 516.

A testator executed a will in 1866, and a codicil to it in May, 1871. In November, 1871, he executed a will which revoked all previous testamentary papers. In 1872 he executed a paper which was headed, "This is a codicil to the will of R., dated May, 1866." It concluded with the appointment of the son as executor of the will and codicil, and the attestation clause commenced, "Codicil to the will of R., dated May, 1866, in presence of, &c.:"—Held, that the only intention to be gathered from the words of the codicil was that the testator intended to revive the will of 1866, but not the codicil of May, 1871. *Reynolds, In goods of*, 3 L. R., P. 35; 42 L. J., P. 20; 28 L. T. 144; 21 W. R. 512.

A testator made his will in 1871. He married in 1872, and on the day of the marriage, but after the ceremony, he executed a codicil by which he made provision for his wife and revived his will. The codicil was destroyed, but the court, being satisfied that he had no intention of thereby revoking his will, decreed probate of both papers. *James v. Shrimpton*, 1 P. D. 431; 45 L. J., P. 85; 35 L. T. 428; 24 W. R. 740.

T. made a will giving a life interest in his property to his wife, Sarah. She died, and he subsequently married B. On the day before his death he told an attendant that he wished the name of Martha (his present wife) to be substituted for it, and requested her to write a memorandum on his will to carry out his wishes. The attendant thereupon wrote a memorandum upon the will, which was duly executed. The memorandum did not, in direct terms, refer to the will:—Held, that the memorandum operated as a codicil to the will so as to revive the will. *Terrible, In goods of*, 1 S. & T. 140.

L. left two wills, each of which disposed of his whole property; he also executed a codicil, which referred to the earlier will by its date and by its contents, and confirmed it. In the instructions for the codicil he merely expressed a wish to make a certain bequest, and in no way made mention of any will. The codicil was prepared by the attorney who had drawn the first will, and who at the time was entirely ignorant that any subsequent will had been executed. The codicil was not read over to the testator before he signed it:—Held, that the codicil revived the first executed will. *Lewis, In goods of*, 7 Jur., N. S. 220.

A codicil, which refers to a will of a particular date and does not refer to a subsequent codicil, does not operate as a republication of that subsequent codicil. *Barton v. Newbery*, 1 Ch. D. 234; 45 L. J., Ch. 202; 34 L. T. 15; 24 W. R. 388.

**— When Conditional.]**—A codicil conditioned to take effect only upon an event which does not happen republishes a will, and is on that ground entitled to probate. *Da Silva, In goods of*, 2 S. & T. 315; 30 L. J., P. 171; 5 L. T. 140.

**— Intention to Revive.]**—The physical annexation (by a piece of tape) of a duly-executed codicil of later date to testamentary papers duly executed, but not revoked, is no ground for

inferring the intention to revive, required by the statute. *Marsh v. Marsh*, 1 S. & T. 528; 30 L. J., P. 77; 6 Jur., N. S. 380. See also cases ante, cols. 922, 923.

**Codicil making invalid Gift in Will valid.]—**

A testatrix gave a share of her residuary real and personal estate to B., and one of the attesting witnesses to the will was B.'s wife. By a codicil, which was attested by other witnesses, the testatrix, after a direction to her executors to allow an extended time for payment of a debt to her from one of her legatees, confirmed her will in other respects:—Held, that the duly-attested codicil had the effect of republishing and incorporating the will, so as to render the gift to B. valid, notwithstanding attestation of the will by his wife. *Anderson v. Anderson*, 13 L. R., Eq. 381; 41 L. J., Ch. 247; 20 W. R. 313.

**No Revival of Will that has Ceased to Exist.]—**

—There can be no revival of a will which has ceased to have both a physical and legal existence. *Rogers v. Goodenough*, 2 S. & T. 342; 31 L. J., P. 49; 8 Jur., N. S. 391; 5 L. T. 719.

**Subsequent Will reviving prior.]—**A testator executed a will and afterwards married. He subsequently executed a second will, and by it he revived and brought into force again the first will, in the event of there being no child of the marriage living at the time of the death of his wife. The same executors were appointed in both wills. The testator died, leaving surviving him his widow and one child. The court allowed the first will to be included in the probate of the second. *Bangham, In goods of*, 1 P. D. 429; 45 L. J., P. 80; 24 W. R. 712.

**By Destruction of Later Will.]—**A. made a will in 1826, and another in 1851, inconsistent with the former. Before his death he burned the second will *animo cancellandi*, accompanying the act with declarations which shewed that he supposed that the will of 1826 had thereby been revived:—Held, first, that the earlier will was not revived, as though made before 7 Will. 4 & 1 Vict. c. 26, it could only be revived in the way pointed out by that statute, and not by declarations of the testator. *Dickinson v. Swatman*, 30 L. J., P. 84; 6 Jur., N. S. 831.

Held, secondly, that the doctrine of dependent relative revocation did not apply to the burning of the later will, but that it was absolutely revoked. *Id.*

**By Gumming-in Signature cut out.]—**A will was found, the signature to which had been cut out, but gummed on to its former place:—Held, that the presumption was that the testator had cut out the signature *animo revocandi*, and that the gumming on the signature in its original place did not revive the will. *Bell v. Fothergill*, 2 L. R., P. 148; 23 L. T. 323; 18 W. R. 1040.

**Of Will of Married Woman.]—**The object of s. 34 of the Wills Act is to get rid of republication as a method of conferring testamentary validity even as regards a will made before the date of the act, and not to extend its operation to wills made since the act. Therefore, the will of a married woman, made in 1869, with the assent of her husband, was held not to be revived by republication after his death, and that what-

ever support, authority, or efficacy the will might have derived from the husband's concurrence was extinguished by his death. *Noble v. Willock* or *Phelps*, 2 L. R., P. 276; 40 L. J., P. 60; 25 L. T. 65; 19 W. R. 1116.

**Republication before 7 Will. 4 & 1 Vict. c. 26.]—**

—A testatrix gave an ultimate remainder in fee of all her lands to trustees, in trust for J., in fee. By a codicil, which she directed to form part of the will, she devised these lands (which were acquired subsequently to the date of the will), together with her other estates, to trustees for J. for life, and after J.'s decease for his child or children, living at the time of her decease, instead of the devise contained in the will; but did not in the codicil dispose of the ultimate remainder in fee. The trustees named in the codicil were not the same as those in the will:—Held, that the codicil operated as a republication of the will, and was not a revocation of it; that the subsequently-acquired land, therefore, passed both by the will and codicil, and the ultimate remainder in fee was in J. *Doe d. Murch v. Marchant*, 6 M. & G. 813; 7 Scott, N. R. 644; 13 L. J., C. P. 59; 8 Jur. 21.

A testator, in February, 1837, devised all his lands in B. to two trustees, to the use of Y. for life, with remainders over; he also bequeathed to the same trustees and Y. sums of money on certain trusts and appointed them executors; and he gave to the three legacies of 100*l.* each for their trouble in the execution of his will. By a codicil dated in February, 1838 (after the 7 Will. 4 & 1 Vict. c. 26, came into operation), after reciting the devises and bequests contained in his will, and that he had since determined to appoint C. an additional trustee for the purposes in his will mentioned, he gave and devised all his messuages, lands, &c., described in and devised by his will, and also the several sums of money therein mentioned, to C., his heirs, executors, &c., upon the trusts in the will mentioned, and nominated him one of his executors; and directed and declared, that it should be read and construed in the same manner, and have the same operation and effect, as if C. had been named a trustee and an executor with the other trustees, and bequeathed to him a legacy of 100*l.*; and in all other respects the testator ratified and confirmed his will:—Held, that the will was republished by the codicil, and passed real estates purchased by the testator after the date of the will and of the codicil. *Doe d. Fork v. Walker*, 12 M. & W. 591; 13 L. J., Ex. 153.

Where a testatrix devised all her estate to L. E. for life, and to his sons and daughters successively in strict tail, and L. E. and his only son died in the lifetime of the testatrix; but he left a daughter, E. E., of whose birth she knew nothing; and she thereupon made a codicil in which she recited her former will, and that L. E. had died without leaving any issue, and then devised over:—Held, that as this codicil was made in ignorance of the existence of E. E., it was only a conditional revocation. Some time after making the codicil, the testatrix was made acquainted with the existence of E. E., but made no further testamentary disposition:—Held, that this did not set up the codicil; for having been once revoked, it could only be republished according to the Statute of Frauds. *Doe d. Evans v. Evans*, 2 P. & D. 378; 10 A. & E. 228.

A testator devised lands to his wife for life, and, after certain other devises, introduced a residuary clause in favour of his wife in fee. He afterwards purchased other lands, and then made a codicil, whereby, after reciting that he had made a will disposing of all he was then possessed of, he ratified and confirmed the will; he then gave his wife a life estate in part of his newly-purchased estates, and devised the other part in a manner that could not take effect:—Held, that the effect of the codicil was to make the residuary clause in favour of the wife applicable to the after-purchased lands. *Williams v. Goodtitle*, 10 B. & C. 895.

A testator, by will executed in 1824, made a general devise of all the residue of his real estate not otherwise disposed of, whether in possession, reversion, remainder or expectancy, to T. and the heirs of his body. By a codicil, made in 1834, he revoked that devise, and devised all his real estate not otherwise disposed of by his will or codicil, to trustees for T. for life, and at T.'s decease, if he should have lawful issue, to T.'s heirs, and, in default, to the testator's own right heirs. Subsequently to the date of this codicil, and in 1835, the testator acquired by purchase other real estate. In 1836 he executed another codicil, by which he altered the devises contained in the will and codicil, but made no mention of the estate acquired in 1835. This codicil contained these passages:—"And whereas by my will or codicil, or one of them, I did give and bequeath all my real estate, not specifically otherwise disposed of, to trustees, the remainder in trust for my son T., now I revoke and annul such part of my bequest as relates to my own right heirs, and leave and bequeath the same real estate, in the event of my son's death without issue, to all the children of J. T. and of my nephew, J. H., and of my daughter H., who shall be then living, share and share alike, as tenants in common:"—Held, that the last codicil did not amount to a republication of the will and former codicil, so as to pass the real estate subsequently acquired, but was confined to the dispositions of the estate he was seized of at the date of the will, and that the testator died intestate as to the after-acquired real estate. *Hughes v. Hosking*, 11 Moore, P. C. C. 1.

## VII. PROBATE AND LETTERS OF ADMINISTRATION.

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## 1. JURISDICTION OF COURT.

**Letters of Administration—In general.**—The court has, as a general rule, no jurisdiction to grant letters of administration unless the deceased leaves personal property in this country. *Evans v. Burrell*, 28 L. J., P. 82.

**Domicil.**—The administration of the personal estate of a deceased person belongs to the court of the country where he was domiciled at his death. *Enohin v. Wylie*, 10 H. L. Cas. 1; 31 L. J., Ch. 402; 8 Jur., N. S. 897; 6 L. T. 263; 10 W. R. 467.

In the administration, in an English court, of property bequeathed by a testator domiciled in France, the interest payable on legacies given by the will is governed by the law of the country in which the estate is being administered. *Hamilton v. Dallas*, 38 L. T. 215; 26 W. R. 326.

**Jurisdiction of Judge of Domicil.**—All questions of testacy or intestacy belong to the judge of the domicil. *Enohin v. Wylie*, *supra*.

**Duty of Judge of Domicil.**—It is the right and duty of that judge to constitute the personal representative of the deceased. *Enohin v. Wylie*, *supra*.

To the court of the domicil belong the interpretation and construction of the will, and to determine who are the next of kin or heirs of the personal estate of the testator. *Id.*

**Effect of Judgment of Court of Domicil.**—The judgment of the court of the domicil of a deceased party at time of death is binding on the court of a foreign country in all questions as to the succession and title to personal property, whether under testacy or intestacy, where the same questions between the same parties are in issue in the foreign court which have been decided by the court of the domicil. *Crispin v. Dogliani*, 3 S. & T. 96; 8 L. T. 518. *Affirmed*, 1 L. R., H. L. 391; 35 L. J., P. 129; 14 L. T. 44. Sub nom. *Dogliani v. Crispin*.

**Over Will of Sovereign.]**—The Probate Court has no jurisdiction to inquire into the validity or invalidity of a will of a sovereign of the realm. *Geo. III., In goods of*, 3 S. & T. 199; 32 L. J. 1218; 8 Jur., N. S. 1134.

**Foreigner—Limited to Chattels Real.]**—A French subject domiciled and resident in France, by his will, executed as required by the 1 Vict. c. 26 (but not made and executed as required for the validity thereof by the law of France), bequeathed his personal estate in England and Ireland to trustees, whom he also named executors, and he gave and devised leaseholds for years in Cork, in Ireland, and all other his real estate and chattels real in England and Ireland to the same trustees:—Held, that the will was valid as to the chattels real, but invalid as to the personal property of the testator, other than the chattels real, and so far as it purported to appoint executors, or to revoke any prior testamentary disposition of personal property other than chattels real, and the court granted to the trustees in that character alone administration cum test. ann. limited to the chattels real in Ireland. *De Fogassieras v. Duport*, 11 L. R., Ir. 123.

**Power of Crown.]**—The right to goods belonging to persons dying intestate, without leaving husband or widow, and without kindred, as bona vacantia, has from the earliest times been vested in the king, in right of his crown. *Dyke v. Walford*, 5 Moore, P. C. C. 434; 12 Jur. 839.

**Former Power of Ordinary.]**—The church never had at any time in this country, by law, any beneficial interest in the property of intestates, but merely the right or duty of jurisdiction and administration, and the right of possession for the latter purposes. *Id.*

The ordinary, when acting officially, had no private or personal discretion respecting the granting of administration. *Canterbury (Archbishop) v. House*, Cowp. 140; Lofft, 622.

**Prerogative.]**—To an action on a deed, by an administrator under a prerogative administration from the Archbishop of Canterbury, it is no answer that the intestate died abroad, and that, at the time of the death, the deed was in Ireland, and was bonum notabile to be administered in Ireland. *Whyte v. Rose*, 2 G. & D. 312; 3 Q. B. 493—Ex. Ch.

Where a mortgage deed in the form prescribed by 3 Geo. 4, c. 126, s. 81, assigned the tolls and toll-houses of a turnpike-road to hold for the residue of the term for which the tolls were granted, unless the mortgage with interest were sooner repaid:—Held, that the mortgage was bonum notabile where the road and toll-houses were situate, and not where the deed was at the time of the death of the mortgagee. *Reg. v. Bailby Workop Turnpike Road Trustees*, 1 B. C. C. 134; 22 L. J., Q. B. 164; 17 Jur. 734.

Where there are bona notabilia in a peculiar, and also in other parts of the diocese of the archbishop, a prerogative administration is not absolutely void, and will therefore be considered valid at law, until set aside by proceedings in the Ecclesiastical Court. *Lysons v. Barrow*, 2 Bing. N. C. 486; 2 Scott, 721; 1 Hodges, 390.

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Stock and money in the funds are, for the purpose of probate and administration, within the province of Canterbury, having no defined locality. *Rea v. Copper*, 5 Price, 217.

**—Pleading.]**—To a declaration by the executor of R., covenantee of a deed, the defendant, after setting out the letters testamentary, pleaded that R. died in the parish of L., and that at the time of his death he resided there, and had the deed there; that the parish is a royal peculiar, and out of the jurisdiction of the Archbishop of Canterbury, by reason whereof the proving of the will and the granting of probate of all the goods of R., in respect of the debt, of right belonged and appertained to the Queen and not to the archbishop; that the will was never proved before, nor were the letters testamentary ever granted by the Queen; that the letters testamentary produced, and granted by the archbishop, were of no effect against the defendant in respect of the debt; and save as aforesaid, by the granting of these letters testamentary, the plaintiff never was executor of the will of R.:—Held, that the plea was in bar of the action altogether, and not in bar of the further maintenance. *Caston v. Carter*, 1 L., M. & P. 222; 5 Ex. 8; 19 L. J. Ex. 173.

**Diocesan.]**—Action on a policy of insurance under seal, whereby three of the directors of the company did order, direct, and appoint that, if the insured should die, the capital stock and funds of the company should stand charged and be liable to pay to his executors, administrators, and assigns, within three calendar months after his decease should be certified, 500*l.* The insured died in the diocese of Exeter, and the policy was in that diocese at the time of his death:—Held, that a probate from the diocesan court of Exeter was sufficient to enable the executors to recover on the policy, though the directors resided, and all the stock and funds of the company were situate, in the diocese of London. *Gurney v. Rawlins*, 2 M. & W. 87; 2 Gale, 235.

An act for making a navigable canal provided that the shares were to be deemed personal estate, and to be transferable as such; the canal passed through parishes in the diocese of Worcester, and other parishes in the diocese of Lichfield and Coventry; the transfers of shares in the canal were filed at the public office of the company, in the diocese of Lichfield and Coventry, where the dividends were also paid and books of account kept:—Held, that the right of a shareholder to a share of the profits, being personal profits, might be considered as locally situate in the diocese of Lichfield and Coventry, for the purposes of probate; and that a probate granted by the consistorial court of the bishop of that diocese was sufficient. *Horne, Ex parte*, 7 B. & C. 632.

In an action by an administrator, the court, in the absence of any allegation upon the subject, will assume that the debt for which the action is brought is bonum notabile in the place where administration is granted. *Huthwaite v. Phaire*, 1 M. & G. 159; 1 Scott, N. R. 43; 8 D. P. C. 541.

Probate granted by the court of the archdeacon of Sudbury, to whom the bishop had granted full power to prove the wills of all persons deceased within the archdeaconry, was

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good, when the testator died within the arch-deaconry; although he was possessed of a term of years in lands lying within another arch-deaconry in the same diocese. *Rex v. Yonge*, 5 M. & S. 119.

Action by an administratrix upon a promissory note given to intestate, averring that administration of all and singular the goods of the intestate was duly granted by the Bishop of C. Plea, that the plaintiff was not nor ever had been administratrix of all and singular the goods of the intestate, modo et forma. Proof of the letters of administration as described in the declaration, and that the intestate, at the time of his death, had bona notabilia in another diocese in a different province, but no evidence of the place of the defendant's residence at the time of the intestate's death was given:—Held, first, that the letters of administration were not void, but passed to the plaintiff all the goods of the intestate within the diocese; secondly, that the only issue joined was, whether administration was duly granted by the bishop, and that the question, whether the defendant at the time of the intestate's death resided within the diocese, was not parcel of that issue; and thirdly, that if the defendant relied on the fact of his residence within a different diocese, he was bound to plead it specially. *Stokes v. Bate*, 8 D. & R. 247; 5 B. & C. 491.

A person whose residence and property were in the diocese of Gloucester went on temporary business to Bristol, and on the way met with an accident, in consequence of which he was taken to the Bristol Infirmary, and died there (and within the diocese of Bristol) a few days after. Probate of his will was granted by the Bishop of Gloucester:—Held, that the probate was regular, for the testator died in itinere, and this was a case within the principle of canon 92, Jac. 1, which provided, that, when a man dies on a journey, the goods which he hath about him shall not cause his testament or administration to be liable to the prerogative court. *Doe d. Allen v. Orens*, 2 B. & Ad. 423.

A grant in a chain of executorship by a diocesan court in general terms, and not limited to property within its jurisdiction, is valid under 20 & 21 Vict. c. 77, s. 87, and entitles the personal representatives of an original testator claiming under such grant to a transfer of stock standing in the Bank of England books in the name of the original testator. *Tucker, In goods of*, 2 S. & T. 123; 3 L. T. 557; 9 W. R. 420.

**Of Court of Probate—Foundation of.]**—The foundation of the jurisdiction of the Court of Probate is, that there are assets of the deceased to be distributed within its jurisdiction. Therefore, the court refused to grant administration to an officer whose domicile was Ireland, but who died in India, and whose only assets were some property in India and a sum of money in the hands of the secretary of state for war. *Roche, In goods of, infra*, observed on. *Butson, In goods of*, 9 L. R., Ir. 21.

Letters of administration granted in the Irish Probate Registry, limited to a certain fund, were presented in the principal Probate Registry in England to be resealed. They had attached to them a certificate from the Inland Revenue Office, that the deceased had no personal estate within the jurisdiction of the English Probate Court to be affected by the administration; and

from the registrar of the Irish Probate Court, that a bond had been given sufficient in amount to cover the property to which the said administration was limited:—Held, that the requirements of the statutes, 20 & 21 Vict. c. 79, and 21 & 22 Vict. c. 95, had not been complied with, and the letters of administration could not be resealed. *Roche, In goods of*, 7 Jur., N. S. 784.

**— Validity of Execution—Questions of Construction where adjudicated upon.]**—Where a question of the valid execution of a power arises upon a will already before the Court of Probate, that question will be then determined without any inquiry before a court of construction. *Phillips v. Jenkins*, 44 L. T. 281.

**— When de facto Executor.]**—Where there is an executor de facto the court has no power to grant letters of administration with the will annexed. *Delacour, In goods of*, 9 Ir. R., Eq. 86.

**— Validity of Will as to Realty.]**—The court has no jurisdiction under 20 & 21 Vict. c. 77, s. 61, to determine the validity of a will in respect of realty, unless the same will which regulates the disposition of the personality also regulates that of the realty. *Campbell v. Lucy*, 2 L. R., P. 209; 40 L. J., P. 22; 24 L. T. 231; 19 W. R. 568.

A domiciled Scotchman, entitled to personality and also to realty in England, executed a will and two codicils affecting the realty, all valid by the law of Scotland, but the will only valid by the law of England. The executors propounded this will and codicils, and cited the coheirresses-at-law to see proceedings:—Held, that as the disposition of the realty in England was regulated by the will only, and that of the personality by the will and codicils, the court had no jurisdiction to make a decree binding on the realty in England. *Id.*

**— To inquire whether Judgment of Court of Domicil is in conformity with the Law of the Country where it was Pronounced.]**—A suit was instituted in the Court of Probate, respecting the succession to the personal estate of a person, who was domiciled abroad at the time of his death:—Held, that a judgment of the court of the domicil is binding and conclusive as to any question raised in the courts of the nationality between the same parties and in relation to the same succession. The Court of Probate has no jurisdiction to inquire whether such a judgment is in conformity with the law of the country where it was pronounced. *Doglioni v. Crispin*, 1 L. R., H. L. 391; 35 L. J., P. 129; 14 L. T. 44.

**— To Compromise.]**—In sanctioning arrangements between parties to probate causes, the court acts upon the statement of counsel that the compromise is expedient, but it does not by such sanction thereby intend to bind infants or any other persons. *Norman v. Strains*, 6 P. D. 219; 50 L. J., P. 39; 45 L. T. 191; 29 W. R. 744.

**— Effect of Judicature Acts.]**—The Judicature Acts do not alter the jurisdiction of the Court of Probate in non-contentious matters.

*Tomlinson, In goods of*, 6 P. D. 209; 50 L. J., P. 74; 30 W. R. 61.

— **Injunction to Restrain Parting or Dealing with Property.**—Proceedings had been taken in the Chancery Division to set aside a devise to the defendant on the ground that the execution of the will had been procured by his fraud, and such proceedings had ended in his favour. The plaintiff then commenced an action for revocation of probate. The property in dispute had been deposited at a bank pending the chancery action, and the bankers informed the plaintiff that they should hand it over to the defendant within a week, if not restrained by a competent authority. The plaintiff was unable to effect service of notice of application for the appointment of an administrator pendente lite. On the ex parte application of the plaintiff, the court granted an injunction restraining the bank from parting with the property pending the probate suit. *Melhuish v. Milton*, 24 W. R. 679.

The defendant, who claimed to be the lawful widow of an intestate, possessed herself of his personal estate, and was alleged to have sold a portion of the property. The plaintiff claimed the grant of administration as next of kin, and denied that the defendant was married to the deceased. On an ex parte application of the plaintiff, after issue of a writ of summons but before service, the court granted an injunction restraining the defendant from disposing of or removing any of the estate of the intestate until further order of the court. *Brand v. Mitson*, otherwise *Brand*, 45 L. J., P. 41; 34 L. T. 854; 24 W. R. 524.

The Court of Probate, as a division of the High Court of Justice, has vested in it the jurisdiction formerly exercised by the High Court of Chancery, and therefore may, under the 17 & 18 Vict. c. 104, s. 65, direct an order to issue prohibiting the dealing in any share of a ship for a time and on conditions to be named therein, and the registrar of shipping, on being served with such order, or an official copy thereof, must obey the same. *Nicholas v. Dracachis*, 1 P. D. 72; 45 L. J., P. 45; 24 W. R. 461.

— **Jurisdiction of Court to restrain Action in Foreign Court to propound later Will.**—A testatrix who was married to a foreigner, and resided abroad, left a will dated 1865, which by compromise was admitted to probate in common form in the Probate Court. Subsequently the husband took proceedings before the foreign tribunal to establish a later will, dated 1872, whereupon the executor of the prior will propounded it in solemn form, and applied to the court to restrain the husband from proceeding with the foreign suit:—Held, that the court would not grant the application. *Dawkins v. Simonetti*, 44 J. P. 816. Affirmed in C. A., 29 W. R. 228.

— **To what Property Probate extends.**—Before granting probate of the will of a married woman it is only necessary for the court to be satisfied that she had a power, or some separate estate; and it need not necessarily ascertain or determine what that separate estate is, or to what effects the probate is to extend; but as under a 24, sub-a. 7 of the Judicature Act, 1873, the court has power to determine all matters in

controversy between the parties in any cause or matter, the court should, unless it can be more conveniently determined elsewhere, decide to what effects the probate is to extend. *Tharp, In goods of, Tharp v. M'Donald*, 3 P. D. 76; 38 L. T. 867; 26 W. R. 770—C. A.

To enable the Probate Division finally to conclude the parties as to what property the probate is to be granted to, there should be a claim in the pleadings for a declaration to that effect. *Ib.*

— **To direct Set-off for Costs.**—It is a common practice of the court to award each party a portion of the costs of a cause at the final hearing; and the court has jurisdiction to direct a set-off of costs awarded by the court itself as between two parties. *Magrath v. Magrath*, 10 Ir. R., Eq. 155.

**Probate of Will Abroad—Probate of Codicil.**—If a will has been proved abroad, probate of the codicils, if any, must be granted by the court which granted probate of the will. *Miller, In goods of*, 8 P. D. 167; 52 L. J., P. 93; 31 W. R. 956.

**Erasures—Extrinsic Evidence—Restoration of Words erased.**—Where erasures in a will are found after the death of a testator, the court can hear evidence to shew under what circumstances they were made, and on proof of their having been made after the execution of the will, may order the original words to be restored. *Sturton v. Whellock*, 52 L. J., P. 29; 48 L. T. 237; 31 W. R. 382; 47 J. P. 232.

**Of Chancery.**—After probate of a will of personalty has been granted, the Chancery Division has no jurisdiction to entertain a suit to set aside testamentary dispositions on the ground of fraud in obtaining the execution of the will, the Probate Division having exclusive jurisdiction in the matter. *Melhuish v. Milton*, 3 Ch. D. 27; 45 L. J., Ch. 836; 35 L. T. 82; 24 W. R. 892—C. A.

A plaintiff claiming a share of leaseholds, partly in the occupation of the defendant, under an alleged will, which he charged was being fraudulently suppressed by him, brought an action claiming partition or sale, and to have the will established and directions given for probate. The defendant denied all knowledge of the will:—Held, first, that before the plaintiff could obtain any relief upon the will, it must first be proved, or probate must be admitted by the defendant. *Pinney v. Hunt*, 6 Ch. D. 98; 26 W. R. 69.

Held, secondly, that a judge in the Chancery Division had, under the Judicature Act, jurisdiction to grant probate, but that it would not be using a sound discretion to exercise the jurisdiction; and the action was accordingly ordered to stand over for probate proceedings to be taken in the Probate Division. *Ib.*

The Court of Chancery has no jurisdiction to determine on the validity of a will of personal estate, and in all cases in which parties apply to that court for its construction of a will, or payment of legacies under a will, the court proceeds only on the foundation of a will proved in a court of competent jurisdiction. The court, however, will interfere for the protection of pro-

perty, pendente lite for probate and letters of administration, and it exercises with great caution and sparingly jurisdiction in cases of fraud practised in obtaining probate, and in the spoliation of wills. *Ryces v. Wellington (Duke)*, 9 Beav. 579; 15 L. J., Ch. 461. See *Allen v. M'Pherson*, 1 H. L. Cas. 191.

The Prerogative Court, putting a construction on a will, made a grant of letters of administration to K. The Court of Chancery held that construction to be wrong, and that W. was entitled. K. appealed to the House of Lords. W. applied for the grant to be to him in accordance with the decree of the Court of Chancery:—Held, that the proceeding in chancery was in the nature of an appeal from the Prerogative Court, and that its decision must prevail, and the grant was decreed to W. *Warren v. Kelson*, 1 S. & T. 290; 28 L. J., P. 122; 5 Jur., N. S. 415.

**Of County Court.**—After a cause has been transferred to a county court, the Probate Court has no power to make an order as to the costs incurred before the transfer. The judge of the county court has power to make an order as to such costs. *Macleur v. Macleur*, 1 L. R., P. 604; 37 L. J., P. 68.

**Value of Estate.**—In estimating the value of the real estate to which a person was entitled at the time of his death, for the purpose of deciding whether the county court has jurisdiction, charges upon such estate cannot be taken into consideration. *Davies v. Brecknell*, 2 L. R., P. 15; 40 L. J., P. 15; 23 L. T. 669; 19 W. R. 136.

For the purpose of determining whether a case comes within the jurisdiction of the county court, the court cannot inquire into the charges on the real estate where the beneficial interest has been sworn over 200*l.* *Id.*

If the estate is of the value of 300*l.*, but the value of the deceased's interest in it is reduced by a mortgage to less than 300*l.*, the county court has no jurisdiction. *Id.*

The county court has no jurisdiction over a probate suit where the deceased died seised or beneficially entitled to real estate of the value of 300*l.*, although the persons interested in the realty have not been cited. *Thomas v. Nurse*, 39 L. J., P. 80.

**Sending to.**—When proceedings have been commenced in the Court of Probate, the court will receive evidence from both sides as to the state of the property, and the place of abode of the deceased, before it determines whether or not it will send the cause to the county court. *Slater v. Alvey*, 2 L. R., P. 154; 23 L. T. 324; 18 W. R. 1103.

## 2. TO WHOM GRANTED.

### a. Executors.

**According to Tenor of Will.**—When the whole personal property is left to a trustee on trust for a specific purpose, and no executor is named in the will, such trustee is not entitled to probate as executor according to the tenor. *Jones, In goods of*, 2 S. & T. 155; 31 L. J., P. 199; 4 L. T. 477.

A testatrix concluded her will thus: "I must

beg A. to appoint some one to see this my will executed:—"Held, that A. might appoint himself. *Ryder, In goods of*, 2 S. & T. 127; 31 L. J., P. 215; 7 Jur., N. S. 196; 3 L. T. 756.

A testator by his will said, "I appoint R. H. P. and J. E. W.," but did not state in what capacity he appointed them. He also bequeathed legacies to "each of my executors," and gave to his "said executors" the residue of his property, with certain directions as to it. The court held, upon motion, that by the words of the will R. H. P. and J. E. W. were appointed executors, and granted probate to them accordingly. *Bradley, In goods of*, 8 P. D. 215; 62 L. J., P. 101; 47 J. P. 825.

A testator bequeathed certain things to be paid by "his executors hereinafter named," but there were no executors named, except in a clause which followed his signature:—Held, that probate must go without the clause. *Dalmo, In goods of*, 1 L. R., P. 189; 35 L. J., P. 81; 12 Jur., N. S. 492; 14 L. T. 573; 14 W. R. 902.

A testatrix executed a will containing these words: "I leave the sum of one sovereign each to the executor and witness of my will for their trouble to see that everything is justly divided," but not naming any executor. Beneath the signature of the testatrix, and opposite the names of the attesting witnesses, were the words "executors and witnesses:—"Held, that there was no appointment of executors. *Woods, In goods of*, 1 L. R., P. 556; 37 L. J., P. 23; 17 L. T. 583; 16 W. R. 407.

A will contained the following clause: "I appoint E. H. my sole trustee, and he is to be paid as an attorney, the same as if he were not a trustee to this my last will and testament." There were debts to be paid, but the only duties created by the will were those which would devolve upon a trustee:—Held, that E. H. was not executor according to the tenor of the will. *Lowry, In goods of*, 3 L. R., P. 157; 43 L. J., P. 34; 30 L. T. 695; 22 W. R. 352.

A testator made a will in which were these words: "This is to cancel all former wills and to leave all in the hands of my mother and wife, jointly or separately, and they are in no way to be interfered with." No executors were named. The court granted probate to the mother and wife as executors according to the tenor. *Glasson, In goods of*, 22 W. R. 845.

A mother, by her will, appointed her daughter, who was under age, sole executor and universal intromitter with her movable means and estate, and certain persons trustees for the daughter until she was of legal age. In a subsequent part of the will she directed the trustees, in case her daughter died before coming of age, to divide the residue of her property in a particular way. The court refused to grant probate of the will to the trustees as executors according to the tenor thereof, but ordered that administration with the will annexed should issue to them under the Probate Act, s. 73, by reason that the testatrix had not appointed by her will an executor competent to take probate. *Stewart or Stuart, In goods of*, 3 L. R., P. 244; 44 L. J., P. 37; 33 L. T. 72; 23 W. R. 683.

A testatrix nominated no executor, but the will contained these words: "W., who holds the policy of my life assurance will, I am sure, act for me in this, and I beg him to pay himself, if he needs it, for his trouble:—"Held, that W.

was executor according to the tenor. *Tracy, In goods of*, 31 L. T. 801; 23 W. R. 385.

A sister executed a will, which contained a clause to the effect, "I appoint my sister S. B. my executrix, only requesting that my nephews, F. P. and J. A. B., will kindly act for and with this dear sister:"—Held, that F. P. and J. A. B. were executors according to the tenor of the will. *Brown, In goods of*, 2 P. D. 110; 46 L. J., P. 31; 36 L. T. 519; 25 W. R. 431.

A duly executed his will, and appointed B. and C. trustees, guardians and executors in as many distinct paragraphs or clauses. Subsequently, he scored out the name of B. wherever it appeared in the will, and inserted that of D; but the alterations in the guardian and executorship clauses were not attested. By the last clause in the will C. and D. were authorized to give receipts for any moneys paid or transferred to them "by virtue of this my will." The court, holding that an executor of a will is either expressly nominated or appointed according to the tenor, declined to look at the construction of the instrument with the view of determining whether D. was executor as well as trustee, and ordered probate to go with the unattested alterations. *Gausson, In goods of*, 17 L. T. 354; 16 W. R. 212.

To constitute a person "executor according to the tenor," there must be a trust to administer the estate generally by him. *Boardman v. Stanley*, 6 Ir. R., Eq. 590.

— **Instructions to Receive and Divide Estate.**—Unless the court can gather from the words of a will that a person named trustee therein is required to pay the debts of the deceased, and generally to administer his estate, it will not grant probate to him as executor according to the tenor. *Punchard, In goods of*, 2 L. R., P. 369; 41 L. J., P. 25; 26 L. T. 526; 20 W. R. 446.

A will contained this clause: "I wish P. A. C. to act as trustee to the estate." Nothing was conveyed to him as trustee, and no duty whatever was cast upon him:—Held, that he was not executor according to the tenor. *Ib.*

In order to constitute one an executor according to the tenor of a will it must appear, on a reasonable construction thereof, that the testator intended that he should collect his assets, pay his debts and funeral expenses, and discharge the legacies contained in such will. *Adamson, In goods of*, 3 L. R., P. 253.

A testator gave to W. F. B. and H. H. W. all his real and personal estate, to apply the same "after payment of debts" to the payment of legacies. The court granted probate to W. F. B. and H. H. W. as executors according to the tenor. *Bell, In goods of*, 4 P. D. 85; 40 L. T. 659.

A direction to an individual to receive the property and divide it, constitutes him an executor according to the tenor of the will. *Saunders, In goods of*, 11 Jur., N. S. 1027.

B., after a direction that his debts and funeral expenses should be paid, bequeathed to certain persons the whole of his property, in trust that they should, as soon as might be after his death, convert into money, get in, and receive the personal estate, and divide it as therein directed, except certain furniture which he bequeathed to his daughter:—Held, that the trustees were also executors according to the tenor of the will.

*Baylis, In goods of*, 1 L. R., P. 21; 35 L. J., P. 15; 11 Jur., N. S. 1028; 13 L. T. 446.

M. duly executed a testamentary paper in the form of a letter, beginning, "My dear Eliza," and containing full information as to the amount of her property, with full directions as to how she wished it to be disposed of; and concluding with these words:—"I know of nothing else, my dear Eliza, to trouble you with, and trust that this will not involve you in much." The court decreed probate of the paper writing to E., as executrix according to the tenor. *Manly, In goods of*, 3 S. & T. 56; 31 L. J., P. 198; 8 Jur., N. S. 493; 7 L. T. 200.

In a codicil, A. ordered certain personal ornaments to be transmitted "to the executor B. in England, to whom the proceeds of the sale" (of her property at Jerusalem) "are to be likewise remitted, and with the amount B. is directed to pay 50% due to C., and the residue equally between" the deceased's two unmarried sisters:—Held, that B. was executor according to the tenor of the codicil. *Cooper, In goods of*, 8 Jur., N. S. 394; 1 S. & T. 66.

A testator left his property, after payment of his debts and funeral expenses, to certain persons, and constituted and appointed A. and B. to be his trustees, with full power to dispose of all his property, and convert the same into money, to be invested in government funds for the purposes above stated:—Held, that they were executors according to the tenor of the will. *Chappell, In goods of*, 37 L. J., P. 32; 17 L. T. 618; 16 W. R. 488.

A. appointed B. and C. trustees to dispose of his effects as they thought fit, and to receive his life assurance for the benefit of his two sons:—Held, that they were executors according to the tenor. *Gale, In goods of*, 18 L. T. 696; 16 W. R. 942.

— **Out of Particular Fund.**—A direction to a person to pay debts or funeral expenses, not out of the general estate, but out of a particular fund, will not constitute him executor according to the tenor. *Toomy, In goods of*, 3 S. & T. 562; 4 L. J., P. 3; 18 W. R. 106.

H. executed a will, in which was a clause as follows: "I give and bequeath to A. B. and C. D., administrators and assigns, and to be disposed of by them as trustees, all funeral expenses and others to be paid, and afterwards the residue of my personal estate to be paid to, &c.:"—Held, that A. B. and C. D. were not executors according to the tenor of the will. *Heaton, In goods of*, 7 Jur., N. S. 832.

— **To Pay Funeral Expenses only.**—A mere direction to a legatee to pay the funeral expenses out of his legacy will not make him an executor according to the tenor of the will. *Smith, In goods of*, 34 L. J., P. 15; 10 Jur., N. S. 1084.

— **Trustees to Carry out Will.**—A testator made his will, bearing date the 3rd of January, 1878, by which he appointed W. S. and T. K. trustees to carry out his will; and he also appointed his two sons W. and G. trustees of his estate, with full power to carry out the contents of his will; and if they should not agree, the two trustees previously appointed to set them right:—Held, that W. S. and T. K. were named as

executors, and that W. and G. were executors according to the tenor, and that probate might go to the four jointly. *Spotten, In goods of*, 5 L. R., Ir. 403.

Where a testator does not appoint an executor in his will, but names two persons whom he would wish to see that the intentions of his will are carried out, as far as consistent with law and equity, the court will declare them entitled to probate as executors according to the tenor, even though they do not take any beneficial interest under the will. *Archdall, In goods of*, 5 L. R., Ir. 618.

A testator by the first clause of his will directed his debts and funeral and testamentary expenses to be paid, and then gave all his personal estate to certain persons on trust to convert into money, get in and receive it in such manner as they should deem expedient, and to divide the proceeds amongst his children, with the exception of some furniture, which he gave to one of his daughters:—Held, that the trustees were executors according to the tenor. *Baylis, In goods of*, 1 L. R., P. 21.

A testator, after giving some specific legacies, bequeathed the residue of his property to three trustees upon trust to sell, and pay the costs and expenses of the sale, his funeral expenses and debts, and some pecuniary legacies, and directed that all the residue of the money remaining in their hands should be divided between his three daughters, or the issue of any of them who should die in his lifetime:—Held, that the trustees were not executors according to the tenor. *Love, In goods of*, 7 L. R., Ir. 178.

— **Mere Execution of Power.**—A married woman who, under a deed of settlement, had a power of appointment by will over a fund, executed a will in which she directed the trustees of her marriage settlement to distribute her property in a particular way in accordance with the terms of such settlement, and gave them all the necessary powers of sale and mortgage the more effectually to carry her will into execution:—Held, that the will was the mere execution of a power for the distribution of the funds already in the hands of the trustees, who, in such distribution, would still act under the settlement, and that they were not executors according to the tenor of the will. *Fraser, In goods of*, 2 L. R., P. 183; 40 L. J., P. 9; 24 L. T. 72; 19 W. R. 333.

— **Interpretation of Words relating to Appointment.**—L., who died domiciled in Portugal, made a will, containing an appointment (substitutional) of four executors in Portugal, and another appointment (also substitutional) of four executors in England. The plaintiff, who was named as an executor in both appointments, was resident in Portugal:—The court held, that the words "in Portugal" and "in England" were equivalent to "for Portugal" and "for England." *Velho v. Leite*, 3 S. & T. 456; 33 L. J., P. 107.

A will, after a legacy to B., contained a gift of other legacies to S., with directions to the latter concerning the testatrix's funeral, and concluded with these words: "I appoint him, my brother B., executor of this my last will:—Held, that the word "with" should be understood as interposed between the words "him" and

"my;" and that as well S. as B. was entitled to probate. *Boardman v. Stanley*, 6 Ir. R., Eq. 590.

**Character of Executor.**—The court cannot pass over an executor by reason of his bad character only; he must also be resident out of the United Kingdom at the time of the death of the testator, in which case it may make a grant of administration, under 20 & 21 Vict. c. 77, s. 73, to some other person with such limitations as it may think fit. *Samson, In goods of*, 3 L. R., P. 48; 42 L. J., P. 59; 28 L. T. 478; 21 W. R. 568.

**More than one Instrument.**—A person left two wills, containing different and inconsistent dispositions of his property. The first will appointed an executor, and the second did not revoke that appointment, and appointed no fresh executor, and contained no general words of revocation. With the consent of all parties probate of both wills, as together containing the last will of the deceased, was granted to the executor named in the first will. *Griffith, In goods of*, 2 L. R., P. 457; 26 L. T. 780; 20 W. R. 425.

A testator executed a will and codicil, the latter referring to the former by its date. The name of the executor appointed by the will was written on an erasure. The court admitted the declaration of the testator as to the person he had appointed executor, made before the execution of the codicil, and granted probate of the will and codicil to such executor. *Sykes, In goods of*, 3 L. R., P. 26; 42 L. J., P. 17; 28 L. T. 142; 21 W. R. 416.

A testator, by a will fully disposing of his property, bequeathed various legacies, appointed executors, and named a residuary legatee; and afterwards made another will, beginning, "This is my last will," repeating some of the legacies in the same words, altering others, and making additional ones, but naming no executor or residuary legatee:—Held, that the two documents were to be taken together as his last will and testament. *Leslie v. Leslie*, 6 Ir. R., Eq. 332.

A testator left two testamentary papers, in the earlier of which was an appointment of executors. In the later one he disposed of his whole property in a manner at variance with the dispositions made in the earlier paper, but no executors were appointed, nor was the previous appointment revoked. The court included both papers in the probate. *Lewis, In goods of*, 25 L. T. 510; 19 W. R. 1038.

A testator executed two wills, one limited to property vested in him as trustee, the other dealing with his own real and personal estate. The court directed that both wills should be included in one probate, but that the probate should be issued in duplicate. *Claus, In goods of*, 31 W. R. 924; 47 J. P. 663.

A testator made two wills. By the first, which disposed of all his property, he appointed his wife executrix. By the second, which disposed of part of his property, and did not revoke the first, he appointed S. his executor:—Held, that the widow was entitled to probate of both instruments, leave being reserved to S. to come in and prove. *Andrew, In goods of*, 42 L. J., P. 38; 28 L. T. 238; 21 W. R. 391.

A person dying domiciled in England having made two wills in England, one relating exclu-

sively to property in Peru, and the other to property in England, and appointing executors of both wills:—Held, that the executor of the English will, who was also one of the executors of the Peru will, was entitled to probate of both instruments. *Winter, In goods of*, 4 S. & T. 204.

— **Name of Executor to Will not in Codicil.**—When some of the executors named in a will are omitted in a codicil, they should not be excluded from probate, unless either their appointment has been expressly revoked, or the terms of the appointment make it inconsistent that all should be recognized as executors. *Lloyd, In goods of*, 6 Ir. R., Eq. 348.

Therefore, where a will named A., B., C. and D. as executors, and a codicil appointed A. and B. only, proceeding to confirm the will "in all other respects, save as altered by this codicil," A., B., C. and D. were all held to be entitled to probate. *Id.*

— **Codicil Found—Supplemental Probate.**—Where, after probate granted, a codicil is found which does not affect the appointment of the executors, the proper course is to apply for a supplemental probate. *Garner, In re*, 1 Ir. L. R. 307.

**Joint Will disposing of Foreign Assets—Subsequent Will disposing of Property in Ireland.**—A. and B. made a joint will, disposing of property in the United States of America, and appointed executors. B. afterwards made a will, referring to and recognizing the joint will, and disposing of property in Ireland, and appointing other executors. The court refused to the executors of B.'s will probate of that will alone, but granted them probate of both wills, reserving the right of the executors of the joint will. *Fletcher, In goods of*, 11 L. R., Ir. 359.

**When out of Jurisdiction.**—The case of an executor's executor is within the spirit of 38 Geo. 3, c. 87, s. 1, and 21 & 22 Vict. c. 95, s. 18. *Grant, In goods of*, 1 P. D. 435; 45 L. J., P. 88; 24 W. R. 929.

The executor's executor being out of the jurisdiction, the court granted administration, with will annexed, to the nominee of parties interested, limited to a particular fund. *Id.*

The words "at the expiration of twelve months from the death of the testator," in s. 1 of 38 Geo. 3, c. 87, when compared with the words given in the form of affidavit in the second section, and of the grant of administration, must be held to mean at or after the expiration of that period. *Ruddy, In goods of*, 2 L. R., P. 330; 41 L. J., P. 63; 25 L. T. 950; 20 W. R. 319.

When the applicant is the residuary legatee, whose interest is undetermined, the grant will be made under 38 Geo. 3, c. 87, but where a particular sum is set aside for and actually payable to the applicant, the grant can be made under 21 & 22 Vict. c. 95, s. 18. *Id.*

The court will make a limited grant to the personal representative of a legatee, the executor being out of the jurisdiction, though the legatee only is mentioned in 38 Geo. 3, c. 87. *Collier, In goods of*, 2 S. & T. 444; 31 L. J., P. 63; 5 L. T. 849.

The executor being out of the jurisdiction, the court made a grant of administration with the

will annexed, to the father and guardian of infant legatees, limited to the interest of those legatees in the unadministered estate, under 38 Geo. 3, c. 87, 20 & 21 Vict. c. 77, s. 74, and 21 & 22 Vict. c. 95, s. 18. *Hampson, In goods of*, 1 L. R., P. 1; 35 L. J., P. 1; 11 Jur., N. S. 304.

Probate of the will of C. had been granted by a peculiar court to his executor, who was now abroad, and supposed to be in Australia. C., at the time of his death, had assets out of the jurisdiction of that peculiar. A motion to grant letters of administration, with the will annexed, to the residuary legatee of C. was refused. *Cooper, In goods of*, 1 S. & T. 66; 8 Jur., N. S. 394.

**Of Married Women.**—A married woman made a will, appointing executors, and died in the lifetime of her husband, who by deed confirmed the will, and consented to the same being proved. The court granted to the executors administration with the will annexed. *Pamala, In goods of*, 31 L. J., P. 158.

— **Husband's Assent to Probate of Will of Married Woman.**—A will was made by a married woman who appointed her husband one of the executors. He assented to the making of the will, and after her death expressed his intention to take probate, but died before doing so:—Held, that he had assented to the probate. *Cooper, In goods of*, 6 P. D. 34; 50 L. J., P. 41; 44 L. T. 111; 29 W. R. 444; 45 J. P. 472.

The court will not make a general grant of probate to the executors named in a will of a married woman; but where the husband, or if dead his representative, assents thereto, it will make to them a general grant of administration with the will annexed. *Reay, In goods of*, 4 S. & T. 215; 31 L. J., P. 154; 8 Jur., N. S. 596.

**Feme Covert Executrix—Husband Objecting to Probate—Grant to Attorney.**—A married woman having been appointed sole executrix of a will and universal legatee, her husband objected to her taking probate. The court, under s. 73 of 20 & 21 Vict. c. 77, made the grant to her attorney:—Quære, whether a husband has an absolute right to object to his wife's taking probate of a will of which she is executrix. *Clerke v. Clerke*, 6 P. D. 103; 50 L. J., P. 69; 78; 29 W. R. 823; 45 J. P. 588.

**Executors Surviving, or not appearing on being Cited.**—When an executor, to whom power has been reserved, survives his acting co-executor, and does not appear to a citation, the grant will go as if his name had never appeared in the will, and the executors, if any, of the acting executor will be the representative of the original testator. *Noddings, In goods of*, 3 S. & T. 15; 9 W. R. 40.

But on the death of an executor, without having either renounced or taken probate, the executor of the survivor of two acting executors becomes the personal representative of the original deceased. *Lorimer, In goods of*, 2 S. & T. 471; 31 L. J., P. 189; 6 L. T. 612; 10 W. R. 809.

B., surviving executor of A., died in Australia; his executors proved his will in that colony, in which alone he had any property:—Held, that no administration with the will annexed of the unadministered property of A. could be granted before the executors of B. had been first cited to

shew cause to the contrary. *Fleming, In goods of*, 6 Jur., N. S. 486.

In 1859 the presumption arose that A., who had not been heard of for seven years, was dead, but there were no circumstances from which the date of his death could be inferred. In 1857 his father, who would have been entitled to administration had he survived A., died intestate, and no administration was taken out to him. It being uncertain whether A. or his father survived, the court granted administration of the effects of A. to his sister without requiring administration to the father to be taken out. *Peck, In goods of*, 29 L. J., P. 95.

**Sole or Joint.**—D., on 3rd January, 1853, devised and bequeathed all his real and personal estate to P., and appointed him "sole executor of this my will." In March, 1862, by a paper purporting to be his last will, he devised and bequeathed two houses as described, and their appurtenances, to G., and made G. "sole executor of this my will."—Held, that the two executors were jointly entitled to probate of both papers. *Geaves v. Price*, 3 S. & T. 71; 32 L. J., P. 113; 8 L. T. 610; 11 W. R. 809.

A testator appointed his wife and his son "whole and sole executrix."—Held, that they were entitled jointly to probate of his will. *Court, In goods of*, 2 S. & T. 485; 31 L. J., P. 61; 8 Jur., N. S. 142; 6 L. T. 658; 10 W. R. 809.

P. appointed C. and D. "executors of my will in India," and W. "sole executrix of my will in England." On an exemplification of probate granted in Calcutta to C. being sent home, probate was granted in the principal registry to W., as one of the executors of the will, reserving power of making a similar grant to the other executors in the will. The Bank of England objected to the reservation of this power, but the court refused, on motion on behalf of W., to direct the probate to be altered. *Pulman, In goods of*, 3 S. & T. 269; 33 L. J., P. 20; 9 Jur., N. S. 1204; 9 L. T. 347; 12 W. R. 60.

**For Limited Objects.**—W. made a will in England in 1861, and appointed B. and C. executors. In May, 1862, being in India, he made a codicil, and on the 9th of June executed a paper whereby he appointed E. and F. "my executors in this country." The court held, that the context of the paper giving the testator's reasons for the appointment of E. and F. shewed that he did not mean them to have any power over his property in England, and granted probate to B. and C., without reserving power to E. and F. *Wallich, In goods of*, 3 S. & T. 423; 33 L. J., P. 87; 9 L. T. 809.

B. appointed each of his sons, when he came of age, to be an executor of his will, "so far as respects any residuary real and personal estate, and the aggregate fund forming my general estate."—Held, that the sons, on coming of age, were entitled to probate, limited, as far as possible, in the words used by the testator, due regard being had to the fact that such probate could not affect the real estate. *Barnes, In goods of*, 7 Jur., N. S. 195.

**Convicted of Felony.**—An executor who, after his testator's death, is convicted of felony is, nevertheless, entitled to probate. *Smethurst v.*

*Tomlin*, 2 S. & T. 143; 30 L. J., P. 269; 7 Jur., N. S. 763.

See also EXECUTOR AND ADMINISTRATOR.

#### b. Administrators.

**To Administrator of Executor.**—Where A. died, having appointed B. executor of his will, and he proved the will, and died leaving part of the estate unadministered, the court made a grant de bonis non (with the will annexed) to the administrator of B., the parties entitled in priority being abroad and difficult to be found; but required that security should be given to the amount of their share of the property. *Hicks, In goods of*, 39 L. J., P. 27; 22 L. T. 553; 18 W. R. 471.

**To Administrators with Will Annexed.**—An administrator with the will annexed cannot be forced to take out administration with a later will annexed, when the first administration is revoked, although he has intermeddled with the estate. *Davis, In goods of*, 4 S. & T. 213.

A mother, by her will, appointed her daughter, who was under age, sole executor and universal intromitter with her movable means and estate, and certain persons trustees for the daughter until she was of legal age. In a subsequent part of the will she directed the trustees, in case her daughter died before coming of age, to divide the residue of her property in a particular way. The court refused to grant probate of the will to the trustees as executors according to the tenor thereof, but ordered that administration with the will annexed should issue to them under the Probate Act, s. 73, by reason that the testatrix had not appointed by her will an executor competent to take probate. *Stewart or Stuart, In goods of*, 3 L. R., P. 244; 44 L. J., P. 37; 33 L. T. 72; 23 W. R. 683.

A testator, after making several specific bequests, "ordered the management of all the rest to John Smith and Judy;" there not being in the will any other words indicative of an appointment of an executor or of a bequest of residue:—Held, that John Smith and Judy had been constituted, not executors according to the tenor, but residuary legatees, and were entitled, not to probate, but to administration with the will annexed. *Smith v. Kerrane, Kerrane, In goods of*, 11 Ir. R., Eq. 447.

Where there is an executor de facto the court has no power to grant letters of administration with the will annexed. *Delacour, In goods of*, 9 Ir. R., Eq. 86.

A person died possessed of real and personal estate. By his will he gave the income derivable from his estate and effects to A. for life, and continued—"the whole after her decease goes to my legal heirs and theirs for ever."—Held, that, on the true construction of the words "my legal heirs and theirs for ever," the heir-at-law took as residuary legatee of the personality as well as realty, and was, therefore, entitled in that character to a grant of administration with the will annexed. *Dixon, In goods of, Toddhunter v. Thompson*, 4 P. D. 81; 47 L. J., P. 57; 39 L. T. 234; 26 W. R. 883.

**Bankruptcy of Administrator.**—An administrator became bankrupt, and in his capacity

as administrator proved for a debt owing by him to the intestate's estate. A dividend became payable to the estate, but in the meantime the administrator became bankrupt again, and left the country. The court refused to recall the letters of administration granted to him and to make a fresh grant to his creditor's assignee. *Hammond, In goods of*, 30 L. T. 76; 22 W. R. 353.

**Administrator pendente lite.**—A married woman, under a power given to her to that effect, duly executed a will. Her husband, by his will, made her universal legatee and sole executrix. She survived him, but did not take probate of his will or re-execute her own. Litigation having arisen on the question whether the wife's executors were entitled to a limited or a general grant of probate, the court appointed an administrator pendente lite to the estate of the husband, as well as one to her estate. *Dawes, In goods of*, 2 L. R., P. 147; 23 L. T. 397.

A party executed a will and two codicils, and by the will he appointed executors. A suit was instituted to try the validity of the second codicil only; such codicil in no way affecting the appointment of executors. The court refused to appoint an administrator pendente lite. *Mortimer v. Paul*, 2 L. R., P. 85; 39 L. J., P. 47; 22 L. T. 631; 18 W. R. 901.

Executors could not enforce in the Court of Chancery an agreement to purchase made with their testator, in consequence of an appeal to the House of Lords as to the validity of the will being still undecided, and their consequent inability to shew a sufficient title to the property. The court, on motion by the executors, and all parties consenting, rescinded the order by which it had delivered out probate to the executors, and issued to them in its place a grant of administration pendente lite. *Wright v. Rogers*, 2 L. R., P. 179; 40 L. J., P. 8; 23 L. T. 569; 19 W. R. 192.

Administration pendente lite was granted to the defendant in a suit, the plaintiff not opposing. *De Chatelain v. Pontigny*, 1 S. & T. 34; 27 L. J., P. 18.

The court will follow the practice of the Court of Chancery in appointing receivers, and will appoint an administrator pending suit, where a bona fide suit is pending, irrespectively of the property being in particular danger. *Bellew v. Bellew*, 4 S. & T. 58; 34 L. J., P. 125; 11 Jur., N. S. 588; 13 L. T. 247.

In appointing an administrator pendente lite the court cannot, except with the consent of all interested parties, give him special powers to pay an annuity, by way of maintenance, to one of the residuary legatees, who is also one of the next of kin. *Whittle v. Keats*, 35 L. J., P. 54.

Where an estate was insolvent and the subject of a suit for administration in chancery, but which was suspended by the death of the administratrix, and could not be proceeded with without the appointment of an administrator, and the children of the deceased were all minors except one, and he was in New Zealand, and the solicitors for the family intimated that none of the children, or any one on their behalf, would take out administration, the court, on an application to grant administration to a creditor who had proved his debt in the administration suit,

declined to grant administration until the children should be cited, and the particulars of the debt, as well as of the estate of the deceased, brought before the court by affidavit. *Bradley, In goods of*, 14 W. R. 409.

Where the estate of a deceased consists of his share of a business which he was carrying on in partnership at the time of his death, and which is continued to be carried on by the surviving partner, the court will not appoint an administrator pendente lite against the wish of the surviving partner, unless a strong case is made that he is dealing improperly with the business. *Morrell v. Witts*, 1 L. R., P. 103; 35 L. J., P. 55; 12 Jur., N. S. 673; 14 L. T. 137; 14 W. R. 515.

The court ordered, in granting administration pendente lite, that the administrator should not remove certain diamonds which were deposited in the Bank of England by the executors after the death of the testatrix. *Smith v. Tebbitt*, 16 L. T. 96.

Concurrent suits were pending between the same parties in the Court of Chancery and Court of Probate, and the former had appointed a receiver of the personal estate of the deceased. The court at first refused to appoint an administrator pendente lite, but afterwards, being satisfied that no conflict of jurisdictions would arise, and that the justice of the case required the order, appointed the receiver of the Court of Chancery also administrator pendente lite at the instance of the creditors of the deceased, with the view of enabling them to obtain speedy payment of their debts. *Tichborne v. Tichborne*, and *Tichborne, In goods of*, 1 L. R., P. 730; 38 L. J., P. 35, 70; 20 L. T. 820, 1015; 17 W. R. 832.

Under s. 70 the court has power to appoint an administrator even though the application is made by a third person not party to the suit. *Id.* See also cases post, col. 988.

**On giving Security.**—An administrator pendente lite was appointed on his giving security, to the amount of one year's income of the property, his administration to be under the direction of the court. The court directed that he should not discharge claims on the estate until they had passed before the registrar. *Charlton v. Hindmarsh*, 1 S. & T. 519; 8 W. R. 259.

**On Administrator's Affidavit that it was for the Good of the Estate.**—In an interest suit between the Queen's proctor and a person asserting himself to be lawful nephew of a deceased intestate, the court appointed the person, who had been made receiver in respect of the same estates in proceedings in chancery, to be administrator pendente lite, on his affidavit that the estates in certain particulars would be benefited by being dealt with by a person clothed with such authority, and on consent of the parties to the suit. *Her Majesty's Procurator-General v. Williams*, 2 S. & T. 353; 5 L. T. 765.

**Representative of Deceased Next of Kin.**—W. died intestate, leaving a sister and several nephews and nieces, children of a deceased brother and sisters, his next of kin. The surviving sister died, and her administrator applied

for a grant of administration of the goods of W.:—Held, that he was not entitled to administration without citing the nephews and nieces. *Walker, In goods of*, 11 L. R., Ir. 360.

**Receivers of Real Estate.**—Before a receiver of real estate will be appointed by the court, it is necessary that it should appear, on affidavit, that the heir-at-law or the devisee, or other person having or pretending interest in the real estate, has been cited. *Purday v. Field*, 3 S. & T. 576.

The court has no power to appoint a receiver unless the validity of the will by which real estate is affected is in dispute. It therefore refused to appoint a receiver when the only question was as to the person who was appointed executor in the will. *Grant v. Grant*, 1 L. R., P. 654; 38 L. J., P. 55; 20 L. T. 684.

**Limited Grant.**—Administration of the estate of B. had been granted to two of his sons in 1818, one of whom had since died, and the other had for many years resided in the West Indies. A sum of money being divisible, in which the surviving administrator had no interest, an administration was granted to a third son, limited to the particular sum to be divided and to continue so long only as the former surviving administrator remained out of the jurisdiction of the court. *Baynes, In goods of*, 7 Jur., N. S. 832.

**To an Administrator in a Chancery Suit.**—On an application in the Probate Division by a defendant in a chancery suit for a grant of letters of administration to the estate of the plaintiff in that suit with a view to wind up the chancery suit:—Held, that an affidavit by the parties interested in the estate and assenting to such a course is necessary. *Richardson, In goods of*, 35 L. T. 767.

Held, also, that even with an affidavit before the court no order can be made without first a certificate under the hand of the judge in the Chancery Division before whom the suit is pending, which shall state that the course proposed is a proper one under the circumstances. *Id.*

**Sale ordered in Chancery after Appointment.**—An administrator pendente lite having been appointed by the Court of Probate, a suit was instituted in the Court of Chancery to administer the estate of the deceased, and an order was made in such suit upon the administrator to sell certain property for the purpose of raising a fund to pay the debts due from the deceased's estate. The Court of Probate refused to interfere and stop the sale so ordered by the Court of Chancery. *Tichborne v. Tichborne*, 2 L. R., P. 41; 39 L. J., P. 23; 22 L. T. 42.

**During Insanity.**—Where an administratrix who was herself beneficially entitled to the unadministered residue of the personal estate of the deceased became of unsound mind, but had not been so found by inquisition, the court granted letters of administration de bonis non to her next of kin for her use and benefit pending her unsoundness of mind: the letters of administration already granted being impounded in the meanwhile. *Espinasse, In goods of*, 3 Ir. L. R. 185.

Where one executor was insane, and the other was a seafaring man engaged on a voyage to the East Indies, the court passed them both over and made a grant of administration with the will annexed to a third person. *Lewis, In goods of*, 25 L. T. 510; 19 W. R. 1038.

**When Unnecessary—Estates Abroad.**—An administrator of C. in India, recovered judgment against M. in an action in Calcutta. M. died, and his estate was being administered in England:—Held, that it was not necessary for the administrator to take out administration in England to C.'s estate. *Macnicol, In re, Macnicol v. Macnicol*, 19 L. R., Eq. 81; 31 L. T. 566; 23 W. R. 67.

When a creditor of an English company which is being wound up by the court dies domiciled abroad, the official liquidator cannot send a dividend abroad to be paid to the foreign executors, but the dividend can only be paid on production of an English stamped probate. *Commercial Bank Corporation, In re; Commissioners of Inland Revenue, Ex parte*, 5 L. R., Ch. 314; 39 L. J., Ch. 497; 22 L. T. 219; 18 W. R. 411.

See also EXECUTOR AND ADMINISTRATOR.

#### c. In Cases of Husbands and Wives.

**To Widow or Next of Kin of Deceased Husband.**—The next of kin and heir to the real estate of the intestate contested the right to administration with the widow, on the ground of her want of interest through the insolvency of the personal estate. There was no distinct denial of the insolvency by the widow, but the evidence to prove it was not very conclusive. The court refused to depart from the practice of preferring the widow, and made the grant accordingly. *Peat v. Peat*, 25 L. T. 108; 19 W. R. 856.

A person died intestate, leaving a widow and several minor children by a former wife. During his lifetime he had been assisted in his business by his brother. On the other hand, his widow, to whom he had been married but a short time, was entirely unacquainted with its management. These circumstances were held not to be sufficient to authorize the court to grant a joint administration to the widow, and to the brother as guardian of the minor children. *Richards, In goods of*, 2 L. R., P. 216; 40 L. J., P. 29; 24 L. T. 142; 19 W. R. 443.

A testator appointed an executor, and bequeathed the residue of his personal estate to A. The testator and A. were lost in the same ship, and there was nothing to shew who was the survivor. The executor renounced:—Held, that as the bequest to A. did not take effect, and therefore was not transmissible to his personal representative, the widow of the testator was entitled to administration with the will annexed. *Chrmichael, In goods of*, 32 L. J., P. 70; 11 W. R. 462.

A testator, having in one clause of his will left all his personal property to his wife absolutely, by a subsequent clause gave her only a life interest therein. Under these circumstances a special grant was ordered to issue, which, after reciting the two clauses, should authorize the widow to take administration as the party named in them. *Westropp, In goods of*, 5 Jur., N. S. 1318.

A soldier, whilst stationed at the Cape of Good Hope, was married to A., and he being still resident in that colony, such marriage was dissolved by a properly-constituted court there, by reason of A.'s adultery. This decree was made before the Divorce Act (20 & 21 Vict. c. 85). He subsequently, still serving with his regiment in the same colony, was married to B., and this last marriage, by the law of the Cape of Good Hope, was a valid marriage:—Held, that B. was entitled to administration of his goods upon his death as his lawful widow and relict. *Argent v. Argent*, 4 S. & T. 52; 34 L. J., P. 133; 11 Jur., N. S. 864; 12 L. T. 768.

**When Widow passed over.**—The court will not, at any rate without notice, pass over the widow, who has been legally separated from her husband by reason of her cruelty, in granting administration to his estate. *Ihler, In goods of*, 3 L. R., P. 50; 42 L. J., P. 18; 28 L. T. 479; 21 W. R. 550.

The court is precluded by 21 Hen. 8, c. 5, s. 3, from making a joint grant of administration to a widow and one of the persons entitled in distribution, even with the consent of the next of kin, and of all the other persons entitled in distribution, and 20 & 21 Vict. c. 77, s. 73, does not enlarge the power of the court in such a case. *Browning, In goods of*, 2 S. & T. 634; 31 L. J., P. 161; 7 L. T. 217; 10 W. R. 96.

An intestate left a widow and two children surviving. He had been separated for some time before his death from the widow, and she had been convicted of felony, and was leading a life of prostitution. The court passed her over, and made a grant to the son. *Boddan, In goods of*, 28 L. T. 368.

For sufficient cause, e.g., the misconduct of a widow, in having eloped from her husband and lived in adultery, the court will grant administration to the next of kin in preference to the widow. *Anderson, In goods of*, 3 S. & T. 489; 33 L. J., P. 149; 11 L. T. 21.

The testator died, leaving a widow but no issue. He bequeathed a policy of insurance for 100l. to his sister for her separate use, but appointed no executor. Such policy of insurance comprised almost the whole of the personal estate of the testator, and there were charges of adultery against the widow. The court, in the exercise of its discretion, without going into the allegations against the widow, made a grant of letters of administration with the will annexed to the sister of the deceased, as the person having the larger interest, but ordered that the widow should have her costs out of the estate. *Homan, In goods of*, 52 L. J., P. 94; 31 W. R. 955.

An intestate was a clerk in the treasurer's office of a corporation. The borough treasurer had admitted that he had been guilty of embezzling a large sum of money belonging to the corporation, and it was also suggested that money was due from the deceased to the corporation:—Held, that there were no special circumstances within 20 & 21 Vict. c. 77, s. 73, to justify the court in passing over the widow and granting administration of the estate to a third person. *Wells v. Brook*, 25 W. R. 463.

J. B. died, leaving her husband G. B. and several children her surviving. G. B. remarried, and died without administering the effects of his first wife. Letters of administration of the effects of G. B. were granted to a creditor, who

renounced all right to administer the effects of J. B.:—Held, that the children of J. B. were, and not the widow of G. B. was, entitled to the grant of administration of the effects of J. B. *Bell, In goods of*, 1 S. & T. 288; 29 L. J., P. 162; 5 Jur., N. S. 473; 7 W. R. 349.

Where a testator assigned his property on trust, to take effect on his death, for his widow and children, the court, in favour of the intention, granted administration, passing over the widow, who was first entitled to the trustee. *Cosnahan, In goods of*, 1 L. R., P. 183; 35 L. J., P. 76; 14 L. T. 337; 14 W. R. 969.

**Husband.**—A husband is entitled to take out administration, in right of the wife, to her next of kin, deceased intestate, and her renunciation in favour of a third person, e.g., a creditor of the deceased, will not deprive the husband of his right. *Haynes v. Matthews*, 1 S. & T. 460.

Quære, whether a husband who, by a deed of separation, has resigned all claim to the property of his wife, is thereby excluded upon her death, in his lifetime, from taking any interest as her representative. In such a case the court will not grant administration to the next of kin of the wife unless the husband is cited. *Oranmore (Lord), In goods of*, 30 L. J., P. 183.

The next of kin of a married woman are not at liberty to question her husband's right to administer to her estate on the ground of the nullity of the marriage by reason of the impotence of the husband. *A. v. B.*, 1 L. R., P. 559.

A married woman was the only legatee of a will which contained no appointment of an executor. Her husband refused to consent to her taking the grant of administration with the will annexed, or to join the bond. The property being left to her separate use, the court made the grant to her attorney without the husband's consent. *Warren, In goods of*, 1 L. R., P. 538; 37 L. J., P. 12.

Rule 50, 1862, which directs that no person who renounces probate or administration in one character shall be permitted to take representation to the deceased in another, does not apply to the husband of a residuary legatee who signs a renunciation, executed by his wife, merely to signify his assent to her act. As a creditor he may take administration notwithstanding his signature to such a document. *Biggs, In goods of*, 1 L. R., P. 595; 37 L. J., P. 79.

A married woman, with her husband's assent, made a will. After her death, her husband took the property bequeathed to him by the will, and at his death the will was found amongst his papers. The court granted probate of the will to the executors upon the ground that the husband after his wife's death had continued his consent. *Child, In goods of*, 16 W. R. 407.

A. died, leaving all the property over which she had power of appointment to B., who was married and resident in America. B.'s husband came to England and applied for a grant of administration with the will annexed. The court, before making the grant, required that B.'s consent should first be obtained. *Williams, In goods of*, 17 L. T. 518.

**Of Administratrix.**—A creditor's administration of the personal estate and effects of B. was granted to C., a feme sole. C. subsequently

intermarried with D., and died six weeks afterwards, leaving part of the estate of B. unadministered, and the debt in respect of which she had obtained the grant still owing. The court held that D. had not reduced his wife's chose in action in the debt into possession by merely taking possession of that part of B.'s estate which he found in her hands, and refused to make to him a grant *de bonis non* of the goods of B. until he had first taken out administration to his wife. *Ridson, In goods of*, 1 L. R., P. 637; 38 L. J., P. 40; 20 L. T. 330.

**To Representatives of Husband and Wife—Death of Wife.**—A wife whose personal estate consisted of a legacy which became payable in 1864, died in 1866 intestate. In 1845 her husband went abroad, and was last heard of in 1853:—Held, that as there was no evidence that she died a widow, her next of kin was not entitled to administer without citing the representatives of her husband. *Nichols or Nicholls, In goods of*, 2 L. R., P. 461; 41 L. J., P. 88; 27 L. T. 323; 21 W. R. 161.

The rule that when husband and wife perish together, and there is no evidence that the one survived the other, administration of their personal estate will be granted to their respective next of kin, is not applicable to such a case. *Id.*

Where a married woman makes a will and appoints no executor, the persons interested under the will are entitled to the grant in priority to the husband, who can only obtain the grant on their renunciations being filed in the registry. *Bailey, In goods of*, 2 S. & T. 135; 30 L. J., P. 190; 4 L. T. 890; 9 W. R. 540.

A woman, being entitled to a legacy on the death of another person, married and died in the lifetime of her husband, who also died before the legacy had become payable and without having taken out administration to his wife:—Held, that the legacy formed part of the estate of the husband, and that administration to the wife in respect of such legacy could only be granted to the representative of the husband. *Harding, In goods of*, 2 L. R., P. 394; 26 L. T. 668; 20 W. R. 615.

In the absence of express words in the grant, the administrator with the will annexed of a married woman, who was an executrix, takes only as administrator of an executrix, and has no relation with the original testator. *Briggs, In goods of*, 26 W. R. 535.

A husband appointed his wife and two other persons as executrix and executors. The wife re-married and died, having, during her second coverture, made a will in accordance with her power of appointment, and she appointed her husband her sole executor. The husband took out letters of administration with the will annexed. Part of the estate of the original testator remained unadministered, the two other executors having predeceased the wife. The court held that the grant of letters of administration to the second husband, with the will of his wife annexed, did not continue the chain of representation to the original testator, and, with the consent of the second husband, granted administration of the unadministered effects of the testator to his daughter as one of the residuary legatees. *Id.*

Where a husband survives the wife, and dies intestate, without administering to her estate,

his next of kin must constitute themselves his legal representatives before they have any claim to administer to the wife's estate. *Crauc, In goods of*, 1 S. & T. 146.

A limited probate taken out of the will of a feme covert will not continue the chain of representation under the general probate of the will of the original testator; but the court will make a supplemental grant, limited to the property which the feme covert had as executrix. *Bayne, In goods of*, 1 S. & T. 132.

A. died in Ireland. B., his executor, proved his will there. B. died, and C., his executor, proved his will in Ireland and had the Irish grant re-sealed in the principal registry of the Court of Probate in England:—Held, that the chain of representation was not continued, and that C. was not entitled to a grant of administration of the personal estate and effects in England of A.'s wife, who predeceased her husband. *Gaynor, In goods of*, 1 L. R., P. 723; 38 L. J., P. 79.

When a married woman, with her husband's consent, had made investments in her own name, and had made a will in his life disposing of property over which she had a power of appointment, and of all her other property, and her husband had, in writing, consented to and approved of the will, and the wife died in the husband's lifetime, the court revoked a limited grant made to her executors, and decreed a general grant of administration with the will annexed to them, upon the consent of the personal representative of the husband to such grant being filed. *Reay, In goods of*, 4 S. & T. 215; 31 L. J., P. 154; 8 Jur., N. S. 596.

A wife separated in 1836 from her husband, on account of his intemperate habits, and afterwards maintained herself. In 1873 she disposed by will of personal property which she had earned after the separation. The court made a grant of probate to the executors limited to the property of which she had disposed, and over which she had power of disposition. *Andrews, In goods of*, 28 L. T. 479; 21 W. R. 576.

A wife was deserted by her husband, and died possessed of property which was invested in 1871. It did not appear at what time she became possessed of the property, but it was after the desertion. The court granted probate only of the property to which the testatrix had become entitled since the passing of the Married Women's Property Act, 1870. *Pepper, In goods of*, 31 L. T. 274; 22 W. R. 832.

A couple married in 1811; in 1817 they verbally agreed to separate, and not to interfere with each other, and divided then their furniture and effects. They never again cohabited, and the wife supported herself by her own industry, and acquired property, which she disposed of by will in 1866. Probate of this will was opposed by the husband, who asserted his marital right to his wife's property:—Held, that the property had been acquired to the wife's sole use, and the *jus disponendi* would therefore attach to such property. *Haddon v. Fladgate*, 1 S. & T. 48; 27 L. J., P. 21. See also cases post, col. 982.

**—Death of Husband.**—A husband was lost at sea in or about 1846, having made a will by which he left all his property to his wife, who died in 1874 without having taken any steps to prove his will. The widow for several years drew the dividends from money in the funds

which had belonged to her husband, but the Bank of England had refused to transfer the stock, or pay the arrears of dividend, to her administrator, until administration to the husband's estate had been taken out. There was no evidence of the name or names in which the stock stood. The court, in the absence of evidence that the husband died possessed of property within the jurisdiction, refused to grant administration with the will annexed of his effects to the widow's administrator. *Lock, In goods of*, 24 W. R. 281.

The court will not, for the protection or convenience of the Bank of England, depart from the principles on which it is accustomed to act. *Id.*

A wife and her husband made an agreement that an annuity to which the former was entitled, and which was in the hands of a trustee, should be equally divided between them. The husband afterwards, viz., in 1841, disappeared, and no payment of his share of the annuity was ever made to him. The wife died in 1856. The wife's executor now applied for a grant of administration de bonis non to the estate of the trustee, limited to a sum of money which was identified as the accumulation of the husband's unpaid share of the annuity, and which was part of certain unadministered estate of the trustee. The court having presumed the husband to have died before the wife, made the grant. *Serjeant, In goods of*, 26 L. T. 669; 20 W. R. 872.

A husband from time to time gave his wife sums of money, part of which accumulated as stock in his name; he received the dividends, and paid them to her, and in every way treated the stock as her separate property. The wife during coverture, with the husband's consent, made a will, whereof she appointed an executrix, survived him a few hours, and died without republishing the will:—Held, that the testatrix had acquired a separate estate, of which the husband had considered himself trustee for her, and to which the *jus disponendi* attached, and that her executrix was entitled to a limited probate. *Smith, In goods of*, 1 S. & T. 125; 27 L. J., P. 39; 4 Jur., N. S. 1193.

A husband left a will, in which he made his wife executrix, and gave her a life interest in the whole of his property; on her death he directed it should be sold, and the proceeds divided amongst his children; and he appointed his eldest son and another person trustees to carry such division into effect. The widow took probate of the will, and subsequently sold the property of her husband for 600*l.*; and with that sum, and 130*l.* of her own moneys, purchased two leasehold houses. On her death, the court granted administration of her effects to the eldest son, the trustee named in their father's will, in preference to the nominee of the other next of kin, five in number. *Stainton, In goods of*, 2 L. R., P. 212; 40 L. J., P. 25; 24 L. T. 320; 19 W. R. 567.

—**Grant of Letters of Administration to Wife's Father.**—A husband agreed by deed of separation that if his wife died intestate her next of kin should be entitled to her property. She died intestate, leaving separate property of which she had become possessed by virtue of the deed, and the court, notwithstanding that the husband objected, granted letters of administration to her father, limited to that property. *Allen v. Hum-*

*phrys, or Humphreys v. Allen, or Humphreys, In re*, 8 P. D. 16; 52 L. J., P. 24; 48 L. T. 125; 31 W. R. 292; 47 J. P. 24.

#### Administration Bond—Consent of Husband.]

—Since the Married Women's Property Act, 1882, when a married woman is administratrix, it is not necessary that her husband should join in the administration bond. *Ayres, In goods of*, 8 P. D. 168; 52 L. J., P. 98; 31 W. R. 660; 47 J. P. 440.

When a wife is entitled to administration, and the husband refuses to join in the administration bond, or to assist her in obtaining the administration, the court will grant the administration to her, allowing a third person to execute the bond for her. *Sutherland, In goods of*, 4 S. & T. 189.

When the universal trustee in a will was a married woman, the property being given to her for her sole and separate use, and the husband refused to execute the bond unless she undertook to share the property with him, the court granted administration with the will annexed to the attorney of the wife. *Warner, In goods of*, 17 L. T. 221.

**Husband and Wife Dying together.**—*See post*, col. 957.

#### d. On Presumption of Death.

**Probable Death at Sea.**—A settler in New Zealand embarked 1st July, 1856, in a vessel bound for Sydney on his way to England. The vessel never reached Sydney, and no intelligence, after inquiries had been instituted, having been obtained, as to the vessel, or any of those on board, she was supposed to have foundered at sea, in some heavy gale, which occurred at the time she was making the voyage in question:—Held, that his death was to be presumed, and that advertisements in newspapers for persons supposed to be dead might be dispensed with, when their history is known and traced within a short period of their being last heard of. *Norris, In goods of*, 1 S. & T. 6; 27 L. J., P. 4.

M. sailed from Liverpool in the *Brevet*, the 27th January, 1857, for Valparaiso. The voyage should have been made in ten weeks. Nothing had been heard of either the *Brevet* or crew since she left Liverpool. The ship was insured, and the underwriters had paid policy thereon, as upon a total loss:—Held, that his death was to be presumed; the payment of policy by underwriters was strong evidence in favour of such presumption. *Main, In goods of*, 1 S. & T. 11; 27 L. J., P. 5.

On the 15th November, 1857, S. sailed from Barcelona to Constantinople, the average duration of the voyage being thirty days. The vessel had never arrived at her destination, nor had anything been heard of her or the crew, and the insurers of the ship had paid as upon a total loss. The court refused to grant administration to his effects, as it did not appear that any inquiries had been made for the crew at Barcelona, but allowed administration to pass conditionally, on an affidavit of such inquiries having been made without the result being filed in the registry. *Smyth, In goods of*, 28 L. J., P. 1.

A master of a ship sailed in her from Deme-

rara, on the 23rd of October, 1858, bound for London, the ordinary duration of the voyage being five or six weeks. A few days after sailing, a hurricane passed over the West Indian Islands, in which it was supposed that the ship and all hands had been lost, neither the vessel nor any of the crew having been heard of since the vessel sailed. The underwriters on the vessel had arranged to pay the amount insured as upon a total loss. On these facts, a motion made on the 30th of March, 1859, for a grant of administration of the effects of A., was rejected, the court holding that the application was premature, since, though the vessel might be lost, the crew might have been picked up by a vessel bound on so long a voyage, that tidings of them could not have been received in the period that had elapsed since the vessel was last heard of; and that inquiries should have been made at Demerara for the crew; but on the 22nd of June, 1859, the underwriters having paid the amount insured on the vessel, and nothing having been heard of either her or any of the crew, administration was granted. *Bishop, In goods of*, 1 S. & T. 303; 28 L. J., P. 93; 7 W. R. 375.

— **Advertisement.**—The court refused to dispense with the usual advertisement in newspapers before presuming the death of a sailor who had been last heard of in 1859, as then about to sail from New Zealand to China in a barque now believed to have been lost. *Atkinson, In goods of*, 7 Ir. R., Eq. 219.

**Not Heard of for Seven Years.**—The husband of A. had, seven years before her death, left this country for America, and had not been heard of since three days after his arrival there, although he had been advertised for in that country:—Held, that he must be presumed to be dead, and probate was granted of her will as if she had died a widow. *Hew, In goods of*, 1 S. & T. 53; 27 L. J., P. 37; 4 Jur., N. S. 366.

T. was not heard of from December, 1846. More than seven years afterwards, namely, in September, 1854, he would, if alive, have become entitled, by the death of a relative, to a share in her residuary personal estate. This share had, in his absence, been paid into the account of the accountant-general of the Court of Chancery, who, it was stated, was prepared to pay it to T.'s administrator. He had no other property in this country. The court declined to make a general grant of administration to his brother, on the ground that he must be presumed to have died before the death of his relative, but made a grant limited to substantiate proceedings in the Court of Chancery. *Turner, In goods of*, 3 S. & T. 476. See also *Peck, In goods of*, post, col. 958.

**Affidavit supporting Application for Administration.**—It is not necessary, in a case of administration on presumption of death, in an affidavit for administration, to negative the existence of the persons who would, if alive, have prior interests to the applicant at the time of the death of the deceased, if the applicant is unable to do so. It is enough to negative their existence at the time of swearing. *Sloane, In goods of*, 11 L. T. 149.

#### e. Next of Kin.

**Generally.**—The consent of the next of kin,

who are minors, and some of them of tender years, is not sufficient to justify the court in making a joint grant of administration to the widow and one of the other next of kin, unless there are special circumstances for departing from the general practice of the court. *Newbold, In goods of*, 1 L. R., P. 285; 15 W. R. 262.

On sufficient grounds shewn, the court will depart from the general practice of the registry by which a party originally entitled in distribution is preferred in making a grant de bonis non to a party having a derivative interest, e. g. the personal representative of the next of kin, and will make the grant to the latter. *Carr, In goods of*, 1 L. R., P. 291; 16 L. T. 181; 15 W. R. 718.

The next of kin of an intestate has by law the same title to administration as has the widow, though, under ordinary circumstances, the practice is to make the grant to the widow. *Corser, In goods of*, 31 L. J., P. 170.

A person who is entitled to administration as next of kin cannot take the grant as a creditor. *Id.*

The next of kin is entitled to administration of the personal estate on the oath that the deceased died intestate, except as to real estate. *Parkins, In goods of*, 1 S. & T. 465; 29 L. J., P. 47; 5 Jur., N. S. 1270.

**To Father with Will Annexed where no clear Disposition of Residue.**—The testator bequeathed to his father "a life interest, or until he shall marry again, of one-third of such money, stocks, funds or other securities, not hereinafter specially devised, as I may die possessed of;" and he gave the other two-thirds of his capital among such of his brothers and sisters as should attain the age of twenty-one. He also directed that, on the death or second marriage of his father, the one-third part, and the share of his mother's estate which would then belong to him, should be divided among his brothers and sisters. There was no specific gift of the residue; both the executors named in the will renounced probate. The court made a grant to the father of the deceased, as next of kin, of letters of administration with the will annexed, with a memorandum to the effect that the will contained no clear disposition of the residue. *Aston, In goods of*, 6 P. D. 203; 50 L. J., P. 77; 30 W. R. 92; 45 J. P. 816; 46 J. P. 104.

**To Children.**—The court granted administration to the natural and lawful child of the deceased, she having been born six months after the marriage of her parents. *Turnock v. Turnock*, 36 L. J., P. 85; 16 L. T. 611.

P. bequeathed the residue of his personal estate to be equally disposed of between five of his children, whom he named. One of those children died in his lifetime:—Held, that the five children took as tenants in common, and the share of the deceased child therefore lapsed to the undisposed residue, and the court granted administration with the will and codicil annexed to B., son of the deceased, not as legatee, but as entitled as one of his next of kin to part of the undisposed residue. *Pile, In goods of*, 2 S. & T. 628; 31 L. J., P. 40; 7 L. T. 194.

— **Where Widow Abroad in Lunatic Asylum.**—The widow of a deceased intestate being

absent in the colonies, and confined in a lunatic asylum, the court allowed the grant of administration to go to one of the children without citing her, *Jamson, In goods of*, 46 J. P. 40.

**Children of First Wife Preferred to Second Wife.**—A. died intestate, leaving her husband and children by him surviving. Her husband afterwards married B., and upon his dying intestate, leaving B. and children by both wives him surviving, administration of his effects was granted to a creditor, the widow and children having been duly cited, but not appearing. Afterwards a sum of money, to which A., at the time of her death, was entitled in reversion, became payable to her estate, and the creditor renouncing his right to administration of A.'s estate, B. applied that it might be granted to her:—Held, that B. had no right to the grant, as she was the representative neither of her husband nor of A., but that on the renunciation of the creditor, the representative of B.'s husband, the children of A. were entitled to the grant. *Bell, In goods of*, 1 S. & T. 288; 29 L. J., P. 162; 5 Jur., N. S. 473; 7 W. R. 349.

**When Testator of Unsound Mind.**—A person made a will, whilst of unsound mind, in favour of a charitable institution. The only party interested to support it being cited to propound it, or shew cause why it should not be treated as void, did not appear. On an affidavit of the medical attendant of the deceased, as to his testamentary incapacity, administration was granted to one of his next of kin, as in an intestacy. *Perry v. Dyke*, 1 S. & T. 12; 27 L. J., P. 7.

**Death of Husband and Wife—No Evidence as to which Died first.**—W. perished with his wife and only child, an infant, in the Cawnpore massacre, leaving no will. There being no evidence as to survivorship, the court granted administration of his personal estate, as having died a widower, to his mother, as his next of kin. The administrator's oath, instead of being in the usual form, may state that there is no reason to believe that the wife survived the husband. *Wainwright, In goods of*, 1 S. & T. 257; 27 L. J., P. 2.

G., with his wife and three children, perished in a shipwreck. There being no evidence as to survivorship, and no will, the court granted administration of his estate as having died a widower, to the maternal grandfather of the surviving children, and directed that the administrator's oath, instead of being in the usual form, should state that there was no reason for believing that the wife had survived her husband. *Grinstead, In goods of*, 21 L. T. 731.

When husband and wife die by the same calamity, and there is no evidence that the one survived the other, administration of their personal estate will be granted to their respective next of kin. *Wheeler, In goods of*, 31 L. J., P. 40.

When a testator made a will appointing a sole executrix and residuary legatee, and next day killed his wife and committed suicide when (as found by a coroner's jury) in a state of insanity, and the residuary legatee had been cited and had not appeared, the court refused to grant letters of administration with an earlier will annexed until the next of kin of the residuary legatee had been cited. *Thomas v. Payne*, 23 W. R. 71,

**No Evidence as to whether Son or Father Died first.**—Where the presumption of A.'s death arose from the fact that he had not been heard of for seven years, and there was no evidence that he was ever married or had left a will, and his father died before the expiration of the seven years, the court, on account of the impossibility of ascertaining whether or not A. had survived his father, under 20 & 21 Vict. c. 77, s. 73, granted administration to the next of kin of A., without requiring administration to be taken out to his father. *Astell, In goods of*, 31 L. J., P. 38.

A bachelor, who had gone to Australia, had not been heard of for seven years. His father died intestate about two years and five months before the expiration of the seven years. No personal representation had been taken out to the father. It being uncertain whether he died before or after his father, the court granted administration of his effects to his sister. *Peck, In goods of*, 2 S. & T. 507.

S. died on the 7th August, 1858, a bachelor and intestate, leaving his mother and sister surviving him. His father left England in 1840, and had not been heard of since the receipt of a letter dated the 9th July, 1854; but there was no evidence on which the court could presume that the father was not alive on the 7th August, 1858, and the grant of administration to the estate was accordingly made to the mother, under the power given by 20 & 21 Vict. c. 77, s. 73. *Smith, In goods of*, 2 S. & T. 508; 31 L. J., P. 182; 7 L. T. 193; 10 W. R. 586.

**Death of Testator and Legatee at Same Time.**—When the testator and his residuary legatee have been drowned at the same time and in the same ship, the legacy is extinguished, and the grant will be made as in case of an intestacy. *Carmichael, In goods of*, 4 S. & T. 224.

**Representative of Next of Kin or Party entitled in Distribution—General Rule—Exception.**—A. having died intestate, leaving his sister his sole next of kin, and several nephews and nieces entitled in distribution, his sister took out letters of administration to his estate, and died, leaving two daughters, whom she appointed executrices of her will, one of whom having proved that will the court granted to her letters of administration de bonis non of the goods of A. The general rule is, that a party originally entitled in distribution is preferred in making a grant de bonis non to a party having a derivative interest; but the court has a discretion in the matter, and will, in a proper case, make a grant to the party having the derivative interest, provided all the persons entitled in distribution have been cited, or shall by appearance or consent waive citations. *Johnson, In goods of*, 7 L. R., Ir. 1.

**To Mother on Father Renouncing.**—One died intestate, unmarried and without issue, leaving his father and mother surviving him. His assets consisted mainly of the amount of a promissory note, which was payable by instalments, which the intestate had, by letters to his mother and his solicitors, directed the latter to hand over to his mother. Several of the instalments had been paid to her before the intestate's death. The court, acting under the 78th section of the

Probate Act, 1857 (which corresponds with the 73rd section of the English Act), and on the renunciation of the intestate's father, granted administration to the mother. *Ferguson, In goods of*, 7 L. R., Ir. 176.

**To Sister when Mother is of great Age.]**—A spinster died intestate, leaving a mother and a sister. The former was seventy-nine years old, and in very precarious health, and it was thought that she could not be informed of her daughter's death without endangering her life. The court, under 20 & 21 Vict. c. 77, s. 73, granted letters of administration to the sister, for the use and benefit of her mother. *Clarke, In goods of*, 46 L. J., P. 16; 25 W. R. 82.

**To Father-in-law for Benefit of Son.]**—A widower died intestate; his only son, the sole person entitled in distribution, was resident in Australia. A legal representative being required immediately for the preservation of the property, administration for the use and benefit of the son was granted to his father-in-law. *Jones, In goods of*, 1 S. & T. 13; 27 L. J., P. 17.

**When not to Next of Kin—Special Reason Necessary.]**—The court refused to grant administration jointly to the widow and son, no special reason being given for the application, and some of the next of kin being of an age at which they were incapable of consenting to such a grant. *Newbold, In goods of*, 36 L. J., P. 14; 15 L. T. 248.

A person died intestate, leaving an aged uncle and aunt the only persons entitled in distribution; at their desire, administration was granted for their use and benefit, to their son, on the sureties justifying. *Roberts, In goods of*, 1 S. & T. 64.

Administration with the will annexed, granted to the nominees of the residuary legatee, who was a married woman, without notice to her husband, the residue being settled to her separate use and at her absolute disposal. *Pine, In goods of*, 1 L. R., P. 388; 36 L. J., P. 95; 17 L. T. 31.

**— When Next of Kin Abroad.]**—A person was supposed to have made a will, appointing his cousin his executor, but at his death it could not be found. His brother, the sole next of kin, had been absent in Australia for forty years, and a representative was urgently needed to carry on the business, to collect the debts, and to represent the deceased in a chancery suit. The court made a grant ad colligenda to his cousin for the use and benefit of the next of kin, with special directions to make certain payments. *Tepper, In goods of*, 25 L. T. 853.

Where the estate of an intestate was perishable, and the next of kin were in Australia, the court granted administration for the use and benefit of the next of kin. *Young, In goods of*, 36 L. J., P. 80; 15 L. T. 446.

A person died in England intestate, leaving two children the only persons entitled to her effects, who were resident in Georgia. She left money in the funds and in a savings bank, a small sum due to her, and a little furniture. The court refused to make a grant to her nephew, for the use and benefit of her children, although communication with her children from England

was cut off by reason of the blockade of the southern ports of the United States, on the ground that the property was not perishable, and that there was no special circumstances to justify the court in departing from the ordinary practice. *White, In goods of*, 2 S. & T. 457; 31 L. J., P. 161; 6 L. T. 162; 10 W. R. 430.

The court granted administration to the sister of a deceased intestate, the mother being willing to renounce, and her husband being in Australia. *Llanvorne, In goods of*, 1 L. R., P. 306; 36 L. J., P. 25; 15 L. T. 193.

C. was possessed of a freehold estate, which he occupied and farmed himself; at his death his only next of kin was in New Zealand. The court, under 20 & 21 Vict. c. 77, s. 73, granted administration of the personal estate to his sister for the use and benefit of such next of kin, and limited until the next of kin should apply for and obtain administration of the goods of the deceased. *Cholwell, In goods of*, 1 L. R., P. 192; 35 L. J., P. 75; 14 L. T. 338.

**— When Next of Kin of Unsound Mind.]**—A person died intestate, leaving her only sister solely entitled in distribution, a lunatic, and without any committee of her estate or person. Administration for the use and benefit of the sister during her lunacy was granted to the stepmother, who was co-executor and co-trustee with the deceased of the father's will, and beneficially interested under it. *Burrell, In goods of*, 1 S. & T. 46.

**Renunciation by.]**—The court refused to grant administration to a person not having any interest in the estate, merely because the next of kin had agreed to renounce in his favour. *Blake, In goods of*, 35 L. J., P. 91; 14 L. T. 769; 14 W. R. 1021.

## 2. Cum testamento annexo.

When a codicil contained dispositions independently of the will, and also referred to the will, which, however, could not be found, the court granted administration with the will annexed. *Greig, In goods of*, 14 W. R. 349.

A legatee was erroneously described as the sister of the deceased, being her daughter; the court, on being satisfied that it was a mistake, allowed the grant, cum testamento annexo, to pass to such legatee. *Hooper, In goods of*, 14 W. R. 210.

A person having had a will prepared, in which an annuity (the amount being left in blank) was given to his wife, and the residue to his children, and the names of executors were not filled in, at the instigation of those about him, executed the same in its unfinished state, at the same time remarking, that it would be no good until the blanks were supplied:—Held, that the court could not, on affidavit, say the deceased did not execute the will animo disponenti, and it must be admitted to probate, but that, as there was an uncertainty as to the residuary bequest, the right of the widow, under 21 Hen. 8, c. 5, s. 3, would prevail, and administration with the will annexed must be granted to her. *Poole, In goods of*, 35 L. J., P. 97.

An administrator, with the will annexed, who has intermeddled with the estate cannot be compelled to take a grant with a later will an-

nexed, upon the revocation of the original administration. *Davis, In goods of*, 29 L. J., P. 72.

C. executed a will in which she appointed an executor who subsequently became bankrupt, and left this country for Australia. The property being small, on the consent of the next of kin the court granted administration, with the will annexed, to one of the parties interested under it, by virtue of the authority given by 20 & 21 Vict. c. 77, s. 73. *Cooper, In goods of*, 2 L. R., P. 21. See also cases ante, col. 944.

### g. Creditors.

**Generally.—In what Cases a Grant will be made.**—Letters of administration were granted to an assignee of a deceased tradesman, limited to the book debts specified in the deed of assignment. *Dixon, In goods of*, 10 Jur., N. S. 854.

G. being a married woman, and having an interest under her father's will expectant on the death of his widow, joined with her husband in 1841 in executing a mortgage of such interest to B., to secure a running account. G. died in 1851, and her husband in 1853, neither possessed of any other property. On the death of her father's widow, a representative to G. was required to release the trustees. B.'s debt being larger than the amount of G.'s interest under the will, the court granted administration of the goods of G. to B. *Godfrey, In goods of*, 2 S. & T. 133; 9 W. R. 499.

Administration with the will annexed, granted to a person as a creditor for funeral expenses, who had undertaken the funeral of the deceased, at the request of the universal legatee named in the will, upon his giving justifying security. *Newcombe v. Beloe*, 1 L. R., P. 314; 36 L. J., P. 37; 16 L. T. 33.

The court will not grant administration to an undertaker as a creditor for funeral expenses, unless informed of the circumstances under which the expenses were incurred, and by whose authority the applicant undertook the funeral. *Id.*

A person died intestate and insolvent, leaving fifteen persons entitled in distribution, of whom one was in New Zealand. The estate chiefly consisted of the goodwills of public-houses, the full value of which could not be realized save by an immediate sale. Under the circumstances, and all the parties in England consenting, the court granted administration to a creditor, notwithstanding that, to avoid delay, the party in New Zealand had not been cited. *Meek v. Durham*, 19 W. R. 391; *S. C.*, *Durham, In goods of*, 24 L. T. 73.

An intestate died, owing debts exceeding in value his personal estate and effects. Gifts of money had been made to him during his life by C., a relative of his deceased wife, to enable him to keep up his establishment, and after his death his debts were paid by C. There were only two next of kin and persons entitled in distribution, and of these one renounced and the other was a lunatic, and his next of kin renounced on his behalf. The court granted administration of the intestate's estate and effects to C. *Bateman, In goods of*, 2 L. R., P. 242; 40 L. J., P. 24; 24 L. T. 399; 19 W. R. 759.

Where an executrix, who was also universal

legatee, disappeared, taking the will with her, the court refused to grant administration, with the substance of the will annexed, to a creditor, until the executrix had been first formally cited by advertisement. *Wormington, In goods of*, 16 L. T. 208.

A husband having died intestate and insolvent, and his widow and next of kin having consented to renounce their prior rights to administration, the court refused to grant administration to a nominee of the deceased's principal creditors, their nominee being a stranger not personally interested in the assets. *Prosser, In goods of*, 11 Ir. R., Eq. 37.

Semble, in such a case the practice is for one of the creditors to obtain a grant of administration, and then to appoint their nominee to act as attorney. *Id.*

J. W., entitled to the property of his wife, E. W., who predeceased him, became indebted to the estate of J. P. The estate of E. W. afterwards became entitled to a share in the residuary estate of J. P. The executrix of J. W. refused to take out letters of administration to E. W.'s estate, and a grant was necessary to enable the creditors of J. W. to obtain E. W.'s share of the residuary estate in satisfaction of their debt:—The court granted (under s. 73 of 20 & 21 Vict. c. 77) administration of the estate of E. W. to a creditor of J. W. *Wensley, In goods of*, 7 P. D. 13; 51 L. J., P. 21; 30 W. R. 431; 46 J. P. 264.

When a person, being the sole party interested in, and entitled to represent, the estate of a deceased party, died without having taken out a grant to such person, and his personal representative filed a renunciation and a consent to the grant being made to a creditor of the party so originally interested and entitled to the grant, the court made the grant to such creditor under 20 & 21 Vict. c. 77, s. 73. *Fraser, In goods of*, 1 L. R., P. 327; 36 L. J., P. 63; 16 L. T. 154.

**On Death of Executrix de son tort.**—An executrix who, without having taken probate, had intermeddled in the estate of her testator, died possessed of property belonging to him:—Held, after citation of her next of kin and their non-appearance, that the representative of the testator was entitled as a creditor to a general grant of letters of administration of her estate. *Mellor, In goods of*, or *Mellor v. Dyson*, 8 P. D. 108; 52 L. J., P. 62; 31 W. R. 476; 47 J. P. 280.

**Right of Action Suspended.**—The rule that when a creditor is appointed executor by his debtor his right of action is suspended, because he is presumed to have retained his debt, and is the person both to pay and receive, applies only when the executor has received assets. *Louie v. Peckott*, 16 C. B. 500; 24 L. J., C. P. 196.

The rule does not apply where the debt arises on a negotiable instrument, which has been legally transferred by the executor. *Id.*

**Where Children of Intestate are Minors.**—A creditor was appointed guardian to minors (the only children of P.), who had no known relations, for the purpose of taking out administration to the estate of P., who had died intestate and insolvent. *Peck, In goods of*, 1 S. & T. 141; 27 L. J., P. 106.

**Surety who has paid Debt.**—A surety who, after the death of the principal, pays off the debt,

is, in case of intestacy, entitled to administration as a creditor. *Williams v. Jukes*, 34 L. J., P. 60.

**Granted to one Creditor although Proceedings commenced by another.]**—Administration may be granted to one creditor, though the proceedings for obtaining administration may have been initiated by another creditor, the latter being allowed such costs as were reasonably incurred by him before the former took up the application. *Andrews v. Murphy*, 4 S. & T. 198; 30 L. J., P. 37.

**Statute of Limitations.]**—A creditor was allowed to cite the next of kin to accept administration, or shew cause why it should not be granted to the applicant, although his right of action was barred by the Statute of Limitations. *Coombs, In goods of*, 1 L. R., P. 193; 35 L. J., P. 78; 14 L. T. 635; 14 W. R. 975.

**Bond conditioned to Administer Estate Rateably.]**—And on their not appearing he is entitled to the grant, but the bond must contain a condition that he distribute the assets rateably amongst all the creditors. *Coombs v. Coombs*, 1 L. R., P. 288; 36 L. J., P. 21; 15 W. R. 286.

When administration has been granted to a creditor, and no application was made at the time the grant issued that the administrator should pay the debts rateably, the court will not revoke such grant subsequently in order to compel such administrator to give up his right to retain assets sufficient to repay himself his own debt in full. *Brackenbury, In goods of*, 2 P. D. 272; 46 L. J., P. 42; 36 L. T. 744; 25 W. R. 698.

For the future, a creditor on taking out administration must, in all cases, if required by the court, enter into a bond conditioned to administer the estate rateably amongst the creditors of the deceased. *Ib.*

**— And Giving Security.]**—The next of kin having renounced, the court granted administration of the personal estate and effects of an insolvent intestate to a stranger nominated by the bulk of the creditors, in preference to a particular creditor whose debt was small, but required the nominee to give justifying security and to enter into a bond to pay the debts pro rata. *Smithson, In goods of*, 36 L. J., P. 77; 15 L. T. 296.

A testator by his will appointed A. and B. executors and trustees, and directed them to allow his wife to receive the rents and profits of his estate, and to carry on his business of a tailor and draper for the term of her natural life, if she should so long remain his widow. The executors declined the trusts and duly renounced probate, and administration, with the will annexed, was granted to the widow, who carried on the business down to the time of her death, in January, 1874. She did not marry again, and she died insolvent and intestate. With the exception of a policy of insurance for a small amount, the whole of the testator's property was employed by the widow in carrying on the business, and while she did so C. supplied her with goods in the way of the trade of a tailor to the amount of 399l. The debt remained unpaid at her death, and C. held no security for any part of it. The parties interested under the will having been cited, and there being no opposition to the motion, the court decreed adminis-

tration, with the will annexed, of the unadministered effects of the testator to C. as an equitable creditor of the estate, but required, as conditions to his obtaining the grant, that he should in the first place, as a legal creditor of the widow, take out administration to her estate, and also give justifying security. *Fairland or Fairland v. Percy, Percy, In goods of*, 3 L. R., P. 217; 44 L. J., P. 11; 32 L. T. 405; 23 W. R. 597.

**Limited Grant.]**—A creditor insured the life of his debtor, but the policy having by mistake been made payable to the representatives of the debtor, the court granted administration limited to the policy. *Patteson v. Hunter*, 30 L. J., P. 272.

**Insolvency of Estate Doubtful.]**—The court will not grant administration with the will annexed to a creditor by reason of the insolvency of the estate of the deceased, if the widow and residuary legatee are willing to take it; much less will it do so if the insolvency is disputed. *Haacke v. Wedderburne*, 37 L. J., P. 33; 18 L. T. 336; 16 W. R. 712.

When there was a doubt as to the solvency of the estate of an intestate, and the sole next of kin was a woman in a low position of life and alleged to be of drunken and dissolute habits:—Held, that there were special circumstances to justify a grant of administration to a creditor under 20 & 21 Vict. c. 77, s. 73. *Farrands, In goods of*, 1 P. D. 439; 24 W. R. 1018.

**Husband's Rights as Creditor.]**—A husband may take a grant with the will annexed, as creditor, although he has signed a renunciation executed by his wife as residuary legatee. *Biggs, In goods of*, 1 L. R., P. 595; 37 L. J., P. 79.

A female having taken administration to an estate as a creditor, married and died. Under the administration she got in a considerable portion of the estate and paid some of the debts, but did not set apart any particular fund in payment of her own debt:—Held, that the husband was not entitled in his own right as a creditor, but only as the representative of his wife, to take administration of the unadministered effects of the deceased. *Risdon, In goods of*, 1 L. R., P. 637; 38 L. J., P. 40; 20 L. T. 330.

**Subsequent Insolvency of Creditor.]**—A. died intestate and letters of administration of his personal estate and effects were granted to B., a creditor. B. was subsequently adjudicated a bankrupt, and died leaving part of A.'s estate unadministered. The trustee in bankruptcy of B.'s estate assigned to C., who was also a creditor of B.'s, the debts due from A.'s estate and securities. The court made a grant de bonis non to C., limited to B.'s interest in A.'s estate. *Burdett, In goods of*, 1 P. D. 427; 45 L. J., P. 71; 34 L. T. 855.

**Person buying up Debt after Death of Intestate.]**—A person who has bought up a debt after the death of the intestate is not entitled to administration as a creditor; and, therefore, where a bill of exchange accepted by an intestate had been indorsed after his decease, the court refused to grant a citation to the next of kin to accept or refuse administration at the instance of the in-

doree. *Galbraith, In goods of*, 3 L. R., Ir. 169.

**Ad colligenda bona.**—The court, under special circumstances, made a grant to a creditor ad colligenda bona, limited to collect the personal estate of the deceased, to give receipts for his debts on the payment of the same, and to renew the lease of his business premises which would expire before a general grant could be made:—The court refused to include in the grant a power to dispose of the lease and goodwill of the business, or a power to carry on the business. *Clarkington, In goods of*, 2 S. & T. 380; 8 Jur., N. S. 84; 7 L. T. 218; 10 W. R. 124.

When a foreigner dies intestate in this country in itinere, without any relative or agent here resident, the custody of his property belongs to the crown; but under special circumstances, and by aid of 20 & 21 Vict. c. 77, s. 73, the court will without a formal notice to the Queen's proctor, grant administration to a responsible person limited ad colligenda bona defuncti. *Wyckoff, In goods of*, 3 S. & T. 20; 32 L. J., P. 214; 9 Jur., N. S. 84; 7 L. T. 565; 11 W. R. 218.

The widow and next of kin in this country renounced administration, and the estate, which was insolvent, was liable to depreciation if the property (timber) was not at once sold. The court, under the circumstances, made a grant ad colligenda bona to a creditor, the money realized by the sale of the timber (after deduction for wages and charges) and collection of debts to be paid into the registry, and the next of kin abroad to be at once cited with a view to the applicant taking a creditor's grant. *Stewart, In goods of*, 1 L. R., P. 727; 38 L. J., P. 39.

A Prussian subject resident in this country died a bachelor and intestate, without any known relations. He carried on the business of a schoolmaster, and an offer was made for the purchase of the goodwill of the school if possession was given forthwith. The court, in these circumstances, made a grant ad colligenda bona to a creditor, with power to dispose of the goodwill of the school, but directed that the administrator should bring into the registry the proceeds of the sale after deduction of expenses and his taxed costs of obtaining the administration. *Schwerdtfeger, In goods of*, 1 P. D. 424; 45 L. J., P. 46; 34 L. T. 72; 24 W. R. 298.

**Administrator out of the Jurisdiction.**—An assignee in bankruptcy of an administrator who is out of the jurisdiction is a creditor within the meaning of 38 Geo. 3, c. 87, s. 1, and 21 & 22 Vict. c. 95, s. 18, and as such may obtain administration de bonis non of the intestate, limited to the fund to which the assignee is entitled. *Hammond, In goods of*, 6 P. D. 104; 50 L. J., P. 70, 73; 44 L. T. 649; 29 W. R. 807; 45 J. P. 619.

**Application by a Creditor—Necessary Affidavits.**—An application by a creditor for a grant of administration of the estate of a deceased intestate, in default of appearance by the next of kin, must be accompanied by an affidavit of the amount and nature of his debt, and of the date when it occurred. *Von Desen, In goods of*, 43 L. T. 532.

When a deceased intestate's next of kin are abroad, or have no known address, and fail to

appear to a citation, by advertisement, an affidavit that service of the citation has been attempted and failed, and that the deceased's next of kin have no known agent in England, is requisite. *Id.*

Before administration to a creditor will be granted, an affidavit of the amount of the personal estate of the deceased must be filed. *Briggs v. Roope*, 29 L. J., P. 96.

Affidavits on which application is made for a grant of letters to a creditor should state that all persons entitled in distribution of the effects of the deceased have been cited. *Brown v. Wildman*, 28 L. J., P. 54.

The court will not grant administration to a creditor without an affidavit of the date when the debt became due. *Rawlinson v. Burnell*, 3 S. & T. 479; 33 L. J., P. 123.

**Citation.**—Where administration is applied for by the creditor of a person who dies intestate without any known relation, a citation, calling upon the next of kin, if any, and all persons having interest in the estate of the deceased, should be issued, and an abstract of it advertised twice, with an interval of a fortnight, notice also being given to the Queen's proctor. After the lapse of thirty days from the last advertisement, if there is no appearance, and the Queen's proctor declines to interfere, administration will be granted to a creditor. *Browne, In goods of*, 28 L. J., P. 126.

Where one of the next of kin of a deceased was a minor, and was resident, in service, in Derbyshire, and her mother, her natural guardian, resided in Middlesex, the court granted administration to a creditor, without requiring the citation to be served on the minor in the presence of her mother; a copy of it, sent by post, having been received by the minor. *Lainson v. Naylor*, 29 L. J., P. 126; 8 W. R. 451.

The court declined to make a grant de bonis non with the will annexed to a creditor, without citing the residuary legatees named in the will who were resident in Australia. *Fairweather, In goods of*, 2 S. & T. 588; 6 L. T. 788; 10 W. R. 862.

Where an application is made for a grant to the secretary of an association, on the ground that the deceased was indebted to the association, the court ought to have such information of the constitution of the association as would shew that the secretary can be treated as a creditor. *Id.*

An intestate died insolvent, and the only assets were a fund in chancery which bore no interest, while two principal debts which exceeded it in amount bore interest at the rate of 5l. per cent.; the court, notwithstanding, declined to grant administration to a creditor until the next of kin, who were in India, had been cited. *Gerrard, In goods of*, 16 L. T. 267.

## h. Guardians.

**Of Minors.**—A left surviving him a widow and two minor children. The widow deserted her children to lead an immoral life; the court passed her over, and granted administration to the guardian of the minor children. *Creed, In goods of*, 6 Jur., N. S. 590.

The guardian of a minor of the whole blood is entitled in preference to the half blood. *Stratton v. Linton*, 31 L. J., P. 48.

The court granted administration to the guardian elected by minors for their use and benefit, without requiring the citation or renunciation of their next of kin, where the property was very small and the next of kin were in Australia and their interest was infinitesimal. *Hagger, In goods of*, 3 S. & T. 65; 32 L. J., P. 96; 9 Jur., N. S. 386; 8 L. T. 470; 11 W. R. 540.

A. died intestate, leaving four children, of whom one was of age, but was abroad, and the other three were minors. An immediate grant of administration being necessary, the court granted administration to the duly-elected guardian of the minors for their use and benefit, limited until one of the children should apply for a grant. *Burgess, In goods of*, 4 S. & T. 188; 32 L. J., P. 158; 9 Jur., N. S. 553; 9 L. T. 86; 11 W. R. 687.

A., whose marriage had been dissolved by reason of the misconduct of her husband, died intestate, leaving one child under age. The court, on copies of the decrees nisi and absolute for the dissolution of such marriage being filed in the registry, ordered that administration should issue to the maternal grandmother of such child for her use and benefit, no notice of the application having been given to the father, who was resident in New Zealand. *Hay, In goods of*, 35 L. J., P. 3; 11 Jur., N. S. 936; 13 L. T. 335; 14 W. R. 147.

The guardian of an infant, sole next of kin of an intestate, is entitled in preference to creditors. *John v. Bradbury*, 1 L. R., P. 245; 36 L. J., P. 33; 15 L. T. 414; 15 W. R. 285.

Where joint guardians have been appointed by the Court of Chancery to a minor, administration for his benefit cannot properly be granted to one of them only; but under special circumstances, and by authority of 20 & 21 Vict. c. 77, s. 73, the Court of Probate will permit this to be done. *Murphy, In goods of*, 5 Jur., N. S. 416.

When a married woman, living separately from her husband, having obtained a protection order, died, leaving him and a minor son her surviving, the court made a grant of her effects to a guardian elected by the son for his use and benefit without citing the father, requiring justifying security. *Stephenson, In goods of*, 1 L. R., P. 287; 36 L. J., P. 29; 15 L. T. 296; 15 W. R. 286.

C. gave all her property of whatsoever description to her son, when he attained the age of twenty-one, and then concluded, "I appoint C. and K., of &c., trustees." The court held that the trustees were not executors, and granted administration, with the will annexed, to the guardian of the minor. *Cozens, In goods of*, 16 L. T. 208; 15 W. R. 532.

When it is desired that a stranger should take a grant of administration for the use and benefit of minors, to whose guardianship there is a next of kin entitled, the practice is, not that the minors should elect the next of kin to be their guardian for the purpose of nominating the stranger to procure the grant, but that the next of kin should renounce his right to the guardianship, and that the minors should elect the stranger to be their guardian, in which capacity he can take the grant. *Molineux, In goods of*, 25 L. T. 162; 19 W. R. 568.

A father left two children in their minorities, his only next of kin. The minors' next of kin were four in number, and three of them renounced their rights to the guardianship and

administration. The fourth went to Nevada in 1869, and nothing was now known of him. The court permitted the minors to elect a stranger in blood as their guardian, without requiring the citation or renunciation of the absent next of kin. *Langham, In goods of*, 25 L. T. 951; 20 W. R. 319.

A brother bequeathed his real and personal estate in two equal moieties to the children of his deceased sisters. The executor renounced, and the children were resident abroad. The sole surviving next of kin was another sister, to whom the testator had left a legacy of "one shilling," and who was leading a dissolute life. Under these circumstances, the court made a grant of administration with the will annexed to a relative not interested, for the use and benefit of the minors until they should appear and take the grant. *Thomas, In goods of*, 23 L. T. 677.

A husband and wife separated by agreement. The husband covenanted not to claim administration of his wife's estate if she should die during his life. She died during his life. The husband refused to renounce: the court refused to make a grant to the guardian of her children until he had been cited. *Pigott, In goods of*, 42 L. J., P. 77; 29 L. T. 45; 21 W. R. 823.

The nearest relatives of minor children having been abroad for many years without having communicated with their friends in this country, the court permitted the children to elect another person to take administration on their behalf of the estate of their father, without citing such nearest relatives in the first instance. *Burchmore, In goods of*, 3 L. R., P. 139; 43 L. J., P. 1; 29 L. T. 377; 22 W. R. 70.

The sole executrix and universal legatee having died in the testator's lifetime, and the next of kin being abroad, the court granted letters of administration with the will annexed, to the guardian of persons entitled in distribution. *See, In goods of*, 4 P. D. 86; 48 L. J., P. 70; 40 L. T. 658; 27 W. R. 665.

A father by will appointed two guardians of his daughter, a minor, and directed that in the event of the death of either of them the survivor should nominate some other person to act as co-guardian with him:—Held, that such direction was within the powers of 12 Car. 2, c. 24, ss. 8, 9, and administration de bonis non was granted to the guardian thus substituted. *Parnell, In goods of*, 2 L. R., P. 379; 41 L. J., P. 35; 26 L. T. 744; 20 W. R. 494.

Where a will duly executed contains simply an appointment of a guardian of his children by a father, but no disposition of personal property, or an appointment of an executor, it is not entitled to probate. *Morton, In goods of*, 33 L. J., P. 87; 9 L. T. 809; 12 W. R. 320.

A testamentary guardian of minor children is entitled to a grant for their use and benefit, preferably to a guardian elected by the children. *Morris, In goods of*, 2 S. & T. 360; 31 L. J., P. 80; 5 L. T. 768.

A testator divided the residue of his personal estate between his son, his only next of kin, and his three illegitimate daughters, who were minors. They propounded the will by their guardian. The son unsuccessfully opposed it, and was condemned in costs. He had a larger interest in the specific legacies than the minors, and it was proved that in fact there was no residue:—The court refused, under these cir-

cumstances, to make the grant to the guardian of the minors, but decreed it to the son. It also declined to make the grant to the son conditional on his payment of the guardian's costs, as by so doing it would delay the payment of the legacy to the widow. *Sawbridge v. Hill*, 2 L. R., P. 219; 40 L. J., P. 27; 24 L. T. 320; 19 W. R. 705.

A. and B. having been nominated by a testator to be executors and residuary legatees in trust, as such renounced probate and administration with the will annexed. They were also appointed, on the death or second marriage of the testator's widow, guardians of the minor children of the testator, the substituted residuary legatees named in his will:—Held, that they were entitled, as such guardians, to administration with the will annexed of the goods of the testator left unadministered by the widow, the first administratrix, for the use and benefit of the minors, with the usual limitations. *Loftus, In goods of*, 3 S. & T. 307; 33 L. J., P. 59; 10 Jur., N. S. 324.

— **To Nominee of Guardian.**—Where a wife had obtained a magistrate's order protecting her property and earnings, and died intestate, leaving minor children, the court granted administration to the uncle of the children, elected by their guardian for that purpose, though the husband was alive. *Wier, In goods of*, 2 S. & T. 451; 28 L. J., P. 111; 8 Jur., N. S. 393.

**Of Union.**—A pauper lunatic died intestate in the possession of 440l., leaving a lunatic sister, his sole next of kin. The court having previously refused the application (*see* 2 L. R., P. 217; 40 L. J., P. 21; 23 L. T. 877; 19 W. R. 422), afterwards, under the 12 & 13 Vict. c. 103, s. 16, 17, granted administration, for the use and benefit of the lunatic sister during her lunacy, to the board of guardians of the union to which the deceased was chargeable, as creditors of the deceased. *Sharland, In re*, 25 L. T. 574; *S. C.*, nom. *Windeatt v. Sharland*, 2 L. R., P. 266; 41 L. J., P. 9; 20 W. R. 211.

F. died intestate and a widow, leaving M., her daughter, the only person entitled in distribution. M. had been for some years in a county lunatic asylum, maintained at the charge of the hamlet of Mile-End Old Town. No committee of her person or estate had been appointed. F. left a sum of money, principally in the funds, in the name of her late husband, under whose will she was entitled to it. After the proper citations, the court, under 20 & 21 Vict. c. 77, s. 73, granted administration of the goods of F. to the clerk of the guardians of the poor, for the use and benefit of the lunatic, limited during the period of her lunacy; the sureties to justify. *Kindlay, In goods of*, 3 S. & T. 265; 33 L. J., P. 21; 9 Jur., N. S. 1253, 9 L. T. 346; 12 W. R. 59.

The court granted administration of the goods and effects of a pauper dying intestate, without known relations, to the guardians of the union (as creditors) on which she was chargeable, the 12 & 13 Vict. c. 103, s. 16, empowering them, in the event of a pauper dying possessed of property, to reimburse themselves the expenses incurred by them in and about the burial of such pauper, and in and about the maintenance of such pauper, at any time during the twelve

months previously to the decease. *McKenna, In goods of*, 35 L. J., P. 91; 13 L. T. 411.

### 1. Legatees.

**With Will Annexed de bonis non—Justifying Security.**—The estate of a testatrix having been administered, except as to one legacy, the court granted administration with will annexed de bonis non to the legatee, without requiring the representative of the executor or his residuary legatees to be cited, but ordered that the sureties should justify. *King, In goods of*, 8 P. D. 162; 52 L. J., P. 93; 31 W. R. 843.

**Residuary Legatee.**—A father devised and bequeathed the residue of his real and personal estate to trustees for the benefit of his children, but in case of the failure of such trust, for such of his two brothers as should be living at the time the failure of the trust was ascertained. At the time of his death the testator had no child, and his wife was not enceinte; one brother died a fortnight after him:—Held, that the failure of the earlier trust, although not known, was determined on the death of the testator, and the residue vested at that time in the brothers, and therefore that the executors of the deceased brother on the citation and non-appearance of the other brother, were entitled to a grant of administration with the will annexed of the goods of the deceased. *Sidebottom v. Sidebottom*, 2 L. R., P. 365; 41 L. J., P. 23; 25 L. T. 855; 20 W. R. 302.

In a will which contained specific bequests of several articles of plate, furniture, &c., the last specific bequest being that of 30l., a bequest to S. of "the residue of my things" would not entitle S. to a grant as residuary legatee. *Ludlow, In goods of*, 1 S. & T. 29.

A testator left to A. whatever money remained at his agent's, and also any money that might result from the sale of his effects:—Held, that he was not entitled to administration as a residuary legatee. *O'Loughlin, In goods of*, 2 L. R., P. 102; 39 L. J., P. 53; 18 W. R. 902.

The court will not grant administration with the will annexed to the residuary legatee, with the consent of the executor. It can only do so on the executor's renunciation of probate, or after a citation has been served upon him, upon his non-appearance within the prescribed time. *Garrard v. Garrard*, 2 L. R., P. 238; 25 L. T. 162; 19 W. R. 569.

A testator died, leaving a mixed fund of real and personal estate. By his will he left the whole of the income arising from his estate and effects to his maternal aunt A. for life, and "the whole after her decease to my legal heirs and theirs for ever":—Held, that on the true construction of the words "legal heirs and theirs for ever," the heir-at-law took as residuary legatee of the personality as well as the realty, and was in that character entitled to a grant of administration with the will annexed. *Dixon, In goods of, Todhunter v. Thompson*, 4 P. D. 81; 47 L. J., P. 57; 39 L. T. 234; 26 W. R. 883.

I. D., by his will, gave all his property to A. H. for life, and then "the whole" . . . to his "legal heirs and theirs for ever":—Held, that both realty and personality were given to his co-heiresses, and the grant made to M. T., one of the co-heiresses, as one of the residuary legatees. *Id.*

B. died in 1864, leaving a will of which he appointed his wife (with others) executrix. She proved the will, and survived the other executors. She afterwards married S., and during coverture with him made a will under powers vested in her, and appointed her husband sole executor. On her death in 1876 letters of administration (with her will annexed) were granted to S., who was the sole person entitled to the personal estate over which she had no disposing power:—Held, that a further grant was required as to the unadministered effects of B., and such grant was made (with the consent of S.) to the natural and lawful daughter of B., and one of the residuary legatees under his will. *Bridger, In goods of*, 4 P. D. 77; 47 L. J., P. 46; 39 L. T. 123.

A testator directed, that after payment of his debts and funeral expenses, all his remaining property, subject to certain legacies, should be placed in proper securities, and appropriated to the education of his sister's children, as should seem most meet and beneficial to them by the executors of his will:—Held, that the children of the testator's sister were absolute residuary legatees, and, the executors having died in the lifetime of the testator, were entitled as such to administration with his will annexed. *Presant v. Goodwin*, 29 L. J., P. 115; 6 Jur., N. S. 404.

In 1817, administration with the will annexed was granted to certain parties in their character of residuary legatees in trust, who had already renounced as executors. B. had acted as executor under three several wills. His executors, being unwilling to intermeddle in the management of those properties, which were mixed up together and incumbered, renounced probate of his will. They afterwards applied for administration with the will annexed to be granted to them as residuary legatees in trust, which was decreed accordingly. *Bennet, In goods of*, 6 Jur., N. S. 326, n.

A testator on his deathbed gave instructions for a will to a person who was unknown to him, and who, in preparing it, omitted his surname and also introduced the name and description of an executor who was totally unknown to the testator or to any of his friends or relations, and who could not, therefore, be identified with the consent of all parties interested; the court granted administration with the will annexed to one of the residuary legatees. *Sawtell, In goods of*, 2 S. & T. 448; 31 L. J., P. 65; 6 L. T. 395; 10 W. R. 782.

S. made the following bequest: "My wardrobe, trinkets and other things to my aunt. In the event of her decease before mine, then all my effects to her two daughters:—"Held, that, looking at the language of the will generally, these words did not constitute the aunt residuary legatee. *Smith, In goods of*, 34 L. J., P. 15; 10 Jur., N. S. 1084.

A testator, after making several specific bequests, "ordered the management of all the rest to John Smith and Judy;" there not being in the will any other words indicative of an appointment of an executor or of a bequest of residue:—Held, that John Smith and Judy had been constituted, not executors according to the tenor, but residuary legatees, and were entitled, not to probate, but to administration with the will annexed. *Smith v. Kerrane, Kerrane, In goods of*, 11 Ir. R., Eq. 447.

When a will does not dispose of the residue,

the legatees are entitled to administration with the will annexed, limited to the property disposed of by the will; the next of kin without the consent of the legatees being entitled to a grant, save and except such property, or to a ceterorum grant. If the deceased dies a bastard and unmarried, the crown takes the same grant as the next of kin. *Rhoades, In goods of*, 1 L. R., P. 119; 35 L. J., P. 125.

—To limited Representative of.]—A married woman, a residuary legatee under a will, by virtue of powers enabling her to do so, executed a will by which she distributed the property of which she had a right to dispose, her residuary interest being part of the property. The chain of executors being broken, a grant of administration, with the will annexed, of her unadministered estate, was made to the limited representatives of the residuary legatee. *Ditchfield, In goods of*, 2 L. R., P. 152; 23 L. T. 325; 18 W. R. 1144.

Universal Legatee.]—A testator appointed his nephew universal legatee of his whole property in trust for legatees named in the will. The nephew took no beneficial interest, and the testator left a son living. No executor was appointed. On motion, the court made the grant to the nephew. *Ford, In goods of*, 23 L. T. 323; 18 W. R. 960.

A. left in the hands of trustees, "all the property she might be possessed of at her death," &c., followed by an enumeration of properties which, however, did not include the whole of her property:—Held, that the specific enumeration did not restrain the general terms preceding it, and that the trustees were entitled to administration, with the will annexed, as universal legatees in trust. *Goodyear, In goods of*, 1 S. & T. 127; 4 Jur., N. S. 1243.

A testator left all his property that he was possessed of to his eldest son for life, and if he had no family that it revert to his fifth son. He stated that his property consisted of houses, stock, and bank shares, and named B. as trustee in conjunction with D., and directed that the said trustees first pay all debts due by his eldest son, and invest some stock and money as the said trustees should think proper in good securities, and that his grandchild T. should have 500*l.* when he arrived at twenty-one. The court granted administration cum testamento annexo to B. and D. as universal legatees in trust. *Palmer, In goods of*, 11 L. R., Ir. 1.

An application for a grant (with the will annexed) to the sole legatee: on affidavit that the testatrix died possessed of no other property than that specifically described in the will:—Held, that no reason was shewn for not citing the next of kin; that they must be cited; or that administration might be taken limited to the property specified in the will. *Watson, In goods of*, 1 S. & T. 110; 27 L. J., P. 7.

A testatrix left to her three nieces all her personal effects and everything of every kind "that I have now, or may have at the time of my decease, at my apartments at A. or elsewhere:—"Held, that the nieces were universal legatees and, as no executor was appointed, that they were entitled to administration with the will annexed. *Searborough, In goods of*, 6 Jur., N. S. 1166; 9 W. R. 149.

A universal legatee, under a will, which does

not appoint an executor, is by the invariable practice of the registry entitled to administration with the will annexed, and not to probate as executor according to the tenor. *Oliphant, In goods of*, 1 S. & T. 525; 30 L. J., P. 82; 6 Jur., N. S. 256.

A husband, left sole executor and universal legatee under his wife's will, which was made by virtue of a power, renounced as executor. Subsequently, owing to the disposition of the trust fund under his wife's will, his consent was required by the trustees to enable them to deal with it. On motion to the court that he might be allowed to retract his renunciation which had already been filed in the registry, the court directed that the applicant should take administration with the will annexed as universal legatee, in which capacity the applicant had not renounced his beneficial interest under the will. *Blisset, In goods of*, 44 L. T. 816.

**Will of Englishman Domiciled in France.**—An Englishman, domiciled in France, wrote a holograph will, in which was the clause following: "J'institue pour ma légataire universelle Madame A. . . . et ce pour lui donner une preuve de ma reconnaissance des bons soins qu'elle a eu pour moi en France le tout sans rien excepter, et notamment pour tous les effets mobilier, et tous les biens meuble, que je possède en France."—Held, on the evidence of French advocates, that A. was entitled to the whole personal property of the testator, whether in England or France. *Laneville v. Anderson*, 2 S. & T. 24; 30 L. J., P. 25; 6 Jur., N. S. 1260; 3 L. T. 304; 9 W. R. 74.

**With Limitation.**—A husband by his will made his wife sole executrix and residuary legatee. By a codicil he devised and bequeathed to A. all property held by him upon any trust or by way of mortgage. He died insolvent, and the widow renounced probate of the will and codicil as executrix, and administration as residuary legatee. The court granted administration, with the will and codicil annexed, to A., limited to the trust property so far as it was personally left to him by the codicil. *Prothero, In goods of*, 3 L. R., P. 209; 44 L. J., P. 8; 31 L. T. 551; 23 W. R. 212.

**When Executors out of the Jurisdiction.**—The words "at the expiration of twelve months from the death of the testator," in s. 1 of 38 Geo. 3, c. 87, when compared with the words given in the form of affidavit in the second section, and of the grant of administration in the third, must be held to mean at or after the expiration of that period. *Ruddy, In goods of*, 2 L. R., P. 330; 41 L. J., P. 63; 25 L. T. 950; 20 W. R. 319.

When the applicant is the residuary legatee, whose interest is undetermined, the grant will be made under 38 Geo. 3, c. 87, but where a particular sum is set aside for and actually payable to the applicant, the grant can be made under 21 & 22 Vict. c. 95, s. 18. *Id.*

One of the executors named in the will proved the paper, and then left the country. The second executor named in the will was also out of the jurisdiction. The court made a grant *durante absentia* to a legatee and also one of the next of kin to enable her to become a party to a suit in the Chancery Division for the administra-

tion of the estate. *Jenkins, In goods of*, 49 L. J., P. 30; 41 L. T. 736; 28 W. R. 431; 44 J. P. 801.

**Renouncing Probate.**—A person who has been appointed sole executrix and named universal legatee and has renounced probate may afterwards take a grant of administration *de bonis non* in the latter character. *Wheelwright, In goods of*, 3 P. D. 71; 47 L. J., P. 87; 39 L. T. 127; 27 W. R. 139.

B. appointed C. and D. executors and residuary legatees in trust, his widow residuary legatee for life or widowhood, and C. D., E. F. and G. substituted residuary legatees. C. and D. renounced probate and administration as executors and residuary legatees in trust, and letters of administration with the will annexed were granted to the widow; she died, leaving part of the estate unadministered. The court refused to allow C. to retract his renunciation as residuary legatee in trust, but granted him administration *de bonis non* as substituted residuary legatee. *Morrison, In goods of*, 2 S. & T. 129; 3 L. T. 786; 9 W. R. 518.

**Where Legatee has purposely Destroyed Will.**—Where the court was satisfied, on the evidence, that the defendant, who had taken out letters of administration, had possessed himself of the will after the death of the deceased, and had suppressed or destroyed it, and therefore decreed letters of administration with the will annexed, as contained in a draft; and as the plaintiff and defendant were the residuary legatees in the will, and as such equally entitled in usual course to the letters of administration, ordered the grant to be made to the plaintiff. *Podmore v. Wharton*, 3 S. & T. 449; 33 L. J., P. 143; 10 Jur., N. S. 756; 10 L. T. 754.

**Misdescription of Legatee.**—Where the object of a testatrix's bounty was erroneously described, the court, on being satisfied that the misdescription was the result of mistake, granted administration, with the will annexed, to such person. *Hooper, In goods of*, 13 L. T. 445.

**Legatee Signing Will, but not as Witness.**—A residuary legatee who was present at the execution of the will, in which no executor was appointed, wrote her name, after the instrument had been signed by the testator and attesting witnesses, underneath the attestation clause at the request of one of the witnesses:—Held, that the court having to determine to whom the grant of administration with the will annexed should go, it was the duty of the court to inquire in what character the legatee had signed the paper; and the court being satisfied that she had not signed the will as a witness, her signature was omitted from the grant. *Sharman, In goods of*, 38 L. J., P. 47.

The residuary legatee signed the will after it was executed at the request of one of the attesting witnesses. The court required, before making an order for the omission of her signature from the probate, that a notice to shew cause should first be served upon the next of kin. *Id.*

B. made her will in the presence of C. and D., who subscribed to the same; subsequently E., an executor and legatee, at the request of the testatrix, signed his name, to signify, as suggested,

his acceptance of the executorship. The court rejected a motion praying to omit E.'s name in the probate. *Forest, In goods of*, 2 S. & T. 334; 31 L. J., P. 200; 5 L. T. 689.

#### J. Attorneys, Agents, and Nominees.

**Person Entitled Resident in England.]**—When the person entitled to administration is in England, a grant will not be made to his attorney, unless the estate consists solely of property held in trust. *Bullar, In goods of*, 39 L. J., P. 26; 22 L. T. 146.

Where a person, solely entitled, was resident in this country, and able to take it himself, the court declined to decree it to his attorney for his use and benefit. *Burch, In goods of*, 2 S. & T. 139; 30 L. J., P. 171; 4 L. T. 451; 9 W. R. 639.

**Person Entitled Resident Abroad.]**—When a party solely entitled to the grant of administration of an estate was abroad, and it was not known where she was, or when she would return to this country, and there was a sum of money payable to the estate, the court made a grant of administration to a person whom she had duly authorized by power of attorney to manage her property in England. *Escot, In goods of*, 4 S. & T. 186.

A testator left three next of kin, one of whom was resident in Calcutta, and another at New York. These two each nominated an attorney in this country for the purpose of taking a grant. The court, however, refused to make a joint grant to these attorneys. *Shepherd, In goods of*, 26 L. T. 405.

Where a party entitled to administration is abroad, and has given a simple power of attorney to his agent in England to take out administration for his use and benefit, the court will only grant administration to the agent on the same terms as it would have granted it to the party himself. *Goldsborough, In goods of*, 1 S. & T. 295; 5 Jur., N. S. 417; 7 W. R. 375.

Where a party entitled, being resident out of England, had, by a power of attorney, specially authorized his brother to execute for him an instrument of renunciation and consent, the court acted on a renunciation and consent so executed. *Rosser, In goods of*, 33 L. J., P. 155; 10 L. T. 695; 12 W. R. 1014.

**Intestate Dying Abroad.]**—B., having acquired a domicile in British Guiana, died a bachelor and intestate, without any known relations there. Under an ordinance of that colony the administrator-general took possession of B.'s property in that colony, and appointed P., F. and P., of Liverpool, to be his attorneys, and in his name to take letters of administration to the personal estate of the deceased in this country. The court, after notice to the Queen's proctor, and citations of next of kin, made the grant accordingly. *O'Brien, In goods of*, 2 S. & T. 604; 31 L. J., P. 194; 7 L. T. 249.

**Testator Dying Abroad.]**—A testator named five executors, four of whom took probate in Victoria, in which colony he died, and power to do so was reserved to the fifth:—Held, that administration with the will annexed could not be granted in this country to the attorney lawfully

constituted of the four executors who proved the will, unless the fifth executor had been first cited. *Fletcher, In goods of*, 8 Jur., N. S. 572.

**Executors Abroad.]**—A. died in 1832, leaving a will, whereof he appointed B., C. and D. executors, and B. residuary legatee. C. alone proved the will, power being reserved to grant probate to the other executors. In 1847 B. died, leaving a will, appointing E. sole executrix, who duly proved B.'s will. In 1855, C. died intestate, leaving part of the personal estate of A. unadministered. D., the surviving executor of A., not having appeared to a citation calling on him to accept or refuse probate of the will of A., administration, with the will of A. annexed, was granted to the attorney of E., then abroad, as the personal representative of the residuary legatee of A., the chain of executorship having been broken. *Collison v. Mawc*, 28 L. J., P. 90.

A., in April, 1856, executed a power of attorney appointing L. her attorney, for the purpose of managing her real and personal estate, and giving him very extensive powers, but not in terms sufficient to constitute him her attorney for the purpose of taking out letters of administration. A. then went abroad, and during her absence, money having become payable to the personal estate of B., who had died intestate, and in respect of whose estate A. was entitled to administration, it became necessary that an administrator should be appointed in order that a discharge for that sum might be given. It being uncertain when A. would return to this country, or where he was, the court granted administration of the estate of B. to L. *Escot, In goods of*, 28 L. J., P. 17.

**To Attorney of Heir, with Decree of Persian Court Annexed.]**—A., a native of and domiciled in Persia, made and duly executed his will according to Persian law. By the law of Persia, which does not recognize the principle of representation of the estate of a deceased person, his will, as well as all his property, is taken possession of by the court having exclusive jurisdiction in matters of wills, inheritance and succession. This court is composed of ecclesiastics called "Moojateheds." It is presided over by one of the body, styled the "Superior Religious Head and Highest Authority," and his decrees are irrevocable. Neither the original nor any copy of the will is allowed to go out of the possession of the court. The contents of the will are published by the court in the presence of the persons (legates and heirs) interested in the property of the deceased, and a document is given to each, certifying the portion of the property to which he is entitled. The testator died possessed of certain property (funds standing in his name in the books of the Bank of England), and this property was appointed to B., his eldest son, by the "Superior Religious Head," who gave a document under his hand and seal certifying that fact. The court granted to the duly-appointed attorney of B. letters of administration (with the decree of the Persian court annexed), limited to the property specified in the said decree. *Dost Aly Khan, In goods of*, 6 P. D. 6; 49 L. J., P. 78; 29 W. R. 80.

**Person appointed Factor loco tutoris by Scotch Court of Session.]**—Administration of the per-

sonal estate in England of a domiciled Scotchman granted to A., appointed by the Court of Session at Edinburgh factor loco tutoris to the infant children of the deceased. *Jones, In goods of*, 28 L. J., P. 80.

**Power of Attorney dispensed with.**—If the court, on the document before it, is satisfied that the party entitled desires the person applying to act as his attorney, it will not require a regularly-executed power of attorney. *Morley, In goods of*, 3 S. & T. 425; 33 L. J., P. 108; 10 L. T. 540; 12 W. R. 1064.

**To Attorney out of the Jurisdiction.**—Administration will be granted to an attorney of the next of kin, such attorney being resident without the jurisdiction of the court, if the sureties to the bond are resident within the jurisdiction. *Leeson, In goods of*, 1 S. & T. 463; 29 L. J., P. 19; 1 L. T. 74; 5 Jur., N. S. 1270.

**In the Case of Foreigners.**—Administration of the effects of an intestate who died domiciled abroad, granted to the agent of a foreigner entitled by the law of the domicile to administration. *Bianchi, In goods of*, 1 S. & T. 511; 28 L. J., P. 139.

**Assignment of Right to Letters of Administration.**—A. bequeathed the residue of his personal estate to W., his sole executor and trustee, in trust for such persons as B., a married woman, should appoint, and in default of appointment to B. absolutely. W. renounced. By deed, B. appointed and assigned to M. and J., who accepted the trust, all her interest under the will, and her right to letters of administration, with the will annexed, in order that they might obtain such letters of administration. Letters of administration, with the will annexed, granted to M. and J. *Martindale, In goods of*, 1 S. & T. 8; 27 L. J., P. 29; 4 Jur., N. S. 196.

**Domiciled Scotchman having Indian Property.**—A domiciled Scotchman died, leaving a will, whereby he appointed executors. The executors proved the will in Scotland, and authorized F. & Co. to take out administration as their agents in India, where the deceased possessed considerable property. F. & Co. did so, and having realized the assets, they paid the money for their own protection into the Court of Chancery in England. On a suggestion that personal representation was also necessary in this country to enable the executors to take the money out of the Court of Chancery, the court expressed its willingness to grant probate of the will, but declined to allow the executors' oath to be altered to meet the facts of the case by having the property sworn under 20*v.* *Murray, In goods of*, 16 L. T. 266.

**Englishman Domiciled Abroad—Administration with Retranslation of Will Annexed.**—A translation of the will of an Englishman dying domiciled abroad but possessed of personal property in England, originally written in English, had been proved in the court of the country of his domicile. One of the executors transferred his powers to his co-executor, who afterwards died, and G. was appointed in his place by the same court. The court granted letters of ad-

ministration, with a retranslation of the will annexed, to G.'s attorney in this country. *Rule, In goods of*, 4 P. D. 76; 47 L. J., P. 32; 39 L. T. 123; 26 W. R. 357.

**To Disinterested Nominee.**—The court will grant administration, with the consent of all parties interested in the property of the deceased, to their nominee who takes no interest in the property himself. *Farrell v. Brownbill*, 3 S. & T. 467.

**To Nominees under Special Circumstances—20 & 21 Vict. c. 77, s. 73.**—The consent of all the persons interested is not a sufficient ground for departing from the general rules as to grants of administration. The court therefore refused to make a joint grant to two of the persons interested in distribution and to a nominee of the next of kin, although the next of kin and all the persons interested concurred in the application. *Richardson, In goods of*, 2 L. R., P. 244; 40 L. J., P. 36; 25 L. T. 384; 19 W. R. 979.

The mere fact that the person who would be entitled to administration desires that some other person should take the grant, does not constitute such a special state of circumstances as to justify a grant under 20 & 21 Vict. c. 77, s. 73. In such a case the proper course to be adopted is for the person entitled to administration to take the grant, and then appoint his nominee to act as his or her attorney. *Hale, In goods of*, 3 L. R., P. 207; 44 L. J., P. 45; 31 L. T. 799.

A will having been set aside by reason of an informality in the execution, the widow and children entered into an arrangement by deed to carry out the intention of the husband as contained in such will, notwithstanding its informality. The court refused to grant administration to the executors named in the will under the Probate Act, s. 73, as the nominees of the parties interested in an intestacy, they themselves having no interest in the property of the deceased. *Id.*

If next of kin are unable to agree amongst themselves which of them shall take administration, and are all willing that such administration shall be granted to a nominee who has no interest therein, that will not be a special circumstance to justify the court in making a grant to such nominee under 20 & 21 Vict. c. 77, s. 73. *Teague v. Wharton, Jeffries, In goods of*, 2 L. R., P. 360; 41 L. J., P. 13; 25 L. T. 764; 20 W. R. 214.

A doubt having been raised as to the legitimacy of the sole next of kin, a deed was entered into by the parties interested for the distribution of the property amongst themselves in certain proportions, and it was a part of the arrangement that administration of the personal estate should be applied for by an individual who had, under no circumstances, an interest therein:—Held, that there were special circumstances in the case which authorized the court to grant such administration to the person designated under 20 & 21 Vict. c. 77, s. 73. *Hopkins, In goods of*, 3 L. R., P. 235; 44 L. J., P. 42; 33 L. T. 320.

**Crown Nominees (15 & 16 Vict. c. 5).**—When a bastard, having no relations, makes a will disposing of a part only of his or her property, the crown has a right to a grant save and except, or to a *caterorum* grant, but not to a general grant

of administration, and the legatees have a right to a grant, with the will annexed, limited to the property disposed of by the will. *Rhodes, In goods of*, 1 L. R., P. 119; 35 L. J., P. 125.

A nominee of the crown taking out administration to the estate of an intestate is under the same obligation as any other administrator. *Att.-Gen. v. Köhler*, 9 H. L. Cas. 654; 8 Jur., N. S. 467.

The 15 & 16 Vict. c. 3, only dispenses with the necessity of his giving the usual bond to the ordinary, but imposes on him all the duties and liabilities of a private administrator. If he improperly pays to the crown part of an intestate's effects, though such payment is made under authority of a warrant under the sign-manual, he makes himself personally liable to restore it to parties afterwards proving themselves legally entitled. *Id.*

Upon his death that liability only continues against his personal representatives, and not against his successor in office. But that successor may make himself personally liable for the acts of his predecessor, as by taking out letters of administration de bonis non to the same estate. *Id.*

Where the nominee of the crown had improperly paid money (thus coming to his hands) to the then sovereign, and the succeeding nominee of the crown had taken out letters of administration de bonis non to the same estate, and, in a suit by the next of kin against him, had only contested the fact of the claimants being truly the next of kin, and denied, if they were so, liability to pay interest on the sum claimed:—Held, that this was in substance an admission of liability to pay the principal to the next of kin, and the claimants having satisfactorily established their title to that character, the liability to pay interest followed, as of course, on the liability to pay the principal. *Id.*

The effects of an intestate having vested in the crown by forfeiture, if letters of administration are granted to A., in consequence of a warrant from the king, and they run in the usual form, viz., "To pay debts," &c., but with this additional clause, "For the use and benefit of his Majesty," A. will be answerable as administrator for the debts of the intestate, and will not be permitted to give evidence tending to question the validity of the letters of administration. *Megit v. Johnson*, 2 Dougl. 542.

**Prince of Wales when Intestate's Estates in Cornwall.]**—T. C. died in Cornwall, intestate, without known relations. The court granted letters of administration of his estate for the use of his royal highness the Prince of Wales as Duke of Cornwall; but, semble, without prejudice to the rights of the crown. *Cornwall (Solicitor of Duchy of) v. Canning or Caving, In goods of*, 5 P. D. 114; 41 L. T. 737; 28 W. R. 278.

#### k. Committees of Lunatics.

**When Entitled.]**—An intestate, whose property was under 1,000*l.* in value, left no known relation except a sister, who was of unsound mind, but had not been found so by inquisition, and who had no property of her own. The court refused to grant administration for the use and benefit of the lunatic to a stranger in blood until the applicant should obtain an order from the

Court of Chancery, under 25 & 26 Vict. c. 86, s. 12, rendering the property of the lunatic available for her maintenance and benefit. *Slumbers, In goods of*, 4 S. & T. 32; 34 L. J., P. 93; 11 Jur., N. S. 396; 12 L. T. 582; 13 W. R. 696.

A. died intestate, without child or parent, leaving a widow and several next of kin. Before the widow took out letters of administration she was found a lunatic, and a committee of her person and estate appointed:—Held, that the committee was entitled in preference to the next of kin. *Alford v. Alford*, 3 Jur., N. S. 990.

A sole executrix and sole legatee, who had taken out probate, was declared a lunatic. Her next of kin was appointed committee of her person, and another person committee of her estate. With the consent of the latter the court passed him over, and granted administration, with the will annexed, to the committee of the person. *Scarlett, In goods of*, 27 L. T. 215; 21 W. R. 79.

**Objection of Masters in Lunacy.]**—A. died intestate leaving B., a person of unsound mind, her lawful sister and sole next of kin, surviving her. C. was appointed committee of B.'s estate, but the Masters in Lunacy objected to his taking the grant of administration of A.'s estate. In these circumstances the court, with the consent of C. and the consent also of the next of kin of B., made the grant to D., a stranger in blood to the deceased. *Hastings, In goods of*, 4 P. D. 73; 47 L. J., P. 30; 39 L. T. 45.

#### l. On Renunciation of Parties.

**Generally.]**—The Probate Court Rules, 1862, are for the guidance of the registry, but capable of modification by the court. *Lofius, In goods of*, 3 S. & T. 307; 33 L. J., P. 59; 10 Jur., N. S. 324; 10 L. T. 240.

When a person has renounced probate or administration in one character, he may be entitled to administration de bonis non in an inferior character, which did not exist when he renounced in the superior character. *Id.*

**By Person Abroad.]**—Where a party entitled, being resident out of England, had by a power of attorney specially authorized his brother to execute for him an instrument of renunciation and consent, the court acted on a renunciation and consent so executed. *Rosser, In goods of*, 3 S. & T. 490.

**Of Executors.]**—Where one of several executors, after intermeddling in his testator's estate, executed a renunciation, and probate had been granted to his co-executors, the court, on the application of the renunciant, declared his renunciation to be invalid, and directed the record of it on the probate to be cancelled. *Badenach, In goods of*, 3 S. & T. 465; 33 L. J., P. 179; 10 Jur., N. S. 521; 11 L. T. 275.

An executor, having renounced in Australia, was appointed by the executors, who proved the will in the colony, their agent to obtain letters of administration with the will annexed in this country: the court held that r. 50 of the Probate Court Rules, 1862, did not apply, and made the grant to him as attorney, but required that he should file a fresh and definite renunciation, which beyond all question should strip him

of the character of executor and bring him within the operation of s. 9 of the Probate Act. *Russell, In goods of*, 1 L. R., P. 634; 38 L. J., P. 31; 20 L. T. 231.

The renunciation of an executor need not be under seal. *Boyle, In goods of*, 3 S. & T. 426; 33 L. J., P. 109; 10 L. T. 541.

The court received and acted on an informal deed of renunciation, which stated in substance, although not in terms, that the executor had not intermeddled. *Gibson, In goods of*, 1 L. R., P. 105; 35 L. J., P. 114; 12 Jur., N. S. 344; 14 L. T. 23.

When a will, disposing of realty, appointed an executor, who afterwards renounced, the court granted administration, with the will annexed, to the next of kin. *Jordan, In goods of*, 1 L. R., P. 555; 37 L. J., P. 22; 16 W. R. 407.

The court will not recognize an agreement by an executor to renounce. *Hargreaves v. Wood*, 2 S. & T. 602; 32 L. J., P. 8; 7 L. T. 338; 11 W. R. 31.

An executor cannot renounce after he has taken probate. *Veiga, In goods of*, 32 L. J., P. 9; 11 W. R. 84.

An executor under the will of a testator domiciled in Portugal accepted the executorship in that country, and also obtained probate in England. Becoming afterwards, through age and infirmity, incapable of acting, a competent Portuguese tribunal permitted him to renounce the executorship, and appoint A. to act as executor in his stead. Upon application for a grant to A. of administration de bonis non with the will annexed:—Held, that the renunciation of the executor, though sanctioned by the law of Portugal, could not be recognized in this country, and that A. therefore was not entitled to the grant prayed. *Ib.*

A renunciation of executorship is not complete and may be retracted at any time before it is filed in the court. *Morant or Morand, In goods of*, 3 L. R., P. 151; 43 L. J., P. 16; 30 L. T. 74.

An executor signed a renunciation of probate, in order that administration with the will annexed might be granted to a creditor. The necessary papers, including the renunciation, to lead the grant, were taken into the registry, but a difficulty arose in the way of the grant, and all the papers were withdrawn:—Held, that there had been no renunciation by the executor within the meaning of the Probate Act, 1857 (20 & 21 Vict. c. 77), s. 79, and that he was entitled to probate of the will. *Ib.*

A person who has been appointed sole executor and named universal legatee, and has renounced probate, may afterwards take a grant of administration de bonis non in the latter character. *Wheelwright, In goods of*, 3 P. D. 71; 47 L. J., P. 87; 39 L. T. 127; 27 W. R. 139.

When "failing A.," B. was substituted executor, the court held, that the condition of substitution was satisfied by A.'s refusal to act, and granted probate to B. on the renunciation of A. *Chlquhoun, In goods of*, 37 L. J., P. 1; 17 L. T. 123; 16 W. R. 88.

See also EXECUTOR AND ADMINISTRATOR.

**Of Next of Kin.**—Where the persons who are sole next of kin and the only persons entitled in distribution renounce their title to administra-

tion, the court will make the grant to a person who would have been next of kin if the sole next of kin had been out of the way, although such person has no interest. *Johnson, In goods of*, 2 S. & T. 595; 7 L. T. 337.

**Retracting Renunciation.**—The Court of Probate has jurisdiction in a proper case to allow an executor to retract his renunciation even where the renunciation is complete. *Bell, In goods of*, 4 P. D. 85; 40 L. T. 659.

It has never been decided that an executor who has filed a renunciation of his rights may not afterwards retract such renunciation, notwithstanding the terms of the Probate Act, 1857, s. 79, but he certainly will not be permitted to do so, unless he can shew that such retraction will be for the benefit of the estate or of those interested under the will. *Gill, In goods of*, 3 L. R., P. 113.

— 20 & 21 Vict. c. 77, s. 79, is not Retrospective.]—The 20 & 21 Vict. c. 77, s. 79, does not apply to an executor who has renounced before that act came into operation; and the retraction of such renunciation after the act came into operation, and a second renunciation after such retraction, will not bring him within that section. *Whitham, In goods of*, 1 L. R., P. 303; 36 L. J., P. 26; 15 L. T. 447; 15 W. R. 560.

The next of kin may, with consent of the court, retract a renunciation before administration has issued to another party; but the court is not bound to allow such retraction. *Park, In goods of*, 6 Jur., N. S. 660.

A. having, before 20 & 21 Vict. c. 77, renounced, as executor, probate of A.'s will, and as residuary legatee in trust, administration with the will annexed, such administration was granted to the residuary legatee for life:—Held, that on the death of the administratrix, A. could not retract his renunciation in either capacity. *Richardson, In goods of*, 1 S. & T. 515; 6 Jur., N. S. 326.

#### m. General or Limited Grant.

**General.**—A clause revoking all former wills in a will purporting to deal only with trust property, entitled the executor of the will to a general grant of probate. *Lancaster, In goods of*, 1 S. & T. 464; 29 L. J., P. 19; 1 L. T. 75.

When the person entitled to a general grant with the will annexed was also an appointee by the same will to a fund of 2,000*l.* in settlement, and the general estate of the testatrix, who died insolvent, did not amount to 5*l.*, the court declined to make a limited grant to the appointee on the suggestion that, by taking a general grant, he rendered himself liable to be harassed with actions by her creditors. *Somerset, In goods of*, 1 L. R., P. 350.

— To Executor of Married Woman.]—A married woman executed a will under powers given to her by her marriage settlement. She survived her husband, and died without republishing her will. All the next of kin, except one in New Zealand, consented to a general grant with the will annexed of the goods of the deceased being made to the executor named in the will. The court made the grant without any

notice to or consent from the next of kin in New Zealand. *Thorild, In goods of*, 36 L. J., P. 119.

**Limited.—To Part of Estate Applicant is Interested in.]**—Administration of the personal estate and effects of a deceased had been granted to A.; and all the property, with the exception of an interest in some fields as tenant from year to year, had been administered. A will having been propounded, dealing with these fields alone, and bequeathing the testator's interest in them to B., the court refused to grant to B. an administration with the will annexed limited to the property contained in the will; but revoking the former administration to A., granted her liberty to apply for and obtain letters of administration with the will annexed. *Clarke, In goods of*, 6 Ir. R., Eq. 26.

Where a party applying for administration has no direct interest in the personal estate of the deceased, he cannot obtain a grant extending to the whole of the property; it must be limited to the particular fund to which he satisfies the court he is entitled. *Dodgson, In goods of*, 1 S. & T. 260; 28 L. J., P. 116; 5 Jur., N. S. 252.

The court will grant administration to a cestui que trust of a trust fund, limited to that fund, when the trustee in whose name the fund stands is dead, and is without a personal representative, the parties entitled to represent the deceased trustee having been first cited. When there are several parties interested in the fund, the grant will be limited to the interest of the cestui que trust making the application, unless the other cestui que trusts assent to the grant extending to their respective interests. *Pegg v. Chamberlain*, 1 S. & T. 527; 8 W. R. 273.

**—To Property passing under a Power.]**—If executors are appointed in a will which disposes only of real property, they are usually entitled to probate of the same; but this is not the case if such will is made under a power, for then the executors have their authority limited to such property as passes under the power, and can take nothing jure representationis. *O'Dwyer, In goods of*, 1 S. & T. 465; 29 L. J., P. 47; 5 Jur., N. S. 1366.

**—To Policy of Insurance.]**—The court may, if it thinks fit, depart from the practice of not granting limited administration to a person entitled to a general grant. The district registrars are, by the rules, bound to adhere to such practice. *Patteson v. Hunter*, 30 L. J., P. 272.

A creditor insured the life of his debtor, but the policy having by mistake been made payable to the representatives of the debtor, the court granted administration to it, limited to the policy. *Id.*

**—To Particular Bequest.]**—A wife who was a legatee under the will of her father died in his lifetime and in that of her husband, leaving issue. The husband died before the father, leaving a will of which probate was granted:—Held, that as under 7 Will. 4 & 1 Vict. c. 26, s. 33, the bequest took effect as if the legatee had died immediately after her father, in which case she would have died a widow, her son was entitled to administration limited to the bequest, without citing the executor of the husband. *Council*,

*In goods of*, 2 L. R., P. 314; 41 L. J., P. 16; 25 L. T. 763.

**—To Trust Fund.]**—A., when blind, made his will, having no property of his own, but being surviving trustee of a fund consisting of stock, solely for the purpose of enabling B., to whom the reversion in the trust fund had been assigned, to receive the same. By the will he appointed B., his executors, administrators and assigns, his sole executor. B. died in A.'s lifetime, having made a will whereof C., one of his executors, had taken probate. The court being satisfied that A. knew and approved of the contents of his will when he executed it, granted probate of it to C., limited to the trust fund. *Aford, In goods of*, 1 S. & T. 540; 8 W. R. 340.

**—To Carrying out Instructions of Testator.]**—A son, being entitled to the whole of the personal estate of his father, deceased intestate, wrote from Madras, where he was serving in the Royal Artillery, to a cousin in England, giving him directions as to securing the amount of the property, and transmitting a small sum to him. The court granted administration, under 20 & 21 Vict. c. 77, s. 73, to the cousin for the use and benefit, &c., limited to carrying into effect the directions contained in the letter. *Drinkwater, In goods of*, 2 S. & T. 611; 31 L. J., P. 93; 7 L. T. 251.

**—As to Debt of Englishman to Foreign Intestate.]**—On the death of A., who was a domiciled French subject, and at the petition of his wife, the tribunal of commerce of the Seine declared his estate bankrupt. According to the practice of that tribunal, a syndic was appointed to administer the estate, and an order was made that the debts due to the estate should be sold. They were accordingly sold by auction, and amongst them one due from a firm in England:—Held, that the court, in its discretion, will not grant administration to enable such a purchaser to recover a debt due in England. *Depit v. Delerieu*, 2 S. & T. 131; 30 L. J., P. 86; 7 Jur., N. S. 196; 7 L. T. 894.

**—As to Time.]**—Upon the death of a testator, A., the surviving executor, being resident in Sydney, B., who held a general power of attorney to act for A. in this country, sent out to him for execution a special power of attorney to authorize B. to take out administration, with the will annexed, for A.'s use and benefit, and also a process of renunciation in case he should wish to renounce. The residuary legatee for life was incompetent from senility to take administration, and, subject to his interest, B. and others were entitled to the residue. The majority of the persons interested under the will being desirous that a grant should be made without waiting for the return of the power of attorney or renunciation, the court granted administration, with the will annexed, to B., limited until such time as A. should apply for probate, or his attorney for administration, with the will annexed. *Lewis, In goods of*, 29 L. J., P. 94.

**—To Property in England.]**—A husband having died in India, his property was administered by the administrator-general there, who paid one moiety of the available funds to the

widow, who was resident in India, and transmitted the other moiety to this country for distribution amongst the parties entitled at the time of his death. The court, under 20 & 21 Vict. c. 77, s. 73, granted administration of his goods to one of such parties limited to the property transmitted to this country by the administrator-general. *Hughes, In goods of*, 3 L. R., P. 140; 43 L. J., P. 31; 29 L. T. 377.

**Determination by Court of Construction.]**—A wife died, leaving property in England and Ireland, and her executrix took out probate in England, "limited to such property as she had power to dispose of." A caveat having been lodged:—Held, that inasmuch as she had power to dispose of some property in Ireland, the court would not take upon itself to decide what particular sum it was, but, simply setting aside the caveat and resealing the probate, would leave that question to be determined by a court of construction. *Mahon v. Hodgins*, 6 Ir. R., Eq. 344.

A woman made her will while under coverture; and by it, after disposing of property to which she was entitled to her separate use, bequeathed "all the residue of the real and personal estate which I shall possess or have power to dispose of at the time of my decease to my niece." After the will was executed her husband died, bequeathing her considerable personal property. Shortly afterwards she died herself, without having re-executed her will:—Held, that although the court would be warranted in holding that the testatrix, having full power over the property acquired from her husband at the time of her death, and having used language in the will sufficiently large to include it, had effectually disposed of it, yet that it was its duty to conform to the decision of the Privy Council in *Barnes v. Vincent* (5 Moore, P. C. C. 201), and to leave the question for the court of construction. *Noble v. Willcock or Phelps*, 2 L. R., P. 276; 40 L. J., P. 60; 25 L. T. 65; 19 W. R. 1115.

It accordingly refused a general probate of the will, but made the limited grant as full as it possibly could, so as not to prejudice the parties or fetter the court of construction. *Id.*

When the will of a married woman is tendered for probate on the ground that she has separate property, and the probate is contested, if the court is satisfied that there is separate property, it has power to grant probate of all such property as the testatrix had power to dispose of without deciding what that property is. But it is generally the duty of the court, so far as the evidence and pleadings enable it to do so, to decide judicially of what such property consists. *Thorp, In goods of, Thorp v. McDonald*, 3 P. D. 76; 38 L. T. 867; 26 W. R. 770—C. A.

**Foreigner Abroad—Property in this Country—Letters of Administration founded on a Foreign Decree.]**—D. M. K., a Persian subject, was by a decree of a Persian court declared entitled to certain property in this country. The decree, though founded partly upon a will, made no mention of it, and the court which had custody of the will refused to give a copy of it. The Court of Probate granted letters of administration limited to the property mentioned in a duly-authenticated copy of the decree. The court allowed the law applicable to the case to

be proved by a Persian ambassador. *Dost Aly Khan, In goods of*, 6 P. D. 6; 49 L. J., P. 78; 29 W. R. 80.

**— To Appointment of new Trustees.]**—A marriage settlement of personal estate contained a power for the surviving or continuing trustee, or the acting executors or administrators of the last surviving trustee (after the death of the husband and wife), to appoint a new trustee or new trustees in the place of any deceased trustee or trustees. The husband and wife were both deceased; and the last surviving trustee of the settlement died, having made a will. Administration of his estate, with the will annexed, was granted, but the administrator died, leaving his estate partly unadministered. The persons entitled beneficially under the settlement were infants under twenty-one years of age. A guardian having been appointed for them, the executors and legatees of the last surviving trustee were cited to accept or refuse probate or letters of administration, cum test. ann., and, on their not appearing, the court gave liberty to the guardian of the infant cestuis que trust to apply for and obtain letters of administration of the goods of the last surviving trustee, without his will annexed, and limited to the appointment of the guardian and one other person as new trustees of the settlement, and to the obtaining a transfer of the trust funds; these persons being shewn by affidavit to be fit and eligible to act as such trustees, and having consented in writing to act:—Mode of procedure and form of order in such a case. *Jackson, In goods of*, 7 L. R., Ir. 318.

**In Case of Property of Married Women.]**—By a post-nuptial settlement, an annuity for life was granted to a wife, her executors, administrators, and assigns, by her husband. The parties afterwards separated, and a decree dissolving the marriage by reason of the adultery of the husband was obtained in a Scotch court. Such decree, however, was ineffectual in this country, as the marriage had been celebrated in England and the parties domiciled here. Subsequently the husband died. After the decree made in Scotland, and before the death of her husband, she executed a will, in which she expressed an intention to dispose of her separate property only. This will was not republished after the death of the husband, and she made no other will. Probate was granted to the executor, limited to such property as he in his affidavit should state he believed to form part of her separate estate. *Crofts, In goods of*, 2 L. R., P. 18.

A wife died at Rome in 1854, in the lifetime of her husband. By an indenture of post-nuptial settlement it was provided that property which was then settled upon certain trusts, and any other property to which she might thereafter become entitled, should, in the event of her predeceasing her husband, and other events which happened, be distributable amongst her next of kin as if she had died unmarried and intestate. Her husband, an Italian, died at Rome in 1871, having executed a will, in which he appointed executors, but the will was not proved in this country. The wife was entitled to one-third share of her father's residuary personal estate which became distributable in November, 1874, and by an order of the Court of Chancery the share was carried over to her account. The court

under these circumstances granted administration limited to the fund in chancery, to one of the next of kin, without requiring the representative of the husband to be cited. *Gorefolini*, *In goods of*, 44 L. J., P. 36; 33 L. T. 72; 23 W. R. 456.

**De bonis non.**—A limited administration de bonis non, with the will annexed, will not generally be granted to a legatee. The persons entitled to a general grant should be first cited; and if they do not take administration, the legatee will be entitled to a general grant. *Watts*, *In goods of*, 1 S. & T. 538; 29 L. J., P. 108; 8 W. R. 340.

A married woman made a will under a power, and appointed two executors. One of them proved, and the husband took out a *cæterorum* administration. The deceased was the executrix of a will which she had proved:—Held, that the claim of executorship was not continued by the appointment of executors made under the power, and that the residuary legatee of the original testatrix was therefore entitled to a grant of administration de bonis non, without citing those executors to accept or renounce probate. *Hughes*, *In goods of*, 29 L. J., P. 165.

Where the unadministered estate of a testator had been transferred to the accountant-general of the Court of Chancery, and a bill had been filed praying for it to be administered by that court, the court decreed a grant de bonis non to the residuary legatee for life, without requiring her to find sureties to the administration bond. *Cleerly v. Gladdish*, 2 S. & T. 335; 31 L. J., P. 53; 5 L. T. 689.

A. died leaving a will, whereby he appointed his wife sole executrix and universal legatee. She took probate, and afterwards married B., and during her coverture made a will in execution of a power vested in her, and appointed B. sole executor. Upon her death B. took limited probate of her will, and also administration of the rest of her effects:—Held, that B., as representing the whole of his wife's personal estate, was entitled to administration of the unadministered effects of A. *Martin*, *In goods of*, 32 L. J., P. 5; 11 W. R. 191.

R., sole executrix of and universal legatee named in a will of A., died intestate, and her three children took out a joint administration to her estate. One of the children subsequently died, and a second took up her residence in Australia. A representative being required to the estate of A., to transfer trust property, the court granted administration, with the will annexed, of the estate of A. left unadministered by B., to one of the administrators of the effects of B., the other surviving administrator having been cited, and not appearing. *Hancock*, *In goods of*, 3 S. & T. 557; 33 L. J., P. 174; 10 Jur., N. S. 758.

An executor named in a will proved the same, but died without having distributed the whole estate. The court decreed administration with the will annexed of the unadministered property, to the assignee in bankruptcy of the residuary legatee. *Downard v. Dickinson*, 34 L. J., P. 4; 10 Jur., N. S. 1084.

If A. dies intestate, and B., who is solely entitled to A.'s personal estate, afterwards dies without taking out administration, the appointment of a representative to B. is a condition precedent to a grant of administration of the effects

of A. *Allen*, *In goods of*, 3 S. & T. 559; 34 L. J., P. 1; 13 W. R. 106.

A., a married woman, the sole executrix and universal legatee named in the will of B., took probate of the same and died, leaving part of his estate unadministered. C., the sole executrix named in the will of A., took probate of the same limited to the property over which A. had a power of disposal, and also administration of the rest of her goods:—Held, that C. should take a grant of administration with the will annexed of the unadministered estate of B., and not a supplemental grant of administration of the goods of A., limited to such personal estate as vested in A. as sole executrix of the will of B. *Richards*, *In goods of*, 1 L. R., P. 156; 35 L. J., P. 44; 13 L. T. 757.

A joint grant of administration de bonis non was made under 20 & 21 Vict. c. 77, s. 73, to a next of kin and to a person entitled in distribution, the next of kin consenting to the grant, and there being special circumstances rendering such joint grant convenient. *Grundy*, *In goods of*, 1 L. R., P. 459; 37 L. J., P. 21; 17 L. T. 451; 16 W. R. 406.

**Ad litem.**—The court, in accordance with the practice of the ecclesiastical courts, will make grants limited to substantiate proceedings in chancery on a mere averment of interest, without in any way considering the merits of the case, and the 15 & 16 Vict. c. 86, s. 44, does not apply where the estate to be represented is the very estate to be administered in the suit. *Maclean v. Davison*, 1 S. & T. 425.

D. propounded a will of E., which was opposed by H., one of the next of kin of E., and certain issues in the suit came on for hearing before the Court of Probate and a jury. Before the jury was sworn, terms of compromise were signed by counsel on behalf of both parties; one of which terms was that a Scotch confirmation of the will brought into court by D. should receive the seal of the court. Subsequently, the parties being unable to agree as to the meaning and effect to be given to the terms of compromise, D. moved to have the confirmation sealed and delivered out to him; the court refused to give effect to one of the terms of the compromise, the parties being unable to agree as to the rest, but held that D. was entitled to take out the confirmation unsealed. H. afterwards filed a bill in chancery for the administration of E.'s estate; a demurrer to this bill for want of parties was allowed. The estate of E. was also alleged to be vested in trustees by sequestration under the Scotch Bankruptcy Acts. H. moved for administration with the will annexed, pendente lite, or for administration limited to substantiate the proceedings in chancery:—Held, that the nominee of H. was entitled to a grant of the latter description. *Hawarden (Viscountess) v. Dunlop*, 2 S. & T. 614; 31 L. J., P. 180; 7 L. T. 251.

F. died in 1836, leaving a will and one codicil, and therein appointed three executors and residuary legatees in trust. Two renounced and the third took probate, but died in 1853 intestate. All the residuary legatees named in the will and codicil then renounced except T., and on his being cited and not appearing, a grant de bonis non (will annexed) was made to K. as a creditor. He died in 1858, leaving personalty of F. unadministered. F. was indebted to his co-trustees of the marriage settlement of D. in

respect of trust moneys misappropriated by him, which had been the subject of proceedings in chancery. By indenture of the 28th of December, 1860, the executors of the surviving trustee agreed with the persons beneficially entitled to the trust fund to transfer all their right and title to sue, on receiving discharges from such persons; and the court, on T. being cited and not appearing, granted to the nominee of the assignees of the executors of the surviving trustee administration de bonis non, with the will annexed, of F., limited to revive and substantiate the proceedings in chancery. *Frampton, In goods of*, 3 S. & T. 169; 9 Jur., N. S. 755; 8 L. T. 701.

The grant of letters of administration ad litem makes the grantee complete representative of the estate to the extent of the authority which the letters purport to confer, and a decree obtained against such grantee is therefore binding upon any one who may afterwards take out general administration to the estate. *Davis v. Chanter*, 2 Ph. 545; 17 L. J., Ch. 297.

T. was not heard of from December, 1846. More than seven years afterwards, namely, in September, 1854, he would, if alive, have become entitled, by the death of a relative, to a share in her residuary personal estate. This share had, in his absence, been paid into the account of the accountant-general of the Court of Chancery, who, it was stated, was prepared to pay it to his administrator. He had no other property in this country. The court declined to make a general grant of administration to his brother, on the ground that he must be presumed to have died before the death of his relative, but made a grant limited to substantiate proceedings in the Court of Chancery. *Turner, In goods of*, 3 S. & T. 476; 33 L. J., P. 180; 10 Jur., N. S. 708.

A., under the impression that he was entitled in his own right to a share in the residue of an estate, assigned it for a sufficient consideration to B. At the time he executed the deed of assignment the share formed part of the estate of his father, to whom he was administrator. On the death of A. the court refused to grant administration to the executor of B. of the estate of the father, limited to A.'s interest in such share, the value of which had been ascertained in the Court of Chancery, but only limited to institute proceedings in that court, and to receive whatever he might be held entitled to by it. *Burdon v. Morgan, Longhurst, In goods of*, 2 L. R., P. 371; 41 L. J., P. 26; 26 L. T. 405; 20 W. R. 618. See also *cases ante*, col. 945.

— **To Substantiate Claim in French Courts.**—When a woman died in France, leaving personal estate there but none in England, and it was alleged that, by the law of France, her husband, from whom she had eloped, could not establish his claim to her property there without a grant from the Court of Probate:—Held, that the court had no jurisdiction to make a limited grant to enable him to substantiate his claim to the property in the courts of France. *Tucker, In goods of*, 3 S. & T. 585; 34 L. J., P. 229.

— **For bringing Action for Damages for Negligence.**—Where the death of a married woman had been caused by negligence, and her husband, a mariner, was abroad at the time, and was not expected to return until after the twelve

months limited by 9 & 10 Vict. c. 93, s. 3, for bringing an action to recover damages would expire, the court granted to her mother letters of administration limited for the purpose of bringing such action. *Williams, In goods of*, 31 L. J., P. 40, n.

— **Subsequent Application for General Grant.**—A grant of administration in the goods of a deceased, limited to carry on proceedings in chancery, having lawfully issued and being still in force, the court will not revoke it, in order that a general grant may be made to the party who in the first instance would have been entitled thereto. The proper course is to supplement the limited grant with a grant of administration of the rest of the goods of the deceased. *Brown, In goods of*, 2 L. R., P. 455.

#### n. Probates of Wills affecting Real Estate.

**How far Probate is Evidence.**—In ejectment by the heir-at-law against the devisee, he served on the plaintiff, under 20 & 21 Vict. c. 77, s. 64, a notice, addressed to her and her attorney, that he intended at the trial "to adduce in evidence the probate of the will as proof of the devise." The plaintiff did not within four days of the receipt of that notice give notice to the defendant that she disputed the validity of the will. At the trial the defendant produced the probate of the will duly stamped with the seal of the Probate Court:—Held, that the probate was not conclusive evidence of the validity and contents of the will. *Barraclough v. Greenough*, 2 L. R., Q. B. 612; 36 L. J., Q. B. 261; 15 W. R. 934; 8 B. & S. 623—Ex. Ch.

An appointment of a testamentary guardian is not "a devise or other testamentary disposition of or affecting real estate" within the 20 & 21 Vict. c. 79, s. 68 (similar to 20 & 21 Vict. c. 77, s. 64), so as to admit of being proved by "the probate of the will or the letters of administration with the will annexed, or a copy thereof, stamped with any seal of the Court of Probate." *Cope v. Mooney*, 14 Ir. C. L. R. 256; 10 L. T. 854.

Where the notice required by s. 68 of 20 & 21 Vict. c. 79 (Irish), similar to s. 64 of the 20 & 21 Vict. c. 77 (English), has been given, and no counter-notice served, probate of a will obtained prior to the passing of that act, and sealed with the seal of the Prerogative Court, is admissible upon a question relating to real estate, and does not require for that purpose to be sealed with the seal of the Court of Probate. *Irwin v. Callwell*, 12 Ir. C. L. R. 144.

Sect. 68 of the 20 & 21 Vict. c. 79 (Irish), only requires that the notice to be given thereunder shall state that the party giving it means to rely on the probate of the will, or a copy thereof; and does not require the party giving such notice to specify the particular purposes for which he intends to make use of the probate or a copy thereof. *Id.*

Probate of a will is admissible without being stamped with the seal of the court under 20 & 21 Vict. c. 77, s. 64. The stamp of the seal of the court is required for a copy only. *Rippon v. Priest*, 3 F. & F. 644.

**To Receivers of Real Estate.**—See *ante*, col. 947.

### c. Foreign and Colonial Grants.

**Foreign Grant.**—Probate in common form of a will alleged to be valid by the law of a foreign country will be granted on *prima facie* proof that the foreign court has adopted it as a valid testament, but the certificate of a notary public, referring to some act of a foreign court, is not sufficient. *Deshais, In goods of; De Vigny (Countess), In goods of*, 4 S. & T. 13; 34 L. J., P. 58; 12 L. T. 854; 13 L. T. 246; 13 W. R. 616, 640.

Where a will has been proved in the proper court of the domicile of the deceased, it is the ordinary practice of the court to grant probate on a copy of the will authenticated by the authorities of the place of domicile; in the case of a Russian probate, however, as the original will forms part of such probate, it will accept a certified copy of the will made in this country. *Clarke, In goods of*, 36 L. J., P. 72; 16 L. T. 366; 15 W. R. 881.

The prayer for probate may also be supported on another ground, viz., on the affidavit of a skilled person as to the validity of such a paper by the law of the foreign country, and on an affidavit as to the domicile of the deceased. *Id.*

Where a translation of a will originally written in English has been proved in the court of a foreign country, and probate is asked on that ground, a retranslation of the translation is the proper document to produce; but if proof of the validity of the paper by the law of the foreign domicile is relied on, then the original, or a copy of the original, should be before the court. *Id.*

A Spaniard died at Bilbao, in Spain. On the day of his death he caused a document to be prepared by a notary, purporting to give authority to his wife to make a will on his behalf. In pursuance of this authority she made a will on his behalf after his decease, and appointed herself executrix. The court being satisfied from the affidavit of a Spanish advocate that such a will was valid according to the law of Spain, decreed probate. *Gutierrez, In goods of*, 38 L. J., P. 48; 20 L. T. 758; 17 W. R. 742.

The court refused to follow a foreign grant which was made by the foreign court to persons who were not entitled as of right, but who were nominated by the widow and next of kin for the purpose, there being nothing on the face of the proceedings to shew that she had renewed the consent in their favour in respect of the administration of the English estate. *Weaver, In goods of*, 36 L. J., P. 41; 15 L. T. 331; 15 W. R. 199.

The court follows the grant of the court of the testator's domicile, as to the document which that court has admitted to probate, but not as to the person to whom the grant is made. *Cosmahan, In goods of*, 1 L. R., P. 183; 35 L. J., P. 76; 14 L. T. 337; 14 W. R. 969.

Where a testator dies domiciled in a foreign country, and probate has been granted in that country, the court will indorse that grant without examining the grounds on which it was based. *Smith, In goods of*, 16 W. R. 1130.

**Colonial Grant.**—A married woman died domiciled in the colony of the Cape of Good Hope. On her marriage with B. an agreement was entered into between them which, according to the laws of the colony, excluded B. from all right or interest in her property, but did not deprive him of the right to administration of

her personal estate and effects, in the event of her dying intestate. On her death, intestate, letters of administration were granted by the supreme court of the colony to the husband of her sister, and the court granted administration of her personal estate and effects in England to one of her brothers and next of kin resident in this country, without requiring the husband to be cited. *Probart, In goods of*, 36 L. J., P. 71; 16 L. T. 298; 15 W. R. 798.

A person died domiciled in New South Wales, in which country probate of his will was granted to A., as executor according to its tenor. According to the practice the words of the will did not constitute an executorship; but in order to follow the colonial grant as near as possible, the court directed that administration should issue to A. under 20 & 21 Vict. c. 77, s. 73, as the person entitled by the grant from the proper court in New South Wales to administer the effects of the deceased. *Earl, In goods of*, 36 L. J., P. 127; 16 L. T. 799.

A certified copy of a will and codicil which had been proved in Jamaica was sent to this country by the secretary of the island, but by mistake the probate was not sent. The court being satisfied by the certificate of the secretary that the copy sent was a true copy of the will and codicil, granted probate until a more authentic copy should be brought into the registry. *Turner, In goods of*, 36 L. J., P. 82; 15 L. T. 446.

### d. Scotch and Irish Grants.

**Scotch—Finding of Commissary as to Domicil.**—The finding of the commissary as to Scotch domicile, under 21 & 22 Vict. c. 56, s. 9, 12, is conclusive evidence of the fact of domicile for the purposes of that act only; i.e. for rendering it unnecessary to take an English probate in respect of assets in England; but it has no effect in determining any issues raised in a suit in the Court of Probate, which will proceed to try such issues, though a confirmation of the will in question is tendered for the seal of the court. *Hawarden v. Dunlop*, 2 S. & T. 340; 31 L. J., P. 17; 5 L. T. 765.

**Confirmation.**—Executors of a Scotch will, having sent the original confirmation granted by the Commissary Court to the colony of Victoria, obtained a duplicate confirmation from that court, and applied under 21 & 22 Vict. c. 56, s. 12, to have the seal of the Probate Court affixed to it. The court ordered the seal to be affixed, on the ground that it was bound to give faith to the commissary's certificate, and could not take into consideration the fact that the confirmation was a duplicate. *Webster, In goods of*, 29 L. J., P. 66; 5 Jur., N. S. 1270.

The fact of one of three executors having declined to accept a confirmation in Scotland is no bar to his afterwards applying, the other executors having died, for a grant of probate in England. *Campbell, In goods of*, 23 L. T. 323; 18 W. R. 844.

Where confirmation of the executor of a person who has died domiciled in Scotland has been sealed with the seal of the Court of Probate, in manner provided by 21 & 22 Vict. c. 56, s. 12, the executor has all the powers of an ordinary English executor, and may sell and dispose of leaseholds in England, although they are specifically be-

queathed, and although, by the law of Scotland, an executor cannot deal with leasehold property in that country. *Hood v. Barrington (Lord)*, 6 L. R., Eq. 218.

— **Eik or additional Confirmation.**—On the death of a domiciled Scotchman, his widow filed in the Commissary Court at Jedburgh an inventory of his estate, distinguishing which part was situate in Scotland and which in England, and the value of each, and she was decreed and confirmed executrix dativo to the deceased. The confirmation was sealed in England. Subsequently additional estate was discovered in England. Thereupon the executrix filed a fresh inventory of such estate in the Commissary Court, and obtained an eik or an additional confirmation, the court ordering the eik to be sealed in the registry. *Ryde, In goods of*, 2 L. R., P. 86; 39 L. J., P. 49; 23 L. T. 166; 18 W. R. 902. The seal of the court will not be affixed to an eik or an additional confirmation. *Hutcheson, In goods of*, 3 S. & T. 165; 32 L. J., P. 167; 11 W. R. 772.

Where an original confirmation obtained in a commissary court of Scotland is incomplete, it is requisite, for the purpose of obtaining the seal of the Court of Probate, that there should be a new confirmation, including the whole of the personal estate in England and Scotland. *Id.*

An additional confirmation granted under 21 & 22 Vict. c. 56, s. 12, does not apply to an original confirmation granted before that act came into operation. *Gordon, In goods of*, 2 S. & T. 622; 29 L. J., P. 67.

Where an inventory has been recorded in a commissary court of Scotland of the personal estate of a person who died domiciled in Scotland, and confirmation has been granted in respect of the same, and afterwards an additional inventory has been recorded of personal estate belonging to the deceased in England, and an eik, or additional confirmation, has been granted in respect of the same, the Court of Probate will not seal such eik, or additional confirmation. *Wingate, In goods of*, 2 S. & T. 625; 8 Jur., N. S. 142.

— **Inventory.**—In a form of confirmation, produced in order to be sealed in the English Court of Probate, it was not stated that the inventory given in on oath contained the personal estate of the deceased "at the time of his death":—Held, that since 23 & 24 Vict. c. 80, the fifth section of which requires that certain property, to be included in the inventory, shall be taken at its value on the day the inventory is sworn to, such words are properly omitted. *Hay, In goods of*, 3 S. & T. 273; 33 L. J., P. 25; 10 Jur., N. S. 136; 9 L. T. 454.

**Assets in Scotland and England—Will proved in Scotland only—Right of Legatee to Insist upon Proof in England.**—W. E. died possessed of property of small value in this country, and entitled under the will of J. O. E., to large assets in Scotland which were being duly administered there. The executors of W. E. proved his will in Scotland only. G. W. H., a legatee under W. E.'s will, applied for a grant of administration of the estate of W. E. in this country, which application was opposed by the executors:—Held, that the court is not bound to make such a grant, but that its power is discre-

tionary. *Ewing, In goods of*, or *Hope v. Ewing*, 6 P. D. 19; 50 L. J., P. 11; 44 L. T. 278; 29 W. R. 474; 45 J. P. 376.

Held, also, that it not having been shewn that the executors were not doing their duty, there was no necessity for any grant in this country. Application refused. *Id.*

A similar application was made by another legatee upon the ground also that such a grant was necessary to substantiate proceedings in chancery. Application refused, on its being proved that the grant was not necessary for the suit in chancery. *Id.*

— **Memorandum as to Domicil of Deceased after Issue of Probate.**—A note or a memorandum on a probate that the deceased died domiciled in England may, under 21 & 22 Vict. c. 56, s. 14, be written after the probate has issued. *Allison, In goods of*, 34 L. J., P. 20; 10 Jur., N. S. 1244; 11 L. T. 514; 13 W. R. 277.

**Irish.**—Letters of administration granted in the Irish Probate Registry, limited to a fund, were presented in the Probate Registry in England to be resealed. They had attached to them a certificate from the Inland Revenue Office, that the deceased had no personal estate within the jurisdiction of the English Probate Court to be affected by the administration; and from the registrar of the Irish Probate Court, that a bond had been given sufficient in amount to cover the property to which the said administration was limited:—Held, that the requirements of 20 & 21 Vict. c. 79, and 21 & 22 Vict. c. 95, had not been complied with, and the letters of administration could not be resealed. *Roohe, In goods of*, 7 Jur., N. S. 784.

After a testamentary suit had been determined by a decree that a paper writing propounded as the last will of a deceased was invalid, the court ordered an Irish grant of administration, which had been brought into the registry, to be resealed with the seal of the Court of Probate in England, under 20 & 21 Vict. c. 79, s. 95. *Collins, In goods of*, 32 L. J., P. 26; 11 W. R. 154.

A party, having obtained letters of administration of the effects of a deceased in this country, and given security to cover the property in England only, may subsequently give additional security to include property in Ireland, in order to apply for the certificate of the registrar in England, without which, under 22 & 23 Vict. c. 31, s. 25, such letters cannot be resealed in Ireland. *Potts, In goods of*, 6 Jur., N. S. 486; 2 L. T. 255; 8 W. R. 454.

G. died intestate, leaving her husband surviving her, who did not take administration to her estate. The will of the husband was proved in the Prerogative Court of Armagh, Ireland, but no grant was made in this country. The will of the sole executor of the husband was also proved in Ireland, but was resealed in London:—Held, that the executor under the last-mentioned will did not represent the husband in England so as to be entitled to obtain administration of the goods of the deceased. *Gaynor, In goods of*, 1 L. R., P. 723; 38 L. J., P. 79; 21 L. T. 367; 17 W. R. 1062.

#### q. In other Cases.

**Debtors.**—Making a debtor an executor is not an extinguishment of the debt. *Carey v. Goodinge*, 3 Bro. C. C. 110.

Where a creditor makes his debtor, or one of his joint and several debtors, his executor, either alone or with others, the debt is discharged by operation of law, for he cannot have an action against himself; and a personal thing if suspended is lost. *Cheetham v. Ward*, 1 B. & P. 630.

Where the payee of a promissory note made the maker his executor, held, that the debt was discharged, and that no action could be maintained on the note, even by a person to whom the executor had indorsed it. *Freakeley v. Fox*, 9 B. & C. 130; 4 M. & R. 18.

**Parties in Equal Degree.]**—A person died, leaving a brother and three sisters surviving him. The brother had been twice bankrupt, and on the last occasion had paid no dividend. The parties applying for administration were, on the one hand, the brother, and on the other, two of the sisters, with the assent of the third:—Held, that the court, where it has a discretion, will, *cæteris paribus*, grant administration to a male in preference to a female, but not so when such grant is opposed by those who have a majority of interests in the property. *Iredale v. Ford*, 1 S. & T. 305; 5 Jur., N. S. 474; 7 W. R. 462.

Where several parties in equal degree apply for administration, the party obtaining it will be required to find justifying security to the amount of the share of the dissenting party. *Ib.*

**Parties Abroad.]**—When administration to an estate of a person who died, resident abroad, is applied for, it should appear upon affidavit that he left personal property in this country. *Evans v. Burrell*, 28 L. J., P. 82.

Where A., the person primarily entitled to letters of administration, is abroad, and a citation has issued, but has not been personally served, calling on him to accept or refuse letters of administration, or shew cause why they should not be granted to B., who in the event of A.'s refusing to accept administration, would be entitled to them, the court, before granting administration to B., requires an affidavit that A. has no agent in this country. *Ib.*

**Male or Female.]**—*Cæteris paribus*, the male is preferred to the female in a contest for a grant of administration, but the female, when with the consent of the male she is prior petens, is preferred to the male who afterwards opposes her taking the grant. *Cordeux v. Trasler*, 4 S. & T. 48; 34 L. J., P. 127; 11 Jur., N. S. 587.

Although charges of intemperance and misconduct were alleged against the eldest male next of kin, who represented the majority of interests, and who was the prior applicant, the court granted administration to him in preference to a female representative of the deceased. *Ellison v. M'Cormick*, 14 W. R. 742.

**When there has been an Intermeddling.]**—On a proxy of renunciation and consent being filed by a widow, which omitted, however, the declaration that she had not intermeddled in the estate (she having intermeddled therein through mistake), the court granted administration to the natural and lawful father of the deceased. *Fell*, *In goods of*, 2 S. & T. 126; 3 L. T. 756; 9 W. R. 252.

The executors of a will intermeddled in the estate and effects of their testator, without taking

probate of the instrument. A citation having been served upon them, to enter an appearance and take probate, they entered an appearance, but took no further steps in the matter. The court refused to grant an attachment against them for contempt in not obeying the citation, but directed a peremptory order to be served upon them to take probate within ten days from the date of the order. *Mordaunt v. Clarke*, 1 L. R., P. 592; 38 L. J., P. 45; 19 L. T. 610.

**Officers of Isle of Man.]**—In the Isle of Man officers called "summers" are appointed in each parish by the bishop, whose duty it is to take upon themselves grants of administration with the wills annexed, in the event of executors refusing to act, or being unable to give security to the ecclesiastical court of the diocese. A. died in the Isle of Man, leaving a will, whereof he appointed executors. The executors being unable to give security to the ecclesiastical court of the diocese, administration with the will annexed was granted to B., sumner for the parish in which A. died. The executors having been cited and not appearing, the court, upon an affidavit as to the circumstances under which the grant was made to B., and upon B.'s consent being filed in the registry, granted administration with the will annexed to the residuary legatee. *Whiston*, *In goods of*, 2 S. & T. 318; *S. C.*, nom. *Cubbon v. Steele*, 30 L. J., P. 192; 5 L. T. 140.

**Corporation.]**—When an executor named in a will is a corporation aggregate, administration with the will annexed will be granted to its syndic, i. e., a person specially appointed by the corporation for that purpose. *Darke*, *In goods of*, 1 S. & T. 516; 29 L. J., P. 71; 2 L. T. 24; 8 W. R. 273.

**Assignees of Bankrupts.]**—A., in 1813, assigned certain bills of exchange and negotiable instruments to B., who was, in 1833, adjudicated a bankrupt. In 1862, C., being his official assignee, assigned the sums remaining due and to become due on the bills of exchange and the negotiable instruments to D. as purchaser, under the Bankruptcy Act, 1861, s. 137, and D. sold and assigned them to E. The court declined to make a grant of the personal effects of A., limited to the aforesaid sums (the next of kin of A. having been cited and not appearing), to E., but made the grant to D. as assignee of the official assignee. *Coles*, *In goods of*, 3 S. & T. 181; 33 L. J., P. 175; 9 Jur., N. S. 1080; 9 L. T. 519.

A. died leaving a will, whereof he appointed B. executor and residuary legatee. B. proved the will, and afterwards became bankrupt, and subsequently died intestate, leaving part of the estate of A. unadministered. At the time of his bankruptcy B. was a creditor of A. The court granted administration with the will annexed of the unadministered estate of A. to the assignee in bankruptcy of B. in the character of assignee of a residuary legatee. *Chune*, *In goods of*, 3 S. & T. 564; 11 L. T. 641.

A married woman had, at the time of her death, a reversionary interest under the will of her grandmother, and shortly afterwards her estate became absolutely entitled to 242*l.* 10*s.* 11*d.* as her share of her grandmother's residuary personal estate. She left no children, and her husband was adjudicated a bankrupt. The husband refused to renounce administration, and did not

appear to a citation issued by the trustee under his bankruptcy. The court, under 20 & 21 Vict. c. 77, s. 73, granted letters of administration to the trustee under the husband's bankruptcy, limited to the share of the deceased in the residuary personal estate of her grandmother. *Tilley v. Trussler*, 26 W. R. 760.

**Trustees.]**—When a court of equity had made an order under the Trustee Act, 1850 (13 & 14 Vict. c. 60), ss. 27 and 32, substituting new trustees for those named in the will, the Court of Probate granted administration with the will annexed to the substituted trustees without requiring the execution of a deed of conveyance to them by the old trustees. *Woodfall, In goods of*, 3 L. R., P. 108; 42 L. J., P. 64; 29 L. T. 248; 21 W. R. 933.

A., who died intestate, was one of the executors and trustees of his father's will, and applied to his own use considerable sums, part of the trust funds, which came into his hands as trustee. A renunciation and consent having been filed by the next of kin, the court granted administration of the personal estate and effects of the deceased to B. and C., the substituted trustees under his father's will. *Bond, In goods of*, 44 L. J., P. 41; 33 L. T. 71; 23 W. R. 597.

**— Of Marriage Settlement—20 & 21 Vict. c. 77, s. 73.]**—A. died intestate. His estate was insolvent, the only asset of any value being an interest in a mortgage of property in Ceylon, which he had conveyed to the trustees of his marriage settlement, one of whom was B., his brother-in-law. A. was a widower, and left five children, two of whom were of full age. The two adult children renounced administration. The court, on a renunciation by the eldest son on behalf of the minor children, who had appointed him as their guardian for the purpose of the application, made a grant of administration to B. under 20 & 21 Vict. c. 77, s. 73. *Tyndall, In goods of*, 51 L. J., P. 12; 30 W. R. 231; 46 J. P. 169.

The sole next of kin of an intestate was a married woman whose husband had been for several years in Australia without being heard of. By a settlement executed on the marriage all property was settled upon the wife to her separate use, independently of her husband and without power of anticipation, with remainder to the husband for life, remainder to the children of the marriage. The wife having renounced administration, the court granted letters of administration to the trustees of the settlement under 20 & 21 Vict. c. 77, s. 73. *Maychell, In goods of*, 4 P. D. 74; 47 L. J., P. 31; 39 L. T. 94; 26 W. R. 439.

**Foreigner's Property in England.]**—A domiciled Paraguayan died in Paraguay, leaving personal property in England. After his death, but before a grant was made in England, a decree of the government of Paraguay declared that all his property, wheresoever situate, was the property of the nation of Paraguay. The court held that, although by the law of Paraguay, as existing at the time when the grant of the probate of his will was applied for, the will might be invalid, the right to the grant and the succession to the property must be governed by the law of Paraguay as it existed at the time of the death; and, therefore, that the government

of Paraguay had no locus standi to contest the validity of the will. *Lynch v. Provisional Government of Paraguay*, 2 L. R., P. 268; 40 L. J., P. 81; 25 L. T. 164; 19 W. R. 982.

When the deceased is domiciled in a foreign country, and an application is made to the Probate Court, either for an original or a *de bonis* grant of administration, it will be prepared to make it to the person recognized by the proper court of that country. *Hill, In goods of*, 2 L. R., P. 89; 39 L. J., P. 52; 23 L. T. 167; 18 W. R. 1005.

Succession to chattels real depends on the law of the country wherein they are situate, and not on that of the deceased's domicile; and in case of intestacy the right to administration as to chattels real must follow the right of succession to them; and it is not the practice of the Court of Probate to limit its grants by the measure of the beneficial interest of the grantee. *Gentili, In goods of*, 9 L. R., Eq. 541.

Where, therefore, a married woman, domiciled in Italy, died there possessed of a leasehold interest in Ireland settled to her separate use, her husband was held entitled to an unqualified administration as to the leasehold, although his beneficial interest in it was but limited. *Id.*

**Dying Abroad.]**—When a party in respect of whose estate a grant is asked for died abroad, there should be an affidavit that he left personal property in England, otherwise the court has no jurisdiction to make the grant. *Evans v. Burrell*, 4 S. & T. 185.

**In case of Felons.]**—A wife became entitled to a legacy of 100*l.* in 1827. In 1833 she was convicted of felony and transported to Van Diemen's Land for seven years. In 1843 she received a certificate of freedom, and was not heard of afterwards. The legacy, which was the only property to which she was entitled, became payable in 1870. The court required notice to be served on the Queen's Proctor before granting administration of her personal estate and effects of her husband. *Stevens or Stephens, In goods of*, 42 L. J., P. 23; 28 L. T. 143; 21 W. R. 345; 12 Cox, C. C. 382.

**Receivers of the Court of Chancery.]**—Proceedings in chancery having been taken by persons having claims upon the estate of an intestate, against his widow, who was alleged to have possessed herself of part of the estate, but who had not taken out administration, the Court of Chancery appointed a receiver, with authority to collect, get in, and receive the estate, and to apply to the Court of Probate for administration. The widow and all the next of kin and persons entitled in distribution having been cited, upon their non-appearance to the citation, the court made a general grant of administration to the receiver. *Mayer, In goods of*, 3 L. R., P. 39; 42 L. J., P. 57; 29 L. T. 247.

**Oath of Administrator.]**—The mother of an intestate was the sole forthcoming next of kin, and as no positive intelligence had been received of the father's death, though he had been missing since 1852, the court allowed the administratrix to swear that she believed herself to be the sole next of kin. *Reed, In goods of*, 29 L. T. 932.

## 3. ADMINISTRATION BOND.

**General Rules as to.]**—The court will not determine the amount under which an estate is to be sworn. *Cleverley v. Gladdish*, 2 S. & T. 335; 31 L. J., P. 53; 10 W. R. 265.

The general rule is, that creditors are not entitled to require the next of kin, or the guardian of the next of kin, to give justifying security; and a very strong case ought to be made out before a departure from the rule is allowed. *John v. Bradbury*, 1 L. R., P. 245; 15 L. T. 414.

F. appointed S. residuary legatee and executor, and in case of his decease leaving the directions of the will unperformed, substituted P. as executor. In August, 1850, probate was granted to S., who died in December, 1862, leaving certain legatees of income for their lives under the will surviving. P. renounced probate, and the widow of S. renounced administration with the will annexed. One of the legatees for life was entitled to administration with the will annexed, technically a cessat grant, on which a bond is usually required in double the amount of the deceased's property at time of death. The court directed a bond to be taken in the same amount as would have been required if the grant had been one de bonis non. *Fozard*, in goods of, 3 S. & T. 173; 32 L. J., P. 160; 9 Jur., N. S. 756; 8 L. T. 702; 12 W. R. 19.

**Lodging Assets in Court under Trustee Relief Act—Surety.]**—The surety in the Probate Court of an administrator who has got money assets of the intestate in his hands, may lodge it in court under the Trustee Relief Act. *Monahan*, in re, 8 Ir. R., Eq. 353.

The balance of the assets of an intestate, after they have been fully administered, should be lodged to a credit entitled, "In the matter of the 11 & 12 Vict. c. 68, and separate credit of the next of kin" of the intestate. *Id.*

**When Penalty will be Reduced—Sureties.]**—When an administrator, who was the sole person entitled in distribution, had no friends in this country willing to become sureties, the court, though it refused to dispense with the ordinary bonds, allowed the amount to be spread over several sureties or to be secured by one surety alone. *Smith*, in goods of, 29 L. T. 932.

When the estate was under 5,000*l.*, and all the debts of the intestate, with the exception of a few small debts, amounting to 25*l.*, had been paid and satisfied by the administrator, who was the only next of kin and the only person entitled in distribution to the personal estate, the court required only one surety to join in the administration bond. *Bellamy*, in goods of, 44 L. J., P. 49; 33 L. T. 71; 23 W. R. 552.

The husband of the sole next of kin of a deceased lunatic administered to the estate after her death. The estate was considerable, and the applicant being in humble circumstances was unable to find the requisite sureties. The court allowed the applicant himself to give a bond for the full amount of the usual penalties, and ordered him to find sureties in 100*l.* *Harrow*, in goods of, 21 L. T. 834.

A wife took out administration to her husband's estate, and became insane before completely administering it. The court in granting administration to the son allowed the sureties to justify for the present instead of the original

value of the estate. *James*, in goods of, 21 L. T. 730.

When a limited administration was granted merely to enable the personal representative to assign the legal estate in certain leaseholds of the value of 6,000*l.* which had been sold by the trustees, the court allowed the administrator's bond to be in the nominal penalty of 200*l.* *Bowly*, in goods of, 45 L. J., P. 100.

A. died intestate, leaving B. his only next of kin, and solely entitled in distribution. His personal estate was of the value of about 55*l.*, and it seemed that he had no debts. B. being unable, through poverty, to obtain sureties to the amount of 200*l.*, the penalty of the requisite bond, the court reduced the penalty to 60*l.* *Harrigan*, in goods of, 32 L. J., P. 204.

A. died intestate, leaving personalty sworn under the value of 6,000*l.* A's father, who was his only next of kin, and the only person entitled in distribution, being unable to procure sureties to a bond in a penalty for double the amount of the estate, the court accepted two sureties in 1,000*l.* each. *McDonald*, in goods of, 32 L. J., P. 132; W. R. 957.

An administratrix was allowed to enter into a bond, with sureties, in the penalty of 100*l.* only, although the effects would be sworn under 3,000*l.* *Gent*, in goods of, 1 S. & T. 54; 27 L. J., P. 37; 4 Jur., N. S. 341.

On an administration with the will annexed de bonis non, to a contingent annuitant and legatee, with the consent of minor children beneficially interested, the property about 8,000*l.*, the court allowed two sureties to justify to the amount of 1,000*l.* each. *Fraser*, in goods of, 33 L. J., P. 57; 9 L. T. 845.

When security had already been given by an applicant, as committee in lunacy, the court required a bond for one-fourth of the property, with two sureties, each in one-half the amount. *Powis*, in goods of, 34 L. J., P. 55.

**Disability of Person entitled in Distribution.]**—In a case of intestacy, where one of the persons entitled in distribution was a minor, but the others were willing to dispense with justifying security, administration was granted to one of the latter, and the amount of security was limited to a sum sufficient to cover the estimated share of the minor in the assets—(1), on the consent of the remaining adult entitled in distribution that the security given should be primarily available to secure the interest of the minor in the personal estate of the intestate; and (2) on the court being satisfied that no danger was to be apprehended from creditors. *Elliott*, in goods of, 3 L. R., Ir. 147.

**Increase in Value of Property—Administrator Abroad.]**—A., having taken out administration to the goods of the deceased, went abroad. Subsequently, under an order of the Court of Chancery, a considerable sum became payable to the estate of the deceased, and of his brother and sister, who were also deceased. The order could not be passed and entered until the additional duty on these estates had been paid. In the absence of the administrator, who was in Japan, the court allowed another person to file an affidavit as to the increase of property, and to execute the bond to cover the increased duty (in the place of the administrator), with two sureties, on the understanding that, as soon as

possible, the administrator should execute a similar bond. *Ross, In goods of*, 2 P. D. 274; 46 L. J., P. 57; 25 W. R. 808.

**Property Sworn under larger Sum than real Value.]**—Where justifying security had been ordered, and it appeared that though the estate had been sworn under 2,000*l.*, its actual value was only 800*l.*, the court allowed the sureties to justify for double the amount of the actual value, instead of double the amount under which the estate was sworn. *England v. Wall*, 31 L. J., P. 16.

Where, under a misapprehension as to the value of the personal estate of an intestate, the penalty of the bond was too large, the court, upon the execution of a fresh bond in a penalty proportioned to the actual value of the estate, ordered the original bond to be delivered out of the registry to be cancelled. *Goold, In goods of*, 1 S. & T. 20; 34 L. J., P. 105; 11 Jur., N. S. 288; 13 L. T. 193.

**Reswearing Amount.]**—An administration was taken out under 20,000*l.*, and a bond in a penalty of double that sum entered into. The administratrix subsequently received a sum of money from a bankrupt estate indebted to the deceased, which made it necessary to reswear the amount under 25,000*l.* The court directed the registrars of the principal registry to receive a separate bond in the penalty of 10,000*l.*, which, together with the original bond, would be double the amount of the sum under which the estate was to be resworn. *Weir, In goods of*, 1 S. & T. 506; 28 L. J., P. 111; 2 L. T. 191.

**Married Woman — Consent of Husband.]**—Since the Married Women's Property Act, 1882, when a married woman is administratrix it is not necessary that her husband should join in the administration bond. *Ayres, In goods of*, 8 P. D. 168; 52 L. J., P. 98; 31 W. R. 660; 47 J. P. 440.

A married woman had become entitled to 3*l.* per cents. standing in the name of the accountant-general of the Court of Chancery, and it was proposed to apply to that court to have a settlement of such property made in her favour. In order thereto it was requisite that she should take administration to the estate of a deceased party under whose will she was so entitled; but her husband refused to execute the bond:—Held, that on an attorney certifying that the wife could act upon such a grant without her husband, administration might issue to her, and that the bond might be executed on her behalf by a third person in place of her husband. *Sutherland, In goods of*, 31 L. J., P. 126; 8 Jur., N. S. 465.

**Sureties—When dispensed with.]**—The court made an order to dispense with the usual sureties to be entered into by A.; who was beneficially entitled to a fund which had been paid into the Court of Chancery, and for which the administration was required, it appearing that A. was, in consequence of sickness, in great poverty, and unable to induce any of his relatives or friends to become sureties to the bond. *De la Farque, In goods of*, 2 S. & T. 631; 31 L. J., P. 199; 7 L. T. 194.

Where a testator was a domiciled Frenchman, and the will was made in France, the court, on affidavits that the legacies were all paid, and

that there were no debts in this country, allowed administration with the will annexed to go, without requiring sureties to the administration bond. *Bejot, In goods of*, 20 L. T. 231.

**— Notice to Creditors by Advertisement.]**—The 22 & 23 Vict. c. 35, s. 29, affords protection to sureties in an administration bond, where the administrator, before distributing the assets of the intestate, has pursued the course pointed out by that section. *Newton v. Sherry*, 1 C. P. D. 246; 45 L. J., C. P. 257; 34 L. T. 251; 24 W. R. 371.

**Sureties Resident out of Jurisdiction.]**—Where a limited grant of administration had been made to a person resident without the jurisdiction of the court, who was unable to procure justifying sureties within its jurisdiction, the court accepted sureties resident in Jersey. *Reed, In goods of*, 3 S. & T. 439.

The court will not allow residents in Scotland to be sureties. *Herbert v. Shiell*, 3 S. & T. 479; 33 L. J., P. 142.

The court is at liberty to accept as sureties persons resident out of its jurisdiction, when the principal, who is also residing without the jurisdiction, is unable to procure sureties within the jurisdiction, provided a writ of summons is servable on the sureties under 15 & 16 Vict. c. 76, s. 18. *Ballingall, In goods of*, 3 S. & T. 441, n.; 32 L. J., P. 138; 9 L. T. 116; 11 W. R. 591.

Where a person applying for administration was solely entitled to the personal estate of the deceased, and there were no creditors, the court allowed the sureties to be persons resident in Scotland. *Houston, In goods of*, 1 L. R., P. 85; 35 L. J., P. 41.

Administration bond allowed to be executed by foreigners resident abroad, upon proof that the administrator was unable to obtain sureties resident here, that the deceased had no debts unpaid, and that the person on whose behalf the letters of administration were applied for was solely entitled to the estate in this country. *Fernandez, In goods of*, 4 P. D. 229.

**Receiver appointed by Court of Chancery.]**—The mere fact that a receiver of the personal estate of an intestate has been appointed by the Court of Chancery is no ground for dispensing with justifying security on a grant of administration. *Jackson v. Jackson*, 1 L. R., P. 12; 35 L. J., P. 3; 13 L. T. 336; 14 W. R. 111.

If a receiver is appointed for a temporary purpose only, and it is not clear that the Court of Chancery will retain its control of the estate after the grant has been made, justifying security will be required. *Id.*

**Under 20*l.***—Where letters of administration were granted merely to enable a personal representative of a deceased party to execute a formal release to a trustee under a marriage settlement, the court allowed the property to be sworn under 20*l.* *Stacpoole, In goods of*, 2 S. & T. 316; 30 L. J., P. 191; 5 L. T. 140.

**Bonds prior to Commencement of Probate Act.]**—*See* 21 & 22 Vict. c. 95, s. 15, as to bonds given before the 11th January, 1858.

Prior to the commencement of the 20 & 21 Vict. c. 77, probate was granted by the Prerogative Court of Canterbury; it turned out that a

small portion of the assets lay in the province of York, but that they were included in the amount of property sworn to:—Held, this being a legal grant, that the 20 & 21 Vict. c. 77, s. 87, had made it unnecessary to have a further grant, but that the probate duty, which would have been payable upon taking out probate in the province of York, must be paid. *Freckleton or Hickleton, In goods of*, 1 S. & T. 16; 27 L. J., P. 16.

Administration to the goods of A. was granted in the Consistory Court of Lichfield, in September, 1857; the property was sworn under, and the duty paid upon, 9,000*l*. It was afterwards discovered that 3,000*l*. consols formed part of this amount. The Bank of England refused to register the letters of administration, which were certainly void under the old law. It was sought to take the opinion or direction of the court as to the effect of ss. 86, 87 and 88 of the 20 & 21 Vict. c. 77, on such a grant. No definite motion being made, the court declined to give any opinion on the point. *Elwell, In goods of*, 1 S. & T. 27.

**Discharge of Sureties.**—The court will not discharge the original sureties and allow other sureties to be substituted for them. *Stark, In goods of*, 1 L. R., P. 76; 35 L. J., P. 42; 13 L. T. 682; 14 W. R. 349.

Where an administratrix entered into a bond with two sureties, and one of them subsequently wished to be discharged, and two other persons of substance were willing to take his place, the court held, it could not allow the bond to be cancelled on the administratrix executing a new bond with the second original surety, and one or both of the persons offering themselves. *Ib*.

**Death of Ordinary—To whom Passing.**—A bond, taken by the ordinary, according to 22 & 23 Car. 2, c. 10, and taken to the ordinary by name, his executors, administrators or assigns, passed on the death of the ordinary, according to the general rule with regard to the descent of chattels in the hands of a corporation sole, to his executor and not to his successor. *Howley v. Knight*, 14 Q. B. 240; 19 L. J., Q. B. 3; 14 Jur. 665.

**Issue and Form of.**—The court has no power, under any circumstances, to dispense with an administration bond. *Powis, In goods of*, 34 L. J., P. 55.

The court has no authority to vary the conditions of the bond, so that an attorney shall undertake only to pay over the personal estate which may come to his hands to the party for whose use and benefit he takes administration, and not to administer it in the usual form, according to law. *Goldsborough, In goods of*, 1 S. & T. 295; 5 Jur., N. S. 417; 7 W. R. 375.

**Attestation.**—Where the property was small, and the administratrix lived in Australia, the court dispensed with the rule of court which requires the bond to be attested by the person who administers the oath to the administrator or administratrix. *Parker, In goods of*, 1 L. R., P. 301; 36 L. J., P. 26; 15 L. T. 248; 15 W. R. 262.

**Assignment of.**—An application for the assignment of an administration bond is not a

proceeding in any action within Ord. LIII. r. 2, and coming under the old practice, the proceeding will be by a rule nisi without notice to the sureties. *Cartwright, In goods of*, 1 P. D. 422; 34 L. T. 72; 24 W. R. 214.

The assignee will not be required to give security for costs if he is resident in England. *Young, In goods of, infra*.

Leave to appeal against an order for the assignment was refused. *Ib*.

Where the alleged breach of the condition was, that the administrator had not paid any part of the personal estate of the intestate to one of the next of kin, and the only question in dispute was, whether the applicant was one of the next of kin, the court directed the bond to be assigned to him upon condition that he would consent to an order that no execution should issue at common law, but that the money, if any, recovered by the judgment should be paid into the registry. *Ib*.

A creditor of an intestate to whom a bond has been assigned, although thereby empowered to sue in his own name, is in all other respects in the same position as the ordinary was, and may, therefore, maintain an action thereon for the general benefit of all parties interested in the estate, but not for his own or the benefit of any one in particular. *Saundrey v. Mitchell*, 3 B. & S. 405; 32 L. J., Q. B. 100; 9 Jur., N. S. 968; 7 L. T. 849; 11 W. R. 363.

**Breach of Condition on.**—When a person makes out a *prima facie* case that there has been a breach of the condition of the bond, the court will direct it to be assigned by the registrar. *Saundrey v. Mitchell*, 3 S. & T. 25.

The court will not entertain objections to the validity of the condition of the bond, but will leave such questions to be determined by a court of common law. *Ib*.

Where a person interested under the estate of a deceased intestate, to whom administration has been taken out, makes out a *prima facie* case of breach of the bond, the court will direct a rule nisi, calling on the sureties to shew cause why the bond should not be assigned. *Jones, In goods of*, 3 S. & T. 28; 32 L. J., P. 26; 8 L. T. 90; 11 W. R. 191.

**Discretion of Court as to.**—But the court might refuse to do so if, on cause shewn, the proceeding appeared to be wholly frivolous and vexatious. *Baker v. Brooks*, 3 S. & T. 32; 32 L. J., P. 25; 8 L. T. 89; 11 W. R. 110.

The court has a discretion as to ordering an assignment for the purpose of the bond being sued upon. It will order the assignment if satisfied that the application is *bona fide*, that a *prima facie* case of breach of the condition is made out, and that the applicant is the proper person to sue. *Young, In goods of*, 1 L. R., P. 186; 35 L. J., P. 126; 14 L. T. 634; 14 W. R. 821, 970.

**Suing upon.**—An administrator executed a bond with one surety under a nominal sum. He subsequently re-swore the value of the property at a greatly increased sum, and executed a fresh bond with two new sureties. He afterwards became a bankrupt, without having duly administered the estate of the deceased; and application was made to the court for leave to sue on the bonds. The court refused

to grant leave to sue upon the first bond until the action on the second bond had been disposed of. *Irving, In goods of*, 1 L. R., P. 658; 38 L. J., P. 83; 20 L. T. 684.

A declaration against a surety on an administration bond in the form required by the rules under the Court of Probate Act, 1857, expressed to be made by B. as the true and lawful attorney of G., only next of kin of the deceased, and conditioned "all the rest and residue of the personal estate and effects, to deliver and pay unto such person or persons as shall be entitled thereto under the act of parliament," assigning, as breach of the condition, that other persons were entitled equally with G. to the residue of the personal estate as next of kin, yet that B. did not deliver and pay the same to such persons, but wrongfully paid over the whole to G., not being sole next of kin, but one of them, is good, the condition being absolute and not qualified by the recital in the bond that G. was sole next of kin. *Lester v. Gooch*, 17 W. R. 139.

#### 4. EFFECT AND PROOF OF PROBATE AND LETTERS OF ADMINISTRATION.

**Effect of.]**—The grant of probate of a will not appealed against, conclusively establishes that the will was executed according to the law where the testator was domiciled at the time of his death. *Whicker v. Hume*, 7 H. L. Cas. 124; 28 L. J., Ch. 396; 4 Jur., N. S. 533.

The probate whenever obtained has relation to the time of the testator's death. *Rogers v. James*, 7 Taunt. 147; 2 Marsh. 425.

Where administration with the will annexed is granted to a person as the attorney of, and for the benefit of, the executor, such person represents the testator during the life of the executor, or until he takes out probate. *Suwerkrup v. Day*, 3 N. & P. 670; 1 W., W. & H. 463; 8 A. & E. 624.

**— Payment to Executor or Administrator a Good Discharge.]**—So long as the probate remains unrevoked, it cannot be impeached in the temporal courts. *Allan v. Dundas*, 3 T. R. 125.

Therefore, a payment of money to an executor, who has obtained probate of a forged will, is a discharge to the debtor of the intestate, notwithstanding the probate is afterwards declared null, and administration is granted to the intestate's next of kin. *Ib.*

Semble, that payment of a debt to an administrator, to whom letters of administration have been regularly granted, exonerates the debtor, though it should turn out that there is a will existing. *Prosser v. Wagner*, 1 C. B., N. S. 289; 26 L. J., C. P. 81. See 20 & 21 Vict. c. 77, ss. 75, 76, 77.

**— Enables Executor or Administrator to Sue.]**—The administrator has sufficient property in coal raised from mines after he takes out administration, and in the barges marked with the name of his intestate, to maintain an action of trover. *Fraser v. Swansea Canal Company*, 1 A. & E. 354; 3 N. & M. 391.

Executors and administrators cannot recover property out of this country, because the jurisdiction of the prerogative courts does not extend beyond their respective provinces. *Scott v. Bent-*

*ley*, 1 Kay & J. 281; 24 L. J., Ch. 244; 1 Jur., N. S. 394.

**— Title of Administrator relates back to Death of Intestate.]**—Letters of administration have relation to the death of the intestate, so as to enable the administrator to sue for goods of the intestate which were sold and delivered by an agent after his death and prior to the granting of administration. *Foster v. Bates*, 12 M. & W. 226; 1 D. & L. 400; 13 L. J., Ex. 88; 7 Jur. 1093.

An administrator may maintain trespass for the seizure of goods of the intestate, between the death and the grant of letters of administration. *Tharpe v. Stallwood*, 6 Scott, N. R. 715; 5 M. & G. 760; 1 D. & L. 24; 12 L. J., C. P. 241; 7 Jur. 492.

The doctrine of relation, by which the letters of administration are held to relate back to acts done between the death of the intestate and the taking out of the letters of administration, exists only in those cases where the act done is for the benefit of the estate. *Morgan v. Thomas*, 8 Ex. 302; 22 L. J., Ex. 152; 17 Jur. 283.

The widow of an intestate remained in the possession of her husband's property for some time after his decease. The intestate's son did not interfere in any way with the property, which was seized under a *fi. fa.* issued against the widow. They afterwards took out letters of administration:—Held, first, that there was no evidence of the administrator's assent to the widow's taking the property. *Ib.*

Held, secondly, that if such an assent could be implied, the estate was not bound by it, as the act to which the assent was given did not benefit the estate. *Ib.*

Semble, that the rule of law, that the title of an administrator has relation back to the death of the intestate, so as to enable him to recover for an injury to personal chattels prior to the grant of administration, applies also to leasehold property; but in that case he must first enter. *Barnett v. Guildford (Earl)*, 11 Ex. 19; 24 L. J., Ex. 281; 1 Jur., N. S. 1142.

**— Purchaser not bound to pay Executor before Probate.]**—Although executors can make an assignment and give a receipt for purchase-money, which are binding, yet a purchaser is not bound to pay the purchase-money till probate, because till the evidence of title exists, the executors cannot give a complete indemnity. *Newton v. Metropolitan Railway Company*, 1 Drew. & Sm. 583; 8 Jur., N. S. 738; 5 L. T. 542.

**Proof of Probate.]**—A will of a feme covert, authorized by a power in her marriage settlement, cannot be given in evidence to shew a title to personal property till it has been proved in the ecclesiastical court. *Stone v. Forsyth*, 2 Dougl. 737.

In an action, as executor, for money had and received, he proved a notice to produce the probate of the will of G., of which the defendant was executor, and under which the plaintiff's testatrix claimed the money which was the subject of the action, and also put in a judge's order to admit an office copy of the will. The will not being produced, the plaintiff tendered in evidence an official copy, purporting to be signed by the registrar of the ecclesiastical court, and annexed to which was a document, purporting to be a copy of the act of the ecclesiastical

count:—Held, that this being a copy of an official act, was admissible as secondary evidence against the defendant. *Waite v. Gale*, 2 D. & L. 925; 14 L. J., Q. B. 212; 9 Jur. 782.

In an action on a promissory note, payable "to the executors of the late Mr. W. B.," the proper proof that they are the executors of Mr. W. B. is the production of the probate of his will, and the reading in evidence so much of it as shews that he appointed them his executors; and the giving in evidence the grant of administration (annexed to the probate) is not sufficient for this purpose. *Hamilton v. Aston*, 1 C. & K. 679.

Under 14 & 15 Vict. c. 99, s. 14, an unstamped copy of an act book of the ecclesiastical court is sufficient evidence of the probate of a will to prove the executorship of the person named in it. *Dorrett v. Meux*, 2 C. L. R. 807; 15 C. B. 142; 23 L. J., C. P. 221.

Where executors suing for a debt due to them as such had put in evidence probate of the will of their testator, and the same had been used without objection.—Held, that the defendant could not afterwards, by giving intrinsic evidence of the value of the estate, object to the admissibility of the probate for want of a sufficient stamp. *Robinson v. Vernon (Lord)*, 7 C. B., N. S. 235; 29 L. J., C. P. 310.

Before 20 & 21 Vict. c. 77, s. 62, the probate was the only evidence of a will of personality. *Rex v. Netherseal*, 4 T. R. 258.

The title of three, claiming as executors, is well proved by the probate granted to one only of the will appointing them all. *Walters v. Pfeil*, M. & M. 362; *S. P.*, *Davis v. Williams*, 1 Smith, 5; 13 East, 232.

The production of the original will, with the act of the ecclesiastical court, ordering probate, is sufficient evidence of the title of an executor, without accounting for the non-production of the probate. *Doc d. Edwards v. Gunning*, 2 N. & P. 260; 7 A. & E. 240; W., W. & D. 460.

The probate of a will is not admissible to prove declarations of the testator as reputation on a question of pedigree. *Doe d. Wild v. Ormerod*, 1 M. & Rob. 466.

— **Of Foreign Wills.**—The copy of a foreign will contained in the ancillary probate granted in this country to the foreign executors, is the only admissible evidence of the will. *Enhoiv v. Wylie*, 10 H. L. Cas. 1; 31 L. J., Ch. 402; 8 Jur., N. S. 897; 6 L. T. 263; 10 W. R. 467.

The certificate of the Hanoverian ambassador, under the seal of the legation, was admitted as evidence of the law of Hanover as to the validity of a testamentary paper. *Klingemann, In goods of*, 3 S. & T. 18; 8 L. T. 172; 11 W. R. 218.

**Proof of Letters of Administration.**—An examined copy of the act book, in the registry of the prerogative court of Canterbury, stating that administration was granted to the defendant of her husband's goods at such a time, is proof of her being such administratrix, in an action against her as such, without giving her notice to produce the letters of administration. *Davis v. Williams*, 13 East, 232; 1 Smith, 5.

To prove a person dead, the production of the letters of administration granted by the ordinary, is not of itself sufficient evidence. *Thompson v. Donaldson*, 3 Esp. 63; *S. P.*, *Moore v. De Bernaldes*, 1 Russ. 301.

## 5. REVOCATION AND ALTERATION OF GRANT.

### Revocation of Grant—Practice Opposed to it.]

—Where a grant had been taken out under the misapprehension that a note or memorandum under 21 & 22 Vict. c. 56, s. 14, might be indorsed after it had issued, the court refused to revoke the grant. *Faulkner, In goods of*, 8 W. R. 454.

A citation was personally served upon the executor and universal legatee, named in a will, calling upon him to bring into the registry the probate of it which had been granted to him, and to shew cause why the probate should not be revoked and declared null and void, and the will itself declared null and invalid. The probate was brought into the registry, but no appearance entered to the citation. The court, although there was no evidence before it as to the invalidity of the will, revoked the probate, and ordered probate of an earlier will to issue in common form to the executor named therein. *Crosby v. Noton*, 36 L. J., P. 55; 16 L. T. 153; 15 W. R. 775.

Semble, where a general grant of administration is properly made, the practice is against revoking it, even with consent of the grantee, unless the grantee has become incapable by the act of God. Grants to creditors, however, are an exception to this rule. *Morris, In goods of*, 2 S. & T. 360; 31 L. J., P. 80.

After a decree had been made on the construction of a will and for the administration of the testator's estate in accordance therewith, a letter of later date was found duly executed and almost an exact counterpart of the earlier will. Questions having arisen as to the effect of the new will on certain legacies, named in both wills, which by the decree had been held to be superseded, the court, on the application of the trustees, directed an inquiry as to who were the persons interested in setting up the alleged new will, and that notice should be given to such persons that, unless they, within a limited time, took steps to recall the existing probate, and to prove the new will, the court would proceed to administer the estate on the will as proved. *Harrison v. Ebery*, 34 L. T. 238.

The court will not revoke a probate rightly granted, and not issued under a mistake. *Muir, In goods of*, 1 S. & T. 294; 28 L. J., P. 49; 5 Jur., N. S. 445.

**On whose Application.**—An executor who has proved a will in common form cannot, as such executor, take proceedings to call in question the validity of that will. He has no right, therefore, to cite the persons interested under it to propound it in solemn form, or shew cause why the probate in common form should not be revoked. *Chamberlain, In goods of*, 1 L. R., P. 316; 36 L. J., P. 52; 16 L. T. 97; 15 W. R. 680.

— **Of Elected Guardian on Discovery of Testamentary Guardian.**—Where a testamentary guardian to minor children had been appointed, and administration had, per incuriam, been granted to a guardian elected by the minors for their use and benefit, the court revoked the grant and granted administration to the testamentary guardian. *Morris, In goods of, supra*.

— **Of Lost Letters of Administration.**—Upon the revocation of letters of administration, which have been lost, an undertaking will be required from the person to whom they were

granted, that, if found, he will bring them into the registry, and that they will not be acted upon. *Carr, In goods of*, 1 S. & T. 111.

— **When Grant made in Error.**—An intestate married his deceased wife's sister. On his death she obtained letters of administration to his personal estate and effects, and died leaving part of the estate unadministered. The court revoked the grant so made in error, and decreed administration to the natural and lawful daughters and next of kin of the deceased. *Wells, In goods of*, 17 L. T. 123.

A next of kin took out administration of the effects of a deceased person and swore that she died intestate. Four years afterwards the administration was called in, and evidence was produced to shew that a will of the deceased, duly executed, was in existence at the time of her death, and that it had passed into the hands of the next of kin. It was not forthcoming. The court revoked the administration, and granted probate of a draft of the will limited until the original was produced. *Podmore v. Wharton*, 3 S. & T. 449; 33 L. J., P. 143; 10 Jur., N. S. 756; 10 L. T. 764.

A., the surviving trustee of a term of 500 years, died, having appointed B. and others his executors, of whom B. proved his will, and survived his co-executors. B. appointed C. his executor, and C. proved B.'s will. D., for the purpose of bringing an ejectment, applied to the Court of Probate for letters of administration de bonis non, to A., limited to the term of 500 years, which were granted to him; and D. brought the ejectment for the term, as the personal representative of A.:—Held, that the letters of administration granted to D. were void, and that he should have been nonsuited. *McDougall v. O'Shaughnessy*, 2 Ir. R., C. L. 157.

— **Procedure after Revocation.**—An order was made for the revocation of a grant with the will annexed. The letters of administration were in the hands of the proctors, who had obtained them, and who claimed a lien upon them for costs. The court declined to order the proctors to deliver up the letters for the purpose of cancellation, but directed that a copy of its order, revoking the grant and requiring the executor to bring the letters into the registry if they ever came into his possession, should be served upon them. *Barnes v. Durham*, 1 L. R., P. 728; 38 L. J., P. 46.

— **Suits for.**—In a suit for revocation of probate the defendant propounding the will should deliver issue, and move for directions as to the mode of trial. *Brandreth v. Brandreth*, 2 S. & T. 446; 31 L. J., P. 153; 6 L. T. 335; 10 W. R. 672.

The court will not direct an issue to the assizes except upon application supported by affidavit. *Id.*

Where executors of a later will having called in the probate of a will of prior date, propound in a declaration the later will, it is not competent to them to allege in their declaration that the probate of the earlier will was surreptitiously obtained, or that the earlier will ought to be pronounced null and invalid. *Rosbotham v. Rosbotham*, 2 S. & T. 121; 30 L. J., P. 38; 3 L. T. 557; 9 W. R. 148.

In a suit for revocation of probate, the party

propounding the will must begin, though the plaintiff has declared, alleging an intestacy. *Cross v. Cross*, 3 S. & T. 292; 33 L. J., P. 49; 10 Jur., N. S. 183; 10 L. T. 70; 12 W. R. 694.

It being doubtful whether an unsuccessful plaintiff in a suit for revocation of probate would be able to pay the costs of an intervener who had propounded the will, the court ordered that the intervener's costs should be paid out of the estate. *Id.*

A next of kin who unsuccessfully applied for revocation of the probate of a will, was condemned in costs, although there was strong evidence of the incapacity of the testator, on the ground that he had allowed an unreasonable time to elapse between the death of the testator and the institution of the suit, and had charged the widow of the testator and the drawer of the will with conspiring to obtain the will when the testator was incompetent. *Clayton v. Davis*, 33 L. J., P. 28.

**What Interest Necessary to entitle Person to Intervene in Suit.**—To entitle a person to intervene in a suit for revocation of letters of administration it is not necessary that he should have had an interest at the time of the death of the deceased; an interest acquired subsequently by purchase of part of the estates from the administrator is sufficient. *Lindsay v. Lindsay*, 2 L. R., P. 459; 42 L. J., P. 32; 27 L. T. 592; 21 W. R. 272.

**Pleas Allowed.**—A person who has no interest in the assets, except under a later will, cannot be allowed to plead any plea to an earlier will, except its revocation by the will on which his interest depends. *Philpott v. O'Callaghan*, 6 Ir. R., Eq. 327.

**Withdrawal of Caveat, Effect of.**—An executor entered a caveat to a will of a later date, but withdrew the caveat before it was warned and allowed letters of administration, with the earlier will annexed, to be granted to one of the residuary legatees named therein:—Held, that he was not estopped by the withdrawal of the caveat under the circumstances from calling in the letters of administration (with the earlier will annexed) and propounding the alleged later will. *Goddard v. Smith*, 3 L. R., P. 7; 42 L. J., P. 14; 28 L. T. 141; 21 W. R. 247.

**Issue Devisavit vel non—Costs.**—When the heir-at-law filed a bill against the devisee and executor impeaching the validity of the will, and an issue was directed which resulted in the validity of the will being established:—Held, that the bill must be dismissed without costs as regarded the devisee, and that the heir-at-law must pay the costs of the executor. *Banks v. Goodfellow*, 11 L. R., Eq. 472; 40 L. J., Ch. 511.

**Amendment of Probate—Words of Will must be regarded.**—There is no difference between the words which a testator himself uses in drawing up his will, and the words which are bona fide used by one whom he trusts to draw it up for him. The court in either case must take the words as it finds them, and therefore held that the plaintiff, the natural daughter, was not entitled to have probate amended by omitting the words "from and after the decease of my said wife without leaving issue of our said marriage,"

on the ground that the draughtsman introduced them without reason or special directions, and that the effect of the same had not been intelligently appreciated by the testator. *Rhodes v. Rhodes*, 7 App. Cas. 192; 51 L. J., P. C. 53; 46 L. T. 463; 30 W. R. 709—P. C.

— **As to Date on which Will was Executed.**—The court may order a memorandum to be indorsed on a probate after it has issued, as to the true date on which a will was executed, if satisfied that the date given in the probate is erroneous. *Allchin, In goods of*, 1 L. R., P. 664; 38 L. J., P. 84; 20 L. T. 757.

— **Description of Testator.**—The court allowed a probate to be amended after it had issued by the addition of a fuller description of the testator than therein contained in the first instance. *Tougood, In goods of*, 2 L. R. P. 408; 41 L. J., P. 84; 26 L. T. 984; 20 W. R. 802.

## 6. PRACTICE RELATING TO.

### a. Citation.

**Parties Cited—Heir-at-Law and Devisee.**—The court will not authorize the citation of the heir-at-law, under 20 & 21 Vict. c. 77, s. 61, until a plea has been filed in the suit, or until the next of kin has been already cited to see proceedings. *Moore v. Holgate*, 1 L. R., P. 101; 35 L. J., P. 46; 14 L. T. 24; 14 W. R. 515.

Where an executor propounds the latter of two wills, the court will direct a citation to issue against the devisees under the earlier will, and against the heir-at-law, though already before the court, as defendant in the suit. *Lister v. Smith*, 3 S. & T. 53; 32 L. J., P. 13; 7 L. T. 219; 10 W. R. 429.

When a party to a suit is before the court as next of kin or legatee, being also heir-at-law or devisee under the same will, it is necessary to cite him to see proceedings under 20 & 21 Vict. c. 97, s. 61, as heir-at-law or devisee. *Emberley v. Trevanion*, 4 S. & T. 197; 22 L. J., P. 142.

Before a receiver of real estate will be appointed by the court, it is necessary that it should appear on affidavit that the heir-at-law or devisee, or other person having or pretending interest in the real estate, has been cited. *Purdey v. Field*, 33 L. J., P. 73; 12 W. R. 1088.

When a suit has been commenced with a caveat, and the defendant has filed no plea to the declaration propounding the will, a citation may issue against the heir-at-law. *Domville v. Domville*, 4 S. & T. 17; 34 L. J., P. 79; 12 L. T. 54; *S.P., Coplestone v. Nicholes*, 33 L. J., P. 57.

When contention arises about a testamentary paper of a deceased, and his heir-at-law is either not within the jurisdiction of the court, or has no known place of abode, the court may still order him to be cited, but will not decide that any particular form of service of the citation shall bind him. *Martin v. Harding*, 11 Jur., N. S. 118.

The executors under a will cited the executors named in a codicil to it, as also the other parties interested, to propound such codicil. An appearance had been entered for the executors named in the codicil, but no declaration had been filed. The bequests in the codicil affected the real estate. The court ordered the heir-at-law to be cited. *Comer v. Parnell*, 36 L. J., P. 81; 16 L. T. 299.

When in a suit commenced by caveat, the party propounding a will wishes to cite the heir-at-law before pleas have been filed contesting the validity of the will, he must make an affidavit that he intends to proceed and prove the will in solemn form. *Peacock v. Lowe*, 1 L. R., P. 311; 36 L. J., P. 46; 15 L. T. 634; 15 W. R. 717.

An heir-at-law who has not been cited, cannot, by entering a caveat, prevent the executors of a will affecting realty from obtaining probate in common form. If the heir-at-law has entered a caveat under those circumstances, it is not necessary for the executors to declare. *Young v. Ferrie*, 4 S. & T. 210.

The provisions of 20 & 21 Vict. c. 77, ss. 61 and 62, which authorize the citing of the heir-at-law or persons interested in the real estate, when contentious proceedings arise as to the validity of a will, and by which the probate of a will granted after such litigation is to enure to the benefit of all persons interested in the real estate affected by the will, are not applicable to wills executed before the Wills Act, or to wills which in whole or in part have been executed not in accordance with the requirements of the Wills Act. *Campbell v. Lucy*, 2 L. R., P. 209; 40 L. J., P. 22; 24 L. T. 231; 19 W. R. 568.

The practice as to citations to see proceedings heretofore in use in the Probate Court has not been altered by the Judicature Acts, and the rules therein contained; and therefore, in order that a decree in a testamentary suit may bind the heir-at-law or devisees of real estate, a citation should be taken out against them under 20 & 21 Vict. c. 77, s. 61, notwithstanding the directions of r. 13 of Ord. XVI. *Kennaway v. Kennaway*, 1 P. D. 148; 45 L. J., P. 86; 34 L. T. 854; 24 W. R. 586.

— **Form of Affidavit.**—An affidavit, upon which an application to cite the persons interested in the real estate affected by a will in dispute is based, must state not only that it disposes of real estate, but that it was executed according to the law of England, and at a date since the Wills Act came into operation. *Campbell v. Lucy*, *supra*.

— **Assignee of Heir-at-Law.**—In an action as to the validity of a will the court will not order the assignee of the heir-at-law of the testatrix to be cited as a person having or pretending interest in the real estate affected by the will. *Jones v. Jones*, 7 P. D. 66; 51 L. J., P. 93; 46 L. T. 919; 30 W. R. 691; 46 J. P. 472.

— **Executors.**—When an executor had proved a will (power being reserved to his co-executors to come in and prove it), upon his refusal to produce the probate and an account of the estate in respect of which it had been granted, so as to enable a co-executor to prove the will without payment of probate duty, the court directed a citation to issue against him. *Turrell, In goods of*, 2 S. & T. 456; 31 L. J., P. 170; 6 L. T. 162; 10 W. R. 430.

An executor by non-appearance to a citation calling upon him to take probate of a copy of a missing will, is barred from afterwards obtaining probate of the original will when found. *Davis v. Davis*, 4 S. & T. 208; 31 L. J., P. 216.

The court allowed a citation to executors to

bring in the probate to issue on an affidavit of the agent of the party citant (the next of kin), who was in Australia; the property being distributed by the Court of Chancery in due course of administration, which could not be stayed until proceedings were instituted for revocation of the probate, and the agent of the party citant being in a position to make the necessary averments to lead the citation. *Hutley, In goods of*, 1 L. R., P. 596; 38 L. J., P. 27.

— **Next of Kin.**—The court allowed a citation to issue against the next of kin, calling upon him to take administration of the goods of a deceased, or shew cause why it should not be granted to the applicant as a creditor, although by the operation of the Statute of Limitations the applicant was debarred from recovering his debt against the estate of the deceased. *Coombs, In goods of*, 1 L. R., P. 193; 35 L. J., P. 78.

A person died on 27th March, 1862, leaving a will dated 17th April, 1860, whereof he appointed two executors; there was also a paper purporting to be a codicil dated 26th March, 1862. The executors believing this not to be a true codicil, asked for a citation on the legatees interested under it calling on them to propound and prove it if they thought fit. The court refused to issue the citation, but suggested that the executors might proceed to prove the will in solemn form, and cite the next of kin and the legatees under the codicil to see the will proved. *Benbow, In goods of*, 2 S. & T. 488; 31 L. J., P. 171; 6 L. T. 659.

The executor named in the will having determined to propound it, cited certain persons who were the next of kin to see proceedings. They appeared, and there being reason to believe that there were other next of kin, the court made an order upon them, under 20 & 21 Vict. c. 77, s. 24, to attend before the registrar to be examined as to the state of the family. *Shepherd v. Beetham*, 2 L. R., P. 384; 41 L. J., P. 44.

A father left two children in their minorities, his only next of kin. The minors' next of kin were four in number, and three of them renounced their rights to the guardianship and administration. The fourth went to Nevada in 1869, and nothing was now known of him. The court permitted the minors to elect a stranger in blood as their guardian, without requiring the citation or renunciation of the absent next-of-kin. *Langham, In goods of*, 25 L. T. 951; 20 W. R. 319.

A brother bequeathed his real and personal estate in two equal moieties to the children of his deceased sisters. The executor renounced and the children were resident abroad. The sole surviving next of kin was another sister, to whom the testator had left a legacy of "one shilling," and who was leading a dissolute life. Under these circumstances, the court made a grant of administration with the will annexed to a relative not interested, for the use and benefit of the minors until they should appear and take the grant. *Thomas, In goods of*, 28 L. T. 677.

— **Queen's Proctor.**—When the will of a bastard affecting real estate is propounded, if such real estate would devolve on the crown in case of an intestacy, the Queen's proctor may be cited to intervene in respect of the real

estate. *Wyman v. Ashwell*, 4 S. & T. 196; 29 L. J., P. 94.

— **Person Interested.**—A citation was ordered to issue against the only person interested in the estate of a deceased person, calling upon him to take administration, on the application of a party who was interested in the due prosecution of a suit in Chancery, for which purpose a representative of the estate was required. *Williams, In goods of*, 2 L. R., P. 81; 39 L. J., P. 48; 22 L. T. 630; 18 W. R. 844.

Before a person is permitted to contest a will he may be called on by the propounder to shew his interest; but when two contest a will, neither can call upon the other first to shew his interest. *Hingston v. Tucker*, 31 L. J., P. 91.

**Costs.**—See post, col. 1034.

— **On Married Women.**—Service of a citation on a married woman is effected by serving her in the presence of her husband. *Hallett v. Cox*, 28 L. J., P. 55 n.; *S. P., Herbert v. Shiell*, 3 S. & T. 479; 33 L. J., P. 142.

When a citation has not been duly served on a married woman, the court will act upon a renunciation subsequently executed by herself and husband. *Herbert v. Shiell*, 3 S. & T. 479; 33 L. J., P. 142.

— **In Case of Husband and Wife.**—When a wife and husband resident abroad have been served with a citation by advertisement, there should be an affidavit that neither of them has any agent in this country. *Evans v. Burrell*, 4 S. & T. 185.

A wife died at Rome in 1854, in the lifetime of her husband. By an indenture of post-nuptial settlement it was provided that property which was then settled upon certain trusts, and any other property to which she might thereafter become entitled, should, in the event of her predeceasing her husband, and other events which happened, be distributable amongst her next of kin as if she had died unmarried and intestate. Her husband, an Italian, died at Rome in 1871, having executed a will, in which he appointed executors, but the will was not proved in this country. The wife was entitled to one-third share of her father's residuary personal estate which became distributable in November, 1874, and by an order of the Court of Chancery the share was carried over to her account. The court under these circumstances granted administration limited to the fund in chancery, to one of the next of kin, without requiring the representative of the husband to be cited. *Gorofolini, In goods of*, 44 L. J., P. 36; 33 L. T. 72; 23 W. R. 456.

A husband and wife separated by agreement. The husband covenanted not to claim administration of his wife's estate if she should die during his life. She died during his life. The husband refused to renounce; the court refused to make a grant to the guardian of her children until he had been cited. *Pigott, In goods of*, 42 L. J., P. 77; 29 L. T. 45; 21 W. R. 823.

— **On Minors.**—The service of a citation on a minor is effected by serving it on him in the presence of his natural or legal guardian, or of some person upon whom the care and custody of the minor have for the time being devolved. *Brown v. Wildman*, 28 L. J., P. 54.

When a minor, of the age of seventeen, was living in service at a distance from her mother, her natural guardian, the court dispensed with the rule, which requires service of a citation upon a minor to be effected upon her in the presence of her natural or legal guardian, or of some person upon whom her custody for the time being properly devolved. *Lainson v. Naylor*, 2 S. & T. 7.

An affidavit that a minor was served with a citation in the presence of his guardian, should go on to shew how he became his guardian. *Johnson v. Weldy*, 2 S. & T. 313; 30 L. J., P. 170; 5 L. T. 118.

Where a citation was served upon two minors at the house where they resided, but their custodian declined to be present at the service, and an attempt was also made to serve the citation on the next of kin of the minor, but failed by reason of the process-server not being permitted to see the next of kin, the court held the service on the minors to be sufficient. *Lean v. Viner*, 3 S. & T. 469; 33 L. J., P. 88.

— **On Lunatics.**—When a person, whom it is necessary to cite as interested in the estate of a deceased, is a lunatic, and a committee of his estate has been appointed, service of a citation upon such committee is sufficient. It is not necessary that the lunatic should be personally served in the presence of some medical man. *Surtees, In goods of*, 28 L. J., P. 89.

— **On Official Liquidators of Companies.**—The plaintiffs propounded the will and codicil of A. W., under the latter of which her husband, who had survived her but a short time, took an interest. The court allowed a citation to issue to the official liquidators of the East of England Bank, creditors of the husband, to see the codicil proved. *Wilson, In re*, 3 S. & T. 572; 10 Jur., N. S. 1242; 11 L. T. 427.

**Service in General.**—The court has no power to dispense with the service of citations. *Potts v. Potts*, 30 L. J., P. 112.

Leave to proceed to prove a will in solemn form will not be granted unless citations have been personally served on the persons entitled to see proceedings, or if personal service is impracticable, have been duly advertised. *Id.*

When a citation has been served, a certificate of service should be indorsed on the citation. *Goodburn v. Bainbridge*, 2 S. & T. 4; 29 L. J., P. 163; 2 L. T. 439; 8 W. R. 504.

An affidavit of the service of a citation should identify the citation served; the citation should be made an exhibit to the affidavit. *Harcn v. Dawson*, 3 S. & T. 50; 32 L. J., P. 94.

The service of a citation by a party to a suit is insufficient. *Glyde v. Davie*, 33 L. J., P. 184.

— **By Advertisement.**—When a party is cited by advertisement, and has no agent in this country, there should be an affidavit that he has no attorney, agent or correspondent in this country. *Kenworthy v. Kenworthy*, 3 S. & T. 64; 32 L. J., P. 107; 8 L. T. 470; 11 W. R. 350.

**Amendment of Citation.**—A plaintiff, in a citation to bring in probate, described himself as one of the lawful cousins and next of kin of the

deceased, and upon an order obtained by the defendant that he should propound his interest, filed an act on petition, in which he alleged that he was one of the executors and residuary legatees of A., deceased, who was the lawful cousin german of the deceased, and one of his next of kin, and living at his death. The court gave the plaintiff leave to amend the citation by inserting in it his correct description, upon payment of the defendant's costs up to the time of the amendment, exclusively of the costs of entering an appearance. *Ridgway v. Abingdon*, 3 S. & T. 3; 32 L. J., P. 4; 7 L. T. 756; 11 W. R. 10.

**Return into Registry.**—When the estate of a deceased, who died without any known relation, was barely sufficient to pay his liabilities, and a citation had been issued and served on behalf of a creditor upon the Queen's proctor and by advertisement, but had been lost or destroyed by his solicitor's clerk, who had absconded for embezzlement, the court dispensed with the rule requiring the citation to be returned into the registry, and made the grant of administration to the creditor. *Robinson, In goods of*, 4 S. & T. 43.

#### b. Appearance.

**Service of Writ of Summons to Appear.**—When a writ of summons cannot be personally served upon one of several defendants by reason of his address being unknown and not ascertainable, the court will not dispense altogether with the service, but will direct service of the writ to be effected by advertisement. *Whitley v. Hencywell*, 35 L. T. 517.

If a defendant is a foreigner resident out of the jurisdiction, he must be served with notice of the writ of summons in the action. *Beddington v. Beddington*, 1 P. D. 426; 45 L. J., P. 44; 34 L. T. 366; 24 W. R. 346.

**Other Matters as to.**—An affidavit of search and of non-appearance should state the day on which the search was made. *Harcn v. Dawson*, 3 S. & T. 50; 32 L. J., P. 94.

Where two persons have been cited, and neither has appeared, it should state that no appearance has been entered by or on behalf of either of them. *Id.*

A caveat entered by a next of kin having been warned by the executors, the next of kin applied to have the time for entering an appearance extended in order that a communication might be made with another next of kin who was in Australia, the caveat purporting to have been entered also on his behalf. The court rejected the motion. *Corcoran, In goods of*, 11 W. R. 241.

A party cited to see proceedings who has appeared, and opposes a testamentary paper, is not allowed to adopt the pleas of the defendant, but should file pleas on his own behalf. *Jones v. Williams*, 4 S. & T. 19.

#### c. Staying Proceedings in Suits.

**Grounds for.**—It is no ground for a stay of proceedings in a suit commenced by the next of kin, that the alleged executor of a will has filed a petition in a commissary court in Scotland, to obtain confirmation of the same instrument.

*Hawarden v. Dunlop*, 2 S. & T. 150; 4 L. T. 339.

The court refused to order that proceedings instituted to prove a will in solemn form should be stayed because the heir-at-law had commenced actions of ejectment in reference to the real estate bequeathed by the will. *Davies v. Devereux*, 35 L. J., P. 77.

A native of France died after many years' residence in London, leaving a will, executed according to the English law, in which he appointed B. sole executrix. B. propounded the will in a declaration. C., the brother, who, with other next of kin, had entered a caveat, filed pleas and treated the will as that of a domiciled Englishman. Some months afterwards, the cause having in the meantime been ordered to be tried by a special jury, C. and the other next of kin commenced proceedings in France to set aside the will on the ground that the testator was a domiciled Frenchman, and that the will was not executed according to the law of France: the court refused to stay the proceedings pending the proceedings before the French tribunal, or to allow the pleadings to be amended so as to raise the question of domicile; the facts as to the domicile having been within the knowledge of C. from the first, and the case standing for trial. *Duprez v. Veret*, 1 L. R., P. 583; 38 L. J., P. 5; 17 W. R. 157.

When an action is brought against executors, who are restrained by an injunction, from disposing of their testator's effects, and they resist the claim, the court will not stay proceedings, although, if a judgment had been signed, it might stay execution. *Davis v. Salter*, 1 D. P. C. 561; 2 C. & M. 466.

The court refused to stay the proceedings in an action by an administrator, upon a suggestion that there was a will in India, which the intestate's widow, who was thereby appointed executrix, had intimated her intention to bring to this country to prove. *Prosser v. Wagner*, 1 C. B., N. S. 289; 26 L. J., C. P. 81.

#### d. Abatement by Death.

When a plaintiff died after the hearing and before judgment, the court would not, on the application of his personal representative, give judgment, unless such personal representative had been made a party to the record. *Staines v. Jones*, 31 L. J., P. 10.

By the death of a plaintiff, after a verdict in his favour, the suit abates; and a suggestion of the death must have been entered on the record before a decree could be made. *Jones v. Jones*, 36 L. J., P. 43; 15 L. T. 544; 15 W. R. 498.

#### e. Affidavits.

**Form.**—An affidavit on which the addition or place of abode of a deponent is not inserted will not be admitted. *Bernard, In goods of*, 2 S. & T. 489; 31 L. J., P. 89; 6 L. T. 726.

When a joint affidavit was made by A. and by B., and B.'s addition was omitted, the court treated the affidavit as that of A. only. *Woodburne, In goods of*, 31 L. J., P. 89, n.

Affidavits were sent out to New Plymouth, New Zealand, to swear the widow of W. K., deceased, as administratrix. In the meantime she had moved to Hobart Town, in Tasmania, and certain interlineations in accordance were

made in the affidavits, but not initialed by the judge who administered the oath; the description of Mrs. King, as widow, was also slightly irregular. The judge made an order that such affidavit should be filed. *King, In goods of*, 2 S. & T. 621; 32 L. J., P. 14; 7 L. T. 394; 11 W. R. 171.

A., in the oath for executrix, described herself as of, &c., "the lawful widow and relict of the deceased," without any other addition. The affidavit was rejected in the registry as contrary to the practice, on the ground that the deponent might be a married woman notwithstanding the terms of the addition:—The court held the addition to be sufficient, and directed the affidavit to be received. *Morgan, In goods of*, 32 L. J., P. 139; 11 W. R. 749.

**Supporting Petition—Reference to Facts not Mentioned in Petition.**—If affidavits filed in support of a petition as to the right of a party to obtain letters of administration, go into matters not set out in such petition, the court will not allow counter-affidavits to be brought in at once, but at the hearing will either refuse to read such parts of the affidavits, or will then, if they be material, permit the other party to answer them on oath. *Cordeux v. Trasler*, 4 S. & T. 48; 34 L. J., P. 127; 11 Jur., N. S. 587.

**Supporting Application for Examination of Witness.**—In order to found an application for the immediate examination of a witness in a pending suit, the affidavit must set out special circumstances; it is not sufficient that it states that the witness is a material witness. *Andrew v. Brooke*, 3 L. R., P. 181; 43 L. J., P. 39; 31 L. T. 102; 22 W. R. 712.

**Affidavit of Scripts.**—A memorandum written by a solicitor from oral directions of the testator, and sent to counsel as instructions to draft a will, is a script within the meaning of the affidavit of scripts, although not read by the deceased. *Bagot v. Bagot*, 1 Ir. L. R., 308.

An omission to annex to, or mention in the affidavits of scripts, the instructions for a will, is no ground for allowing out of the estate the costs of an unsuccessful opposition to the will, if such opposition is not founded on the absence of instructions. *Foxwell v. Poole*, 3 S. & T. 5; 32 L. J., P. 8; 7 L. T. 757; 11 W. R. 32.

**Taken in Foreign Places or Countries.**—An affidavit sworn before a notary abroad will not be admitted unless it appears on affidavit that there was not, at the place where it was sworn, a British consul or other officer empowered by 18 & 19 Vict. c. 42, s. 1, to take affidavits, and that a notary has, by the law of such place, authority to take affidavits. *Bernard, In goods of*, 2 S. & T. 489; 31 L. J., P. 89; 6 L. T. 726.

A requisition to New South Wales under the seal of the Prerogative Court of Canterbury, to swear an administrator:—Held, that the Court of Probate can decree administration on the affidavits so sworn. *Bedwell, In goods of*, 1 S. & T. 15; 27 L. J., P. 8.

But a declaration on oath was received instead of an affidavit, the person making it being resident abroad, where an affidavit could not be made. *Lambert, In goods of*, 1 L. R., P. 138; 35 L. J., P. 64; 14 L. T. 227; 14 W. R. 617.

**In Reply.]**—The court will allow affidavits in reply to be read at the hearing of a cause, if it thinks such affidavits are necessary. *Cordoux v. Trasler*, 4 S. & T. 48; 34 L. J., P. 127; 11 Jur., N. S. 587.

### 2. Parties.

**Propounding Will.]**—A person appointed executor, and after the testator's death convicted of felony, is not thereby disentitled to maintain a suit in the Court of Probate, with a view of establishing the validity of the will by which he is appointed executor. *Smethurst v. Tomlin and Bankes*, 2 S. & T. 143; 7 Jur., N. S. 763; 6 L. T. 712.

A party propounding a will may put any person opposing it on proof of his interest; but where two parties oppose a will, e.g., the Queen's proctor and an alleged next of kin, neither can put the other on proof of his interest. *Hingston v. Tucker*, 2 S. & T. 596; 7 L. T. 337.

Being cited to propound and prove a will is a distinct matter from being cited to take probate under 21 & 22 Vict. c. 95, s. 16. *Bewsher v. Williams*, 3 S. & T. 62; 8 L. T. 290, n.; 11 W. R. 541.

The burden of proof lies upon the party propounding a will. He is, therefore, bound to begin, although he is an intervener, and although the plaintiff in the suit has, in his declaration, alleged an intestacy. *Cross v. Cross*, 3 S. & T. 49; 12 W. R. 694.

A jury found for a will, although the only surviving attesting witness swore that it was a forgery, and the court refused, upon the evidence, to disturb the verdict. *Ib.*

Where parties interested under a testamentary paper have been cited to appear and propound it, and have not appeared and propounded it, the court will grant administration as to an intestate, or probate of an earlier will, as the case may be, in common form. *Morton, In goods of*, 3 S. & T. 179; 32 L. J., P. 174; 9 Jur., N. S. 728; 9 L. T. 300.

A party who has no interest under a will cannot propound it. *Parton v. Johnson*, 1 L. R., P. 549; 37 L. J., P. 67; 18 L. T. 923; 16 W. R. 1192.

**Particulars of Papers propounded.]**—Where a will or a codicil is propounded in a declaration in the usual form, and there is ground for suggesting that other testamentary papers, besides those specifically referred to in the declaration, may be included in the probate, the court will order the party propounding the will or codicil to furnish the other party with particulars of the testamentary papers he intends to set up. *Marsh v. Corry*, 3 S. & T. 458; 33 L. J., P. 112; 10 Jur., N. S. 159.

**Interested in Opposing.]**—A caveat was warned by the widow, and the defendants appeared thereto as universal devisees and legatees of the estate of A., the universal devisee and legatee of the whole estate of the deceased. The plaintiff thereupon declared, alleging an intestacy. The defendants pleaded propounding a will, whereof A. was sole executrix and universal legatee. On motion for an order to amend the pleas by setting forth how they derived their interest:—Held, that it was too late for the plain-

tiff to call upon the defendants to set forth their interest after the declaration had been delivered. *Inkson v. Jeeves*, 3 S. & T. 39; 32 L. J., P. 69; 8 L. T. 173; 11 W. R. 350.

A deed executed by the deceased in favour of the defendant, in which she was described as a sister of the deceased, is sufficient evidence of relationship, so that she, as next of kin, can contest the validity of the will of the deceased. *Smith v. Tebbitt*, 1 L. R., P. 354; 36 L. J., P. 35; 15 L. T. 694.

An executor having propounded a will, a party who appeared to dispute it as the natural son of the deceased, was put upon proof of his interest. In his declaration he alleged that the deceased was a domiciled Portuguese, that he was his natural son, that, by the law of Portugal, he was entitled to the whole of the deceased's property, and that he had instituted a suit in Portugal against the executor, in which he obtained a decree that he should be put into possession of the property. The declaration did not state the nature of the suit, nor the questions involved in it; nor did the judgment shew that the plaintiff was in the same position as a legitimate son:—Held, that the foreign judgment alone did not shew such an interest in the party in whose favour it was made, as to entitle him to dispute the will. *Crispin v. Dogliano*, 29 L. J., P. 130.

**Parties entitled to Contest Proof of Will.]**—An executor of a former will has the same right as a next of kin to put an executor of a later will upon proof in solemn form, and to interrogate his witnesses. *Boston v. Fox*, 4 S. & T. 199.

**Infants—Guardian ad litem.]**—When a will is disputed by a guardian ad litem on behalf of infants, the Court of Probate has power to inquire whether the suit is for their benefit. *Percival v. Cross*, 7 P. D. 234; 52 L. J., P. 16; 47 L. T. 353; 31 W. R. 124; 46 J. P. 792.

In appointing a guardian ad litem to an infant, the court, if it thinks fit, may pass over the next of kin. *Quick v. Quick*, 33 L. J., P. 177; 10 Jur., N. S. 372.

The court refused to appoint the paternal uncle guardian to a minor, for the purpose of instituting a suit on his behalf against the mother in reference to the validity of the will of his father, without first citing the mother to shew cause why such an appointment should not be made. *Jenkins, In goods of*, 1 L. R., P. 690; 38 L. J., P. 72. *See also* INFANT.

**Paupers.]**—A plaintiff who, through poverty, is unable to prosecute a suit instituted by him, should apply for leave to continue the suit in formâ pauperis. If he does not, and the suit is dismissed for non-prosecution, he will not afterwards be allowed to recommence it in formâ pauperis. *Cathrell v. Jeffree*, 33 L. J., P. 178; 10 Jur., N. S. 445.

S. obtained probate, in common form, of a paper professing to be the will of L. Such probate, at the suit of the next of kin of the deceased, was revoked, the court holding that the paper was not the will of the deceased, and that S. had been guilty of fraud in obtaining probate; and in contesting the suit, S., though suing in formâ pauperis, was condemned in the costs of the suit. *Carless v. Thompson*, 1 S. & T. 21.

A person suing in formâ pauperis, to whom counsel has been assigned by the court, cannot appear by another counsel until there has been a renunciation, or a new assignment of counsel, or he has been dispaupered. *Hamer v. Boreham*, 1 S. & T. 26; 27 L. J., P. 107.

### g. Pleadings.

**Claim—Form of.]**—When a will which has been destroyed is propounded, it is not necessary to set out the substance of the will, or to allege its destruction in the declaration. *Glen v. Burgess*, 3 S. & T. 43; 32 L. J., P. 157; 8 L. T. 174; 11 W. R. 463.

The declaration should, however, if possible, assign a particular date to the will, and an averment that the deceased in or about a certain month made his last will, is primâ facie insufficient. *Id.*

A plaintiff propounded a will in a declaration in the ordinary form, to which the defendant pleaded. The plaintiff then filed a second declaration in a special form, propounding the will as an American will. To this declaration the defendant pleaded, and evidence was taken on the questions raised by the pleadings under a requisition and commissions in America. Before the case came on for trial, the plaintiff amended his declaration by reverting to the case which he had originally set up, whereupon the defendant abandoned his opposition and consented to probate. The court condemned the defendant in the costs of proving the will in solemn form, as if the suit had proceeded upon the original declaration, and made no order as to the costs caused by the filing of the second declaration. *Archer v. Burke*, 1 L. R., P. 558; 37 L. J., P. 30.

**—Interest Suit.]**—The pedigree of parties claiming to be next of kin of a person dying intestate, against the Queen's proctor claiming administration on the ground of bastardy, must be set out in their pleadings and not by way of particulars. *Griffin v. Greenwood*, 19 L. T. 661.

**—Action to prove Will and to discharge Protection Order made in Wife's Lifetime.]**—A claim to pronounce against the validity of the will of a married woman who had obtained a protection order, and a counter-claim to discharge the protection order, may be included in the same action. *Mudge v. Adams*, 6 P. D. 54; 50 L. J., P. 49; 44 L. T. 185; 29 W. R. 307.

**Leave to Plead.]**—Before a plea that the testator did not intend the alleged testamentary instrument to operate as his will can be put on the record, leave must first be obtained; but it is not necessary to furnish particulars under such plea. *Harrison v. Kirby*, 17 L. T. 152; 6 W. R. 144.

**Defence.]**—When the statement of claim does not deny the defendant's interest in the estate, the court will not order the statement of defence to be struck out for not alleging an interest in the defendant. *Medcalf v. James*, 25 L. R. 63.

When a plea contains irrelevant matter, it could be objected to on application at chambers. *Farlar v. Farlar*, 1 S. & T. 124; 27 L. J., P. 3.

The admission of a responsive allegation, plead-

ing in the earlier part the personal and testamentary history of the testatrix, and in the later part that the paper in question was procured by her husband at a time when, by reason of extreme illness, she had not testamentary capacity, was opposed:—Held, that the earlier part of the allegation, though in itself inadmissible, as not affecting the issue, would, in combination with the averment of testamentary incapacity contained in the latter part, be such evidence as a judge could not properly withdraw from the consideration of a jury at a trial of the issue of testamentary competency, and must be admitted to proof accordingly. *Latham v. Woolbert*, 1 S. & T. 1; 27 L. J., P. 10.

When a party pleading relies upon a will of later date than that propounded, he is bound to set it forth in the plea, with the same particulars as in a declaration. *Leake v. Hurst*, 30 L. J., P. 39; 7 Jur., N. S. 104.

An executor propounding a will cannot plead in opposition to an earlier will propounded in the same suit any plea but revocation by the will which he propounds. *Parton v. Johnson*, 1 L. R., P. 549; 37 L. J., P. 67; 18 L. T. 923; 16 W. R. 1192.

**Pleas of Undue Execution and Revocation.]**—Under a plea that a paper propounded is not the will of the deceased, evidence of undue execution, or of incapacity, is not admissible. The meaning of that plea is, that the deceased did not execute the paper intending that it should operate as his will. *Cunliffe v. Cross*, 32 L. J., P. 68.

A plea that the will propounded is not the will of the deceased, is too vague and indefinite, and will not be allowed to be pleaded. *Owen v. Davies*, 3 S. & T. 588; 33 L. J., P. 201; 13 W. R. 88.

**—That Testator was incapable of Executing Will.]**—A defendant pleaded, that at the time of the pretended execution of the will deceased was incapable of executing it, and that the will was prepared and made by A., and that deceased had not given to A. directions to prepare or make it:—Held, that both pleas were bad. *Middlehurst v. Johnson*, 30 L. J., P. 14.

**—That Testator did not know Contents of Will.]**—A plea that at the time when the testator signed the will he did not know and approve of the contents thereof, is good on demurrer. *Hastilow v. Stobie*, 1 L. R., P. 64; 35 L. J., P. 18; 11 Jur., N. S. 1039; 13 L. T. 473; 14 W. R. 211.

A plaintiff having propounded a will and codicil, the defendant pleaded that the codicil was not prepared in conformity with the instructions of the deceased; and that the deceased, at the time of the execution of the codicil, was ignorant of its contents:—Held, that the plea was bad. *Cunliffe v. Cross*, 3 S. & T. 37; 32 L. J., P. 68; 9 Jur., N. S. 210; 8 L. T. 172; 11 W. R. 258.

In a suit as to the validity of a will, the next of kin pleaded that it was not the will of the deceased. The jury found that the testatrix gave instructions for, and intended to have inserted in her will, certain small legacies, which were in fact omitted; that such instructions, at the moment she executed the will, were absent from her mind; and that the residuary legatee, who procured such execution, knew that such

instructions were absent from her mind. The verdict on this issue, by direction of the judge of assize, was entered for the next of kin:—Held, that as no fraud was pleaded or imputed to the residuary legatee, and as the will was read over to the testatrix at the time she executed it, the mere omission of the legacies did not prevent the instrument propounded from being her will. *Mitchell v. Gard*, 3 S. & T. 75; 32 L. J., P. 129; 9 Jur., N. S. 673.

A plaintiff propounded a will. The defendant pleaded denying the due execution of such will; and, that the deceased subsequently executed another will, by which the first was revoked; and finally, that he destroyed the second will with an intention to revoke it:—Held, that the last fact was not properly pleaded, inasmuch as it was no answer to the declaration. *Powell v. Powell*, 1 L. R., P. 6; 35 L. J., P. 5; 11 Jur., N. S. 982; 13 L. T. 566; 14 W. R. 147.

At the trial a legatee in an earlier will who resisted probate of a later will, which was propounded by the executors, impeached the genuineness of the testator's signature to the instrument, though no allegation of fraud had been pleaded:—Held, that evidence in support of the allegation of forgery was admissible under the plea of undue execution. *Hooton v. Dennet*, 17 L. T. 670; 16 W. R. 488.

A defendant pleaded, in addition to pleas of undue execution, want of testamentary capacity, and undue influence, that a will of an earlier date, brought in with the scripts, was the last will and testament of the deceased:—Held, that the plea might stand, as it occasioned no inconvenience to the plaintiff. *Tailby v. Brown*, 13 L. T. 566.

**Pleas of Undue Influence and Fraud.**—A plea that a will was procured by undue influence is bad, unless the name of some person exercising the undue influence is stated in it. *West v. West*, 4 S. & T. 22; 34 L. J., P. 146; *S. P., Harris v. Bradbury*, 30 L. J., P. 168.

A plea that a will was procured by the undue influence of "A. and others," is good, but the other side is entitled to the particulars of "the others." *Ib.*

When it is intended to invalidate a will on the ground of fraud, or of circumstances tantamount to a charge of fraud, there should be a plea alleging that the execution of the will has been obtained by fraud. A plea of undue influence is insufficient to let in a charge of fraud. *White v. White*, 2 S. & T. 504; 31 L. J., P. 215.

In a plea averring that the execution of a will was obtained by the undue influence or fraud of A., and others acting with him, it must be shewn that he personally exercised such influence or fraud. *Purcell v. Barlow*, 9 Ir. R., Eq. 367.

Leave was granted to a defendant (propounding the latest will of the deceased) to insert a different name in each plea, he paying the costs from the filing of the pleas to the amendment. *Ib.*

**Particulars of Pleas.**—By a rule of proceeding in the Probate Court (1865), made as to contentious business, it is required that any party having pleaded certain pleas as to the competency of the testator, and the validity of the execution of the will, shall give particulars

in writing, stating shortly the substance of the case he intends to present to the court, and no other defence shall be available. The particulars delivered set forth that, "at the time of the execution of the alleged will, the deceased was in a state of mental prostration brought on by habitual drunkenness and disease of the brain, and that when he executed the alleged will he was not conscious of, and did not approve of, the contents of the alleged will or of the residuary clause:—Held, that these particulars could not be construed as restricting the defendant to proof that the non-approval of the residuary clause was alone occasioned by mental prostration brought on by habitual drunkenness and disease of the brain. *Fulton v. Andrew*, 7 L. R., H. L. 448; 44 L. J., P. 17; 32 L. T. 209; 23 W. R. 566.

**Costs of Pleas of Undue Influence.**—A defendant pleading undue influence, and not appearing at the trial in support of the plea, will be condemned in costs. *Tolland v. Stevenson*, 12 Jur., N. S. 300; 13 L. T. 609.

A defendant pleaded that the will propounded was not duly executed, and that the deceased was incapable at the time of making a will. With this plea, he gave notice that he only intended to cross-examine the witnesses produced in support of the will. Subsequently he obtained leave to, and did, file a plea of undue influence on the part of the plaintiff, but did not withdraw the notice:—Held, that such notice only protected the defendant from costs, in case he limited his cross-examination to those matters required to be established by an executor in proving a will in solemn form, namely, that the will was duly executed and that the testator was capable at the time of execution. *Ireland v. Rendall*, 1 L. R., P. 194; 35 L. J., P. 79; 14 L. T. 574.

The court refused to condemn a next of kin in costs who had unsuccessfully opposed a will on the ground of incapacity and undue influence, although there was no direct evidence of undue influence, when it appeared that the will was made in favour of the testator's widow, and at her instigation, by answers of "aye" and "no" at a time when his capacity might be fairly questioned. *Smith v. Smith*, 1 L. R., P. 239; 36 L. J., P. 13; 15 L. T. 192; 15 W. R. 230.

**Pleadings by Interveners.**—An intervener may plead after issue joined by leave of the court. *Jones v. Williams*, 34 L. J., P. 102; 11 Jur., N. S. 288.

A party intervening after the pleadings have been closed, cannot be allowed by a minute of court to adopt and adhere to the pleas given in in opposition to a will, but must file his own separate pleas. *Ib.*

**Withdrawing Pleas.**—Leave to withdraw a plea to which there has been a demurrer, will not be granted except upon payment of costs. *Hawke v. Hawke*, 32 L. J., P. 132.

**Amendment of Pleadings.**—M. A. D., the testatrix, in 1853, made her will, by which she gave her property equally between the plaintiffs, defendants, and interveners. In an action by the plaintiffs propounding this will, it appeared that in 1874 she gave instructions for another will, which would have deprived the plaintiffs of

all interest in her estate. In the course of the plaintiff's case some evidence was given tending to shew that the testatrix was prevented by force and threats from executing the proposed will. The court allowed the pleadings to be amended by adding statements to that effect, and praying for a declaration that the plaintiffs held their shares as trustees for the defendants and interveners. *Betts v. Doughty*, 5 P. D. 26; 48 L. J., P. 71; 41 L. T. 560.

The inclination of the court is to allow the record to be amended at the trial by the addition of a new plea rather than to shut out any defence which might be raised. *Todd v. Simpson*, 1 S. & T. 269.

B. died in May, 1850, leaving a will dated May, 1849, and two codicils dated May, 1850. Probate of these papers was taken in common form, in July, 1850. In April, 1858, two legates intimated their intention of disputing the two codicils; whereupon the surviving executors commenced a suit, and filed their declaration on the 25th of June. On the 21st of July the defendants filed pleas, first, alleging that the codicils were unduly executed; and, secondly, that the testator was of unsound mind at the time of their execution. On the 18th of November, the plaintiffs set the case down for hearing, but it had not come on for trial. The defendants then, on the affidavit of their solicitor, applied for leave to amend their pleas by inserting similar pleas against the will, on the ground that since the pleas were filed their solicitor had received information impeaching the validity of the will. The court hesitantly allowed such amendment, on condition of a portion of a legacy, already received by one of the defendants, being brought into court, the costs of the motion being paid, and the pleadings amended within a week. *Ware v. Claxton*, 1 S. & T. 251.

The court will, at the trial, allow pleadings to be amended by adding a plea on the terms of adjournment, if desired by the other side, and payment of the costs of the day. *White v. White*, 31 L. J., P. 215.

But leave to introduce a new plea after issue joined will not be given, unless affidavits in support of the motion disclose such facts, as, if proved in evidence, would warrant the plea. *Twells v. Clarke*, 3 S. & T. 280; 33 L. J., P. 49; 9 L. T. 658.

If at the trial evidence of such facts should be given, the court would allow a corresponding plea to be added to the record if it could be done without injury to the other party. *Id.*

The court will not give leave to amend at the eleventh hour unless fresh facts have only just been found out. *Duprez v. Veret*, 1 L. R., 583; 38 L. J., P. 5; 17 W. R. 157.

**Demurrers.**—Where a party takes no step on an order to join in demurrer within a given time, the party demurring is at the expiration of the time entitled to judgment on the demurrer. *Wells v. Wells*, 2 S. & T. 607; 31 L. J., P. 112; 7 L. T. 250.

#### h. Evidence.

**Subpoena.**—The Probate Court of Ireland has jurisdiction to order a subpoena to issue to compel the attendance of a witness resident in England or Scotland. *Ross v. Burke*, 6 Ir. R., Eq. 328.

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**Examination of Witnesses.**—Neither defendants nor interveners, unless they plead, can be permitted either to examine or to cross-examine witnesses. *Nugent v. Nugent*, 7 Ir. R., Eq. 519.

**Commission to Examine Witnesses.**—In a testamentary suit the question at issue was, whether the will of the deceased was executed in accordance with the provisions of the 7 Will. 4 & 1 Vict. c. 26. One of the attesting witnesses being resident in New Zealand, the court ordered the original will to be transmitted to that colony, attached to the commission for the examination of such witness, an attested copy having been first deposited in the registry, and time having been allowed for the examination of the other witness before one of the registrars of the court by either party. *Forster v. Forster*, 33 L. J., P. 113; 10 Jur., N. S. 594.

A commission for the examination of a witness in a distant colony will authorize the commissioners to act jointly or severally. *Id.*

The court has power to issue a commission to examine a witness who is not prevented by illness or by reason of being without the jurisdiction of the court from attending the trial, but will not make such an order without the consent of the other side. *Jones v. Williams*, 13 W. R. 696.

The court directed a commission to issue for the examination of the surviving attesting witness to a will, which was in litigation before it, although the affidavit filed to support the application merely stated that the witness was upwards of sixty-six years of age, and frequently suffered from ill health. *Brown v. Brown*, 1 L. R., P. 720; 38 L. J., P. 78; 21 L. T. 339; 17 W. R. 720.

Under s. 26 of 20 & 21 Vict. c. 77, the court has power to order a commission to issue to examine a person as to her knowledge of a testamentary paper. *Banfield v. Pickard*, or *Pickard*, *In goods of*, 6 P. D. 33; 50 L. J., P. 72; 29 W. R. 613; 45 J. P. 508.

**Discovery and Inspection.**—The court possesses powers as extensive as the Court of Chancery and the superior courts of common law to compel a discovery, by virtue of the 20 & 21 Vict. c. 77, s. 36, such powers being "auxiliary to the trial of questions of fact by a jury before the court itself." *Hunt v. Anderson*, 3 L. R., P. D. 476; 37 L. J., P. 27; 18 L. T. 33; 16 W. R. 583.

The court will exercise its power of compelling a discovery in cases where a discovery would be granted by the Court of Chancery, in order that parties may not be compelled to resort to the Court of Chancery for assistance in the prosecution of a suit in the Court of Probate. *Id.*

The court has power to order any documents sufficiently described, and shewn to be material to the inquiry going on before it, to be brought into the registry, and also to order either party to file additional affidavits as to scripts. *Peacock v. Lowe*, 36 L. J., P. 91; 16 L. T. 641.

The opposite counsel cannot inspect letters which a witness has with him during examination, though they relate to the cause, without putting them, if required by the other side, in evidence. *Palmer v. Maclear*, 1 S. & T. 149.

**Declaration of Deceased Person.**—Declarations of a deceased person, claiming a limited interest under a particular will of property of

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which he was in possession, are admissible to prove the fact that such will had a legal existence, and that certain persons were named executors therein. *Sly v. Sly*, 2 P. D. 91; 46 L. J., P. 63; 25 W. R. 463.

**Copy of Will.]**—A copy of a will in the handwriting of one of the attesting witnesses, who was a solicitor's clerk, was found after a lapse of fifty years among the solicitor's papers tied up with other papers belonging to a client who was one of the executors named in the will:—Held, on proof of due search for the original will, that the copy was admissible. *Ib.*

**By Affidavit.]**—In an action brought for the purpose of proving a will in solemn form, where none of the parties cited had appeared, the court declined to order the execution and attestation of the will, to be proved by affidavit under Ord. XXXVII. r. 1. *Cook v. Tomlinson*, 24 W. R. 851.

Affidavits having been sworn before the United States consul in Vera Cruz, as there was no English consul or diplomatic agent there:—Held, that the court had no power to receive them. *De Salazar, In goods of*, 21 W. R. 776.

**Notice with Plea to Call and Cross-examine Witnesses.]**—When a party opposing a will has given notice that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of it, he may on the eve of the trial recall such notice, and substitute another expression of his intention to produce, if necessary, witnesses on the trial of the cause. *Edmonds v. Leaver*, 13 L. T. 248.

If a party opposing a will does not deliver the notice of his intention not to call witnesses until after he has delivered his plea, he loses the protection against condemnation in costs given by the rule of the court, and the question of costs is left to the discretion of the court. *Bone v. Whittle*, 1 L. R., P. 249; 36 L. J., P. 15; 15 L. T. 330.

An attesting witness to a codicil, signed a written statement to the effect that it was not duly executed, and it was opposed upon that statement. The court being of opinion that the statement had been unfairly obtained from the witness by the party opposing the codicil, condemned her in the costs. *Ib.*

A party who pleads that the deceased did not know and approve of the contents of his will may upon that question cross-examine the witnesses produced by the plaintiff without being liable to costs, if he has given the notice required by r. 41. *Cleare v. Cleare*, 1 L. R., P. 655; 38 L. J., P. 81; 20 L. T. 497; 17 W. R. 687.

A conditional notice, that if both attesting witnesses to a will are produced the parties opposing it only intend to cross-examine the witnesses, is a sufficient notice to protect them against condemnation in costs. *Leeman v. George*, 1 L. R., P. 542; 37 L. J., P. 13; 17 L. T. 518.

**Calling Attesting Witnesses.]**—The court will not, under 20 & 21 Vict. c. 77, s. 26, order the attendance for examination in open court of the attesting witnesses to a will because they may have declined to give information as to the circumstances attending the execution of the same.

*Erans v. Jones*, 36 L. J., P. 70; 16 L. T. 299; 16 W. R. 778.

A party having been brought before the court to be examined as to her knowledge of the testamentary papers of the deceased, counsel was permitted to attend on her behalf, to put questions to her, and also to the other persons who had been required to attend on the same inquiry. *Cope, In goods of*, 36 L. J., P. 83.

In contentious proceedings the party propounding a will is not bound to call both the attesting witnesses. *Forster v. Forster*, 33 L. J., P. 113; 10 Jur., N. S. 594; *S. P., Belbin v. Keats*, 1 S. & T. 148; 27 L. J., P. 56.

But a party proving a will in solemn form is bound to call at least one of the attesting witnesses. *Bowman v. Hodgson*, 1 L. R., P. 362; 36 L. J., P. 124; 16 L. T. 392.

It will not suffice to prove the execution by other witnesses who were present at the time, but did not attest the instrument. *Ib.*

When a party propounding a will in a contested suit, the only issue being due execution, and notice under the 41st rule having been given, called one of the attesting witnesses, who gave evidence against the due execution:—Held, that he was bound to call the other attesting witness. *Owen v. Williams*, 32 L. J., P. 159; 9 L. T. 86; 11 W. R. 808.

An executor having produced one of the attesting witnesses to the will in dispute, who failed, from mental incapacity or some other cause, to give a rational account of the time and manner of execution, called the second witness. The second witness deposed that the testator did not sign his name or acknowledge his signature in the presence of two witnesses present at the time:—Held, that though the second witness could not be considered a hostile witness, yet he was produced to satisfy the requirements of the law; and that the party producing him might put questions to other witnesses tending to throw doubts upon his general credibility. *Coles v. Coles*, 1 L. R., P. 70; 35 L. J., P. 40; 13 L. T. 608; 14 W. R. 290.

**Proof of Signature.]**—When attesting witnesses are out of the jurisdiction, a will may be proved by evidence of their handwriting, although the will might possibly have been sent to the witnesses. *Wilson v. Collum*, 9 L. R., Ir. 150—C. A.

### i. Trial.

**20 & 21 Vict. c. 77, s. 29.]**—Semble, that 20 & 21 Vict. c. 77, s. 29, applies only to procedure. *Oliphant, In goods of*, 1 S. & T. 525; 30 L. J., P. 82.

The rules for practice in the registry are not, under all circumstances, absolutely binding on the court. *Laftus, In goods of*, 3 S. & T. 307; 33 L. J., P. 59; 10 Jur., N. S. 324; 10 L. T. 240.

**When Counsel will be Heard.]**—All motions required to be made before the court must be made by counsel. *Drake v. Morgan*, 27 L. J., P. 3; 4 Jur., N. S. 32.

Where an executor propounds a will in solemn form, and there are several defendants whose case on the pleadings is substantially the same, the court will hear counsel only for one defendant. *Palmer v. Maclean*, 1 S. & T. 149.

A person suing in formâ pauperis, to whom

counsel has been assigned by the court, cannot appear by another counsel until there has been a renunciation or a new assignment of counsel, or he has been dispaupered. *Hamer v. Boreham*, 1 S. & T. 26; 27 L. J., P. 107.

**Right to Begin.]**—In a testamentary suit the party propounding the last will is entitled to begin. So also is a party who alleges only undue influence, in opposition to the validity of a will. *Hutley v. Grimston*, 5 P. D. 24; 48 L. J., P. 68; 41 L. T. 531.

At the trial of an ejectment by the heir and a devisee under a prior will as co-plaintiffs against the devisee under a later will, the defendant admitted the heirship, but, nevertheless, the plaintiffs were held entitled to begin, because of the joinder of the devisee as a co-plaintiff. *Purdon v. Longford (Earl)*, 11 Ir. R., C. L. 267.

**Consolidation of Actions.]**—Two executors had commenced separate defences, and two records had been made up. The court ordered the records to be consolidated, but gave the defendants leave to be represented by counsel separately. *Limb v. Holden*, 21 L. T. 731.

**Place of.]**—In a testamentary suit, touching the validity of a will, the jury was discharged without agreeing to a verdict. A rule absolute for a new trial was granted, but on motion by the plaintiff, at whose instance the first trial was had, the court refused to change the venue to Stafford assizes. *Mumford v. Shuffebotham*, 21 L. T. 835.

By Ord. XXXVI. r. 1, the statement of claim must contain a paragraph stating the place where the plaintiff proposes the trial of his cause shall take place. Except under special circumstances, the court will not allow causes to be tried out of Middlesex, unless the application is made in the statement of claim in pursuance of this order. *Ridge v. Ridge*, 35 L. T. 428.

**Directions as to Mode of.]**—The court will not make an order as to the mode of trial of a cause unless all the pleadings have been regularly filed in the registry. *Isaacks v. Whaley*, 11 W. R. 549.

**By the Court itself.]**—The court has power to direct issues of fact to be tried before itself by a jury, reserving issues of law arising out of the pleadings to be tried by itself alone. *Crispin v. Dogliani*, 2 S. & T. 493; 31 L. J., P. 64; 6 L. T. 694; 10 W. R. 810.

When the cause, from the nature of the issues of fact raised, is a more proper one to be tried before the court itself than by a jury, the court will, on the application of one of the parties, direct it to be heard without a jury, unless such application is opposed by the heir-at-law. *Quick v. Quick*, 3 S. & T. 460; 33 L. J., P. 108.

When the main question to be decided was presumptive revocation of a will, the court (the defendants who were not heirs-at-law opposing) directed the cause to be tried by the court without a jury. *Smith v. Hooad*, 3 S. & T. 462.

**By Jury.]**—The court will make it part of an order for the trial of a cause by a special

jury, that if the applicant does not take the requisite steps for striking the jury, the other party may have it tried by a common jury. *Morris v. Owen*, 30 L. J., P. 213.

The court refused to allow an issue as to the contents of a destroyed will to be tried by a jury. *James v. Foster*, 36 L. J., P. 46; 15 L. T. 544; 15 W. R. 498.

**At the Assizes.]**—Application on behalf of a plaintiff to direct a cause to be tried at the assizes refused. There is no similarity between the position of a plaintiff in the Probate Court and his common law right to lay the venue where he pleases. A testamentary suit is at large, and ought to be tried before the judge, though he has a discretionary power to send an issue to be tried before a judge of assize. *Cooper v. Moss*, 1 S. & T. 143.

In order to save expense and delay, the court will generally allow issues to be tried at the assizes. When, however, the suit was for revocation of probate, and there had been great delay in calling in the probate, and the property was large, the court considered these circumstances sufficient ground for refusing an application by the plaintiff, opposed by the defendant, that the issues should be tried at the assizes, but ordered that the defendant, if successful, should not be allowed more costs than he would have been entitled to if the issues had been tried at the assizes. *Ridgway v. Abington*, 32 L. J., P. 107; 11 W. R. 500.

When the principal issue raised was, whether the deceased had destroyed, with the intention of revoking it, a will which was not forthcoming, the court refused to send the issues for trial at the assizes. *Beech v. Rathbone*, 35 L. J., P. 26.

The court has no power to order an issue to be tried at the assizes by a judge, without a jury. If both parties wish the issue to be so tried, they should apply to the judge, who will try the issue under the C. L. P. Act of 1854, s. 1. *Bushell v. Blenkhorn*, 1 L. R., P. 89; 35 L. J., P. 75; 13 L. T. 80; 14 W. R. 408.

When issues are tried at the assizes, the postea should be signed by the associate. *West v. Goodrick*, 31 L. J., P. 39.

**By County Court Judge.]**—When the judge is satisfied that the county court has jurisdiction over a cause, he will direct a cause to be tried before the judge of a county court having jurisdiction, and will also direct the papers in that cause to be transmitted to the county court for the purposes of that suit, but he will give no directions as to the mode in which the cause shall be tried. *Norris v. Allen*, 2 S. & T. 601; 32 L. J., P. 3; 7 L. T. 338; 11 W. R. 32.

It will be for the judge of the county court to decide whether the cause shall be tried before him with or without a jury. *Id.*

When a county court has jurisdiction, the court may, though application is made on behalf of all the parties to the cause for it to be tried at the assizes, still in its discretion direct it to be tried in the county court. *Dunn v. Dunn*, 1 S. & T. 521; 30 L. J., P. 40; 8 W. R. 259.

When on an application acquiesced in by all parties to direct an issue to be tried at the assizes, it appeared that the whole property did not amount to 300*l.*, the court required that it

should also appear that the personalty was not under 200*l.*, so as to shew that the county court had no jurisdiction. *Ib.*

Where issues in a suit for proving a will in solemn form have been directed to be tried by the judge of a county court, and are found by him against the will, upon a certified copy of his decree being filed in the principal registry, the judge of the Probate Court will pronounce against the will, and decide any questions as to costs. *Thomas v. Crowther*, 2 S. & T. 501; 10 W. R. 861.

When contentious proceedings are referred by the court to a county court, the court has no further jurisdiction, except by way of appeal, over such proceedings. *Macleur v. Macleur*, 1 L. R., P. 604; 37 L. J., P. 68.

See also PRACTICE (Trial).

**Amendment of Pleadings at.]**—M. A. D., the testatrix, in 1853 made her will, by which she gave her property equally between the plaintiffs, defendants, and interveners. In an action by the plaintiffs propounding this will, it appeared that in 1874 she gave instructions for another will, which would have deprived the plaintiffs of all interest in her estate. In the course of the plaintiffs' case some evidence was given tending to shew that the testatrix was prevented by force and threats from executing the proposed will. The court allowed the pleadings to be amended by adding statements to that effect, and praying for a declaration that the plaintiffs held their shares as trustees for the defendants and interveners. *Betts v. Doughty*, 5 P. D. 26; 48 L. J., P. 71; 41 L. T. 560.

**Restraining Proceedings in the Court of Probate.]**—The defendants, the heir-at-law and some of the next of kin of a deceased person whose will could not be found, joined with the plaintiff in executing a deed confirming the dispositions made in a draft will in favour of the plaintiff. Afterwards, the defendants applied for letters of administration, and opposed the grant of probate to the (draft) will. On motion by the plaintiff, the defendants were restrained by a Court of Equity from further proceedings in the Court of Probate, but it was held that on the construction of the deed there was nothing in it to prevent the other next of kin from obtaining administration. *Wilcocks v. Carter*, 10 L. R., Ch. 440; 32 L. T. 444; 23 W. R. 530.

**Issues.]**—He upon whom the burden of proving an issue lies is not bound to prove every fact or conclusion of fact upon which the issue depends. From every fact that is proved, legitimate and reasonable inferences may be drawn; and hence, in discussing whether there is, in any case, evidence to go to the jury, what the court has to consider is, whether, assuming the evidence to be true, and adding to the direct proof all such inferences of fact as in the exercise of a reasonable intelligence the jury would be warranted in drawing from it, there is sufficient to support the issue. *Parfit v. Lawless*, 2 L. R., P. 462; 41 L. J., P. 68; 27 L. T. 215; 21 W. R. 200.

**Refusal to Propound Will.]**—When the parties interested under a questioned will do not, though cited, propound it, the mode of having the will

condemned is by motion, on notice, for administration, notwithstanding such will. *Brennan v. Dillon*, 7 Ir. R., Eq. 215.

**Survivorship of Husband or Wife ascertained by Petition or Declaration.]**—A question whether a husband, who has not been heard of for many years, survived his wife, litigated between the next of kin of the husband and of the wife, may be decided either on a petition or declaration. *Peppercombe v. Gardner*, 3 L. R., P. 149.

Objection to either form of procedure is waived by taking any step in the cause. *Ib.*

**Postponement of.]**—A defendant moved for the postponement of a trial from the spring to the summer assizes, on the ground that a material witness for the plaintiff, whom the defendant wished to cross-examine in court, would be prevented by illness from being present at the trial. The court rejected the motion, as it appeared that the witness would probably die before the summer assizes, and no advantage would, therefore, be gained by the postponement. *Williams v. Henry*, 3 S. & T. 463; 33 L. J., P. 110.

### J. New Trial.

**Within what Time Application made.]**—When an issue has been tried at the assizes, the parties are not bound by the rule of court, which directs that an application for a new trial must be made within ten days of the trial, or on the first sitting of the court after the trial. *Charlton v. Hindmarsh*, 29 L. J., P. 163.

### By way of Appeal from Judge of County Court.]

—When a testamentary cause, in which a county court has jurisdiction, has been commenced in, or has been transferred to, a county court, the Court of Probate has no power to grant a new trial, or to make any order in the cause, unless it is brought before it by way of appeal from the determination of the judge of the county court in point of law, or upon the admission or rejection of evidence, under 20 & 21 Vict. c. 77, s. 58. *Zealley v. Verryard*, 1 L. R., P. 195; 35 L. J., P. 127; 14 L. T. 769; 14 W. R. 970.

**For further Evidence.]**—When the only material question at issue was whether the deceased, who was proved to have been subject to insane delusions, was subject to them at the date of the will, and the evidence of the plaintiff's principal witnesses negatived the existence of delusions at any time, and the defendant's witnesses were unable to fix the date of their first appearance, and the defendant after trial (which terminated in a verdict in favour of the will) discovered evidence tending to throw further light on the question; the court being of opinion that the latter had not received that full investigation and final solution on which it was proper to found a decree, granted to the defendant a new trial upon payment by him of the plaintiff's costs of the former trial. *Young v. Dendy*, 1 L. R., P. 344.

**Witness Convicted of Perjury.]**—In a testamentary suit the jury, being unable to agree, was discharged without giving a verdict. The question in dispute, the capacity of the deceased, was afterwards referred to a second jury, who

found in the affirmative and for the plaintiff. Application was made for a new trial on the ground of the verdict being against the weight of evidence, but it was refused. Subsequently the plaintiff was convicted of perjury in reference to the evidence he gave in the suit:—Held, that that circumstance was not in itself sufficient to justify the court in allowing a new trial after an application with that object had been rejected. *Davies v. Brocknell*, 3 L. R., P. 88; 42 L. J., P. 39; 28 L. T. 604.

**Misdirection.**—On issues directed by the Court of Probate to determine the validity of a will, evidence was given on the part of those propounding the will that the will was read over to the deceased before execution, and this evidence those who impeached the will were not in a position to contradict. The jury found that the will was duly executed, that the testator was at the time of sound mind, that the execution was not procured by undue influence, and that he at the time of the execution knew and approved of the contents of the will except as to the residuary clause, of the contents of which he did not know and approve. A verdict was entered accordingly:—Held, that no new trial ought to be granted, on the ground that the jury was not directed that if they believed that the deceased was at the time of the execution of sound mind, they were bound upon the uncontradicted evidence that the will was read over to the deceased before execution to find that he knew and approved of its whole contents. For (assuming that the jury believed the evidence of reading over, which they were not bound to do merely because no contradiction was in fact given to it) no irrebuttable presumption of knowledge and approval of contents would arise upon proof that the testator was of sound mind, that the will was read over to him, and that he thereupon affixed his signature. *Fulton v. Andrew*, 7 L. R., H. L. 448; 44 L. J., P. 17; 32 L. T. 209; 23 W. R. 566.

**House of Lords.**—When the Court of Probate granted a rule nisi for a new trial, and made it absolute to enter a verdict, the House of Lords, upon appeal from the order in this form, entertained the original question of new trial, and made the order which ought to have been made in the court below. *Ib.*

**On Affidavits—Postponement of.**—The hearing of a motion for a new trial upon affidavits, if formally made in time, will be postponed when there has not been sufficient time to procure the necessary affidavits. *Young v. Dendy*, 36 L. J., P. 43.

*See also cases under PRACTICE.*

#### k. Appeal.

**Generally.**—The judge of the Probate Division having directed a jury to find in favour of a will, on the ground that the facts proved were no evidence of its having been revoked, and having pronounced in favour of the will, and directed an exception to his ruling to be annexed to the record, there being no record to which it could be annexed, the Court of Appeal directed notice of appeal to be given. *Harris, In re, Cheese v. Lovejoy*, 2 P. D. 161—C. A.

When a cause has been heard before a judge without a jury, the evidence being given viva voce, the parties may, if they please, apply for a rehearing under r. 60 of the Probate Court Orders of July, 1862, or they may, without doing so, appeal from the decision of the judge, on the facts as well as the law, to the Court of Appeal. *Sugden v. St. Leonards (Lord)*, 1 P. D. 154; 45 L. J., P. 49; 34 L. T. 369; 24 W. R. 479—C. A.

**To the House of Lords.**—Where there is an appeal from a final decree to the House of Lords, all interlocutory orders are under appeal, and it is unnecessary to obtain leave to appeal from such orders. *Smith v. Atkins*, 2 L. R., P. 169; 39 L. J., P. 78; 22 L. T. 247.

Leave to appeal from an order discharging a rule for a new trial was refused on the ground that it was unnecessary, the final decree being under appeal. *Ib.*

*See also APPEAL.*

#### l. Costs.

##### i. On Opposing or Contesting Proof of Wills.

A next of kin pleaded undue execution and incapacity in opposition to a will, and called witnesses in support of these pleas. The court pronounced for the will, but refused to condemn the next of kin in costs, undue influence not having been pleaded. *Summerell v. Clements*, 3 S. & T. 35; 32 L. J., P. 33; 8 L. T. 172; 11 W. R. 153.

Failure to establish pleas of undue influence and fraud will, as a rule, be followed by condemnation in costs. *Ib.*

In deciding whether the costs of an unsuccessful party should be paid out of the estate or not, the court will be guided by the opinion of the judge before whom the issues were tried. *West v. Goodrick*, 31 L. J., P. 39.

When the opposition is groundless the unsuccessful opponent of a will, who has pleaded the incapacity of the testator, will be condemned in costs, although he may have acted bona fide. *Ib.*

In interest causes the general rule is that the unsuccessful party is condemned in costs, except under special circumstances of misconduct by the opposite parties. *McLean v. McLean*, 1 Ir. L. R., Ch. 271.

In a testamentary suit, condemnation in costs includes all the charges of an administrator pending suit. *Fisher v. Fisher*, 4 P. D. 231; 48 L. J., P. 69.

The rule and practice by which a party may compel proof of a will in solemn form without liability for costs does not extend to a residuary legatee under a prior will. *Hockley v. Wyatt*, 7 P. D. 239; 51 L. J., P. 92; 47 L. T. 354; 46 J. P. 792.

The opponents pleaded undue influence and fraud, but offered no evidence in support of these pleas. The court, to mark its sense of the impropriety of putting these pleas on the record, condemned them in whatever costs the plaintiffs might have incurred to rebut these pleas. *Du Boison (formerly Maxwell) v. Maxwell*, 28 L. T. 369; 21 W. R. 575.

**Where Reasonable Grounds exist for.**—A will of a married woman being propounded by her

executors, it was opposed by her husband, and a question of domicile was raised upon the pleadings. That question was decided in favour of the executors, and the decision was affirmed, upon appeal to the House of Lords, without costs. The costs of the litigation in the Court of Probate were allowed out of the estate, on the ground that the question raised by the party opposing was so doubtful that he was entitled to have it decided by a competent tribunal. *Robins and Paxton v. Dolphin*, 1 S. & T. 518; 29 L. J., P. 138; 8 W. R. 177.

A person entitled in distribution, who merely puts executors to strict proof of a will in solemn form, if he has reasonable ground for doing so, will generally be allowed his costs out of the estate. But if it appears that his object in calling for such proof was not simply to obtain the judgment of the Court of Probate as to the validity of the will, but to elicit evidence which might be used by him in a suit instituted in another court, he will not be allowed his costs out of the estate. *Swinfen v. Swinfen*, 1 S. & T. 283; 29 L. J., P. 153.

Where a legal question fairly arises on the papers of a deceased person, the court will order the costs of the losing party to be paid out of the estate. *Thorncroft v. Lashmar*, 2 S. & T. 479; 31 L. J., P. 150; 8 Jur., N. S. 595; 6 L. T. 476.

Where the judge of assize was satisfied with a verdict for the plaintiff establishing a will, but would not have been dissatisfied with a contrary verdict, the court refused to condemn the defendant in costs. *Bramley v. Bramley*, 3 S. & T. 430; 33 L. J., P. 111, n.; 12 W. R. 992.

If the cause of litigation takes its origin in the fault of the testator, or of those interested in the residue, the costs will properly be paid out of the estate. *Mitchell v. Gard*, 3 S. & T. 275; 33 L. J., P. 7; 10 Jur., N. S. 51; 9 L. T. 491; 12 W. R. 255.

If there are sufficient and reasonable grounds, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent. *Id.*

The costs of an unsuccessful opposition of a will allowed out of the estate, on the ground that the misconduct of those interested in setting up the will had given reasonable ground for the litigation. *William v. Henry*, 3 S. & T. 471; 33 L. J., P. 110; 12 W. R. 1015.

H. died in 1856; his widow proved his will in 1860, and died in 1862, making D. her executor, and leaving him all her property. C., next of kin of H., cited D. to bring in the probate of H.'s will. D. propounded it, and C. pleaded thereto; the jury found the issues in favour of D.:—Held, that though C., on the facts proved, might have had reasonable grounds for opposing the probate when taken, yet he had no right to wait till after the widow's death, who might have given important evidence, and then call in the probate, without being liable to costs in case of failure. *Hawkins, In goods of*, 3 S. & T. 290; 10 L. T. 70.

#### Costs incurred by Conduct of Testator.]—

Doubts having been caused by the condition in which the testatrix had left her testamentary

papers, the court allowed the costs of all parties out of the estate, including, besides the costs of the executors propounding the former will, the costs of legatees named in it. *Jenner v. Finch*, 5 P. D. 106; 49 L. J., P. 25; 42 L. T. 327; 28 W. R. 520.

Issues of undue execution, incapacity, and undue influence, raised by the next of kin in opposition to a will, were found against him. The court, however, refused to condemn him in costs, because it was of opinion that the parties propounding the will, and in whose favour it was made, had acted so as to excite the suspicion of the next of kin; but refused to allow his costs out of the estate, because he had not sufficient grounds for the pleas he had filed. *Broadbent v. Hughes*, 29 L. J., P. 134.

A party pleading undue influence does not exempt himself from liability for costs, by giving notice that he intends only to cross-examine the witnesses produced in support of the will. *Harlington v. Bowyer*, 2 L. R., P. 264; 41 L. J., P. 17; 25 L. T. 385; 19 W. R. 982.

Prima facie, an executor is justified in propounding his testator's will, and if the facts within his knowledge at the time he does so tend to shew eccentricity merely on the part of the testator, and he is totally ignorant at the time of the circumstances and conduct which afterwards induce a jury to find that the testator was insane at the date of the will, he will, on the principle that the testator's conduct was the cause of litigation, be entitled to receive his costs out of the estate, although the will is pronounced against. *Boughton v. Knight*, 3 L. R., P. 64; 42 L. J., P. 25; 28 L. T. 562.

A testator, before the execution of his last will, which was in favour of his wife, and was propounded by her, had executed another will not so favourable, but the existence of which he concealed from her. The last will being disputed unsuccessfully by parties interested under the prior will:—Held, that the testator had conduced to the litigation, and costs granted out of the estate. *Du Boison (formerly Maxwell) v. Maxwell*, 28 L. T. 369; 21 W. R. 575.

The court allowed costs out of the estate to the unsuccessful opponent of a will, although he had pleaded undue influence and fraud, being of opinion that the mode in which the testator had executed the will and the conduct of the persons beneficially interested under it, had reasonably excited doubt and suspicion, and justified those pleas. *Orton v. Smith*, 3 L. R., P. 23; 42 L. J., P. 23; 28 L. T. 112.

The costs of an unsuccessful opposition to a will must be paid out of the estate in cases where the testator, by his own conduct, and habits and mode of life, has given the opponents of the will reasonable ground for questioning his testamentary capacity. *Davies or Davis v. Gregory*, 3 L. R., P. 28; 42 L. J., P. 33; 28 L. T. 239; 21 W. R. 462.

In cases where neither the testator by his own conduct, nor the executors or persons interested under the will by their conduct, have brought about the litigation as to its validity, but the opponents of the will, after due inquiry into the facts, entertained a bona fide belief in the existence of a state of things which, if it did exist, would justify the litigation, and the opposition is unsuccessful, each party must pay his own costs. *Id.*

Nine years after a testator's death, his executor produced and propounded a will. It

was opposed by the next of kin. The executor accounted for the delay by saying that the testator had desired that it should not be produced until after his mother's death. The will being admitted to probate:—Held, that as the conduct of the testator in desiring its concealment had given the next of kin a reasonable ground for suspicion, she ought not to have been condemned in the costs of her opposition. *Emberley v. Trevanion*, 29 L. J., P. 143.

**Of Next of Kin.]**—After a next of kin had taken out administration, a will was propounded by one of the residuary legatees. The court pronounced for the will, but allowed the costs of the next of kin, in obtaining administration and in putting the residuary legatee upon proof in solemn form, out of the estate, as the residuary legatee did not produce the will until after administration had been taken out, and several months after the testator's death, although he was several times desired by the next of kin to produce it if it existed, and he gave no explanation of the delay. *Smith v. Smith*, 4 S. & T. 3; 34 L. J., P. 57; 11 Jur., N. S. 143; 13 W. R. 504.

A next of kin, who unsuccessfully opposed a will, was condemned in the costs of another next of kin, whom he had cited to see proceedings, and who had appeared and pleaded, but had taken no other part. *Cross v. Cross*, 3 S. & T. 292; 33 L. J., P. 42; 19 W. R. 694.

A next of kin, who contested the validity of a will, propounded by the widow of the deceased as the sole executrix named therein, which was pronounced against by the court, but without condemning the widow in costs, is entitled to have his costs out of the estate. *Critchell v. Critchell*, 3 S. & T. 41; 32 L. J., P. 108; 8 L. T. 173; 11 W. R. 401.

An executor propounded a will, to which the defendant, next of kin, pleaded undue execution, but gave no notice of merely cross-examining plaintiff's witnesses. At the trial the plaintiff examined one attesting witness, who proved due execution; the defendant called the other attesting witness, who negatived due execution, and the jury found a verdict establishing the will. The court refused to make an order as to costs. *Ferrey v. King*, 3 S. & T. 51; 32 L. J., P. 120; 7 L. T. 219.

B., acting really in the interest of an infant residuary legatee, succeeded in establishing a will under which she herself took only a trifling legacy, the executor having refused to propound the will. The court held that the circumstances of the case were such as to warrant the opposition to the will, and at first refused to make any order as to costs; but, on the representation that B. was not primarily entitled to the grant with the will annexed, and so might never be in a position to repay herself the expenses of the suit, it ordered her costs to be paid out of the estate. *Bewsher v. Williams*, 3 S. & T. 62; 11 W. R. 541, n.

A next of kin who calls in probate of a will and gives the usual notice under r. 41, will not, if unsuccessful, be condemned in costs because the sole evidence upon which his opposition to the will is founded must to his knowledge be open to grave suspicion, from being that of an attesting witness who had previously made an affidavit of due execution. Such evidence, though *prima facie* untrustworthy, may justify the next

of kin in requiring proof of the will in solemn form. *Sheffield v. Sheffield*, 43 L. J., P. 72; 31 L. T. 455.

A next of kin who unsuccessfully opposed a will on the ground of incapacity, was not condemned in costs where the opposition was induced by a statement of the medical attendant of the deceased, who also attested the will, to the effect that he read over the will to the deceased, who signified his assent by gesture only, and that he could not swear that the deceased was in full possession of his mental faculties. *Tippett v. Tippett*, 35 L. J., P. 41.

**— After Notice that Will not to be Supported.]**—When a next of kin, who resisted probate on the ground of undue execution, proceeded to trial, despite of notice by the executor that it was not intended to support the will, the court refused to allow him costs out of the estate, other than such as the registrar, having regard to the duty cast upon him, might think reasonable. *Fritchley v. Fritchley*, 16 L. T. 267.

**— Propounder Withdrawing on Morning of Trial.]**—An attorney propounded, as executor, a will which purported to be attested by two of his clerks. The next of kin pleaded in opposition to the will; issue was joined, and the cause came on for trial before a jury. On the morning of the trial, the counsel for the executor stated that the executor would consent to a verdict for the defendant. In the absence of a satisfactory explanation by the plaintiff of the circumstances under which the will had been propounded and withdrawn, the court condemned him in the costs of the suit. *Richards v. Humphreys*, 29 L. J., P. 137.

**— Intervening after Establishment of Will.]**—A next of kin, though not cited to see proceedings, and not having intervened, if in fact cognizant of a suit between the executor of a will and other next of kin, ending in the establishment of the will, is not at liberty in any way to oppose probate of such will being taken; and where, on a verdict, the court had pronounced for a will, and a next of kin so situated had entered a caveat, the court directed probate to issue in spite of the caveat, and condemned the next of kin in costs. *Ratcliffe v. Barnes*, 2 S. & T. 486; 31 L. J., P. 611; 8 Jur., N. S. 313; 6 L. T. 658.

The next of kin opposed a will executed in the Mysore territory, in the East Indies, on the ground that the testator was a domiciled Scotsman, and that the execution was invalid by the law of Scotland. Pending the suit, a court of appeal in Scotland, in another case, determined that the will of a domiciled Scotsman as to personalty was good, if executed according to the *lex loci actus*. The next of kin gave notice to the plaintiffs that they no longer intended to dispute probate; and when the cause came on for hearing asked for their costs out of the estate; but the court refused to make any order for costs, on the ground that they had raised an issue of fact as to domicile likely to put the plaintiffs to great expense, as well as the issue at law. *Onslow v. Cannon*, 2 S. & T. 136; 30 L. J., P. 165; 4 L. T. 217.

**Of Executors.]**—A widow twelve months after the death of her husband, who died in Canada, took probate of a will in which she was named executrix. A month afterwards a citation was

extracted by the plaintiff, calling upon her to bring such probate into the registry, which she did. He then propounded a later will and after a short delay she withdrew from the suit. The court declined to condemn her in the costs. *Smith v. Fletcher*, 2 L. R., P. 20; 21 L. T. 646.

A person was of eccentric habits, but had always managed his own affairs. His executors propounded his will, but failed to support it, the evidence shewing that at the time it was executed he was not of sound mind. The court being of opinion that they had acted in the bona fide belief of his capacity, and that they could have had no knowledge of his true life and character, until it was disclosed on the trial, allowed their costs out of the estate. *Boughton v. Knight*, 3 L. R., P. 64; 42 L. J., P. 41; 28 L. T. 562.

An executor propounded a will in the interest of infant children, and did not become aware, until after the suit was instituted, that it had not been duly executed.—Held, that he was entitled to his costs out of the estate. *Darves v. Rees*, 13 L. T. 609.

A will propounded by the executors was opposed by the plaintiff, one of the next of kin. The issues were tried by a jury, and were found for the executors, and the will was pronounced for. After an order nisi for a new trial, on the ground that the verdict was against the weight of evidence, had been granted, the plaintiff abandoned further opposition to the will. The court, upon the application of two of the next of kin, who had been cited to see proceedings and had appeared, but had not pleaded, allowed them to plead and adopt the proceedings already had in the suit. The order for a new trial was ultimately made absolute, the executors being allowed their costs up to that time out of the estate. *Boulton v. Boulton*, 1 L. R., P. 456; 37 L. J., P. 19; 17 L. T. 415.

— **Acting without Reasonable Cause.**—A nude executor who, without reasonable ground, propounds a testamentary paper, is liable for costs. An executor, if he has any doubt as to the validity of a testamentary paper, should, before propounding it, take security for his costs from the persons interested. *Rennie v. Massie*, 1 L. R., P. 118; 35 L. J., P. 124; 14 L. T. 188; 14 W. R. 516.

A nude executor who propounds a testamentary paper, of the validity of which there is no reasonable prima facie probability, cannot escape from the liability of being condemned in costs by the fact that he takes no interest under the paper. *Roberts v. Cowmeadow*, 21 L. T. 367.

— **Where Negligent.**—Where the substance of a will has been propounded, and, in most particulars, established by an executrix, through whose negligence the original will had been lost, the court condemned the executrix in the costs of the defendants, and allowed her only such costs as she would have incurred in proving the original will in solemn form. *Burle v. Burle*, 1 L. R., P. 472; 36 L. J., P. 125; 16 L. T. 677; 15 W. R. 1090.

— **Guilty of Misconduct.**—The executor propounded the will. It was opposed on behalf of the crown by the solicitor for the duchy of Lancaster, who alleged that the deceased had died intestate, leaving no next of kin, and also

by persons claiming to be next of kin. The crown and the other defendants, whose interest was accepted by the plaintiff, pleaded the same pleas. All parties were represented by counsel at the trial, and the will was upset. The crown did not ask for costs; and it ultimately turned out that the other defendants were not next of kin. The court, notwithstanding, condemned the executors in the costs incurred by them in the suit. *Goss v. Hill*, 40 L. J., P. 39; 25 L. T. 133; 19 W. R. 878.

An executrix having propounded a will in solemn form, the residuary clause, which was in her favour, was opposed, and the court pronounced for the will, excluding the residuary clause from the probate on the ground that it had been obtained by her undue influence. The court condemned her in the costs of the suit, with the exception of the costs of proving the will in solemn form, which she was allowed to take out of the estate. *Smith v. Atkins*, 2 L. R., P. 169.

— **Resisting Renunciation.**—A testator executed two wills, the first in England, and the second in Italy where he was domiciled at the time of his death. The English will disposed of realty and personalty, and nominated an executor. The second, or Italian will, disposed of the personalty only, but contained a general revocatory clause:—Held, that the second will revoked the first, including the appointment of the executor. And the executor, who resisted revocation of the probate of it, granted to him in common form, was condemned in costs. *Cottrell v. Cottrell*, 2 L. R., P. 397; 41 L. J., P. 57; 26 L. T. 527; 20 W. R. 590.

— **Of a Previous Will.**—An executor of a former will has the same right as a next of kin to put an executor of a subsequent will upon proof in solemn form, and to interrogate his witnesses, without being liable for costs. *Boston v. Fox*, 29 L. J., P. 68.

Probate of a will was opposed by the next of kin, who was also the executor of a previous will. He made an inquiry into the circumstances under which the later will was executed, though he was aware of the execution, and knew the name of the attorney who had prepared it. He pleaded undue execution, incapacity, and that the will was not the last will of the deceased, but gave notice before the hearing that he did not intend to produce evidence. On cross-examination of a witness in support of the will, facts were elicited, which, in the opinion of the court, would have justified the next of kin in calling for proof of the will in solemn form, if they had been known to him; but as they were not known to him until stated by the witness in court, and he had made no previous inquiry as to the circumstances attending the execution, the court refused to allow his costs out of the estate, although it did not condemn him in costs. *Seaton v. Sturch*, 29 L. J., P. 195.

Where executors of an earlier will, being disinterested persons, opposed on reasonable grounds a will of later date, and the verdict of a jury establishing the later will, the executors of the earlier will held to be entitled to their costs out of the estate. *Foale v. Tvetheury*, 9 L. T. 87.

Where a next of kin successfully opposed, on the ground of undue influence exercised by the executor, and by the residuary legatee, a will

propounded by the executor, the court condemned the executor in costs. *Nash v. Yellowly*, 3 S. & T. 59; 8 L. T. 290; 11 W. R. 541.

The plaintiff was also executor under an earlier will, which appointed the same residuary legatee, under which the executor took nothing, and the court refused to make an order, securing out of the estate to the defendant such costs as he might not be able to recover from the plaintiff. *Ib.*

**Interveners.**—A., B. and C., three legatees named in a codicil, sought probate of it in solemn form against the executors named in the will. Subsequently to their having propounded the codicil, D., another legatee, intervened. The executors by their replication, which was given in after D. had intervened, admitted part of the alleged codicil, including the legacy to D.:—Held, that D. was not entitled to have his costs out of the estate. *Shaw v. Marshall*, 1 S. & T. 129.

In interest suits, the unsuccessful party is, as a general rule, condemned in costs. *Wiseman v. Wiseman*, 1 L. R., P. 351; 36 L. J., P. 22; 15 L. T. 415.

But when the litigation was caused by the misstatements of the widow herself, and the neglect of her attorney to supply the other side with the time and place of the marriage, which was denied, the court declined to condemn in costs the party who challenged her interest, and failed. *Ib.*

**Of Legatees.**—Where the litigation arose out of the testator's act, and the subsequent conduct of the parties was calculated to excite suspicion, the court allowed a legatee, who resisted probate, costs out of the estate, although the opposition was unsuccessful, and fraud was charged. *Hooton v. Dennet*, 17 L. T. 670; 16 W. R. 488; *S. P.*, *Mitchell v. Gard*, 3 S. & T. 276; 33 L. J., P. 7; 10 Jur., N. S. 51; 9 L. T. 491; 12 W. R. 255.

**Of Heir-at-Law.**—An heir-at-law cited to see proceedings, if he pleads, but does not prove suit, in opposition to a will, is, with respect to his liability to costs, in a position analogous to that of the next of kin in the Prerogative Court, who, not content with putting the executors on proof of the will, have brought in an allegation, and have failed to prove it, and therefore an heir will be liable for costs incurred since an entry of a caveat by him. *Fyson v. Westrope*, 1 S. & T. 279; 29 L. J., P. 139; 5 Jur., N. S. 250.

When the court gives the next of kin, who unsuccessfully oppose a suit, their costs out of the estate, on the ground that the litigation was caused by the act of the testator, it will also give the heir-at-law, who has been cited to see proceedings, his costs out of the estate if he has not by his conduct put the estate to unnecessary expense. *Smyth v. Wilson*, 36 L. J., P. 82; 15 L. T. 446.

In a suit as to the construction of a will, in which the heir-at-law is a necessary party, and is made a party by order of the court, he will be allowed the costs both of proving his heirship, and also of the general suit between the parties, even though he is ultimately unsuccessful. *Singleton v. Tomlinson*, 3 App. Cas. 404; 38 L. T. 653; 26 W. R. 722.

An heir-at-law, who intervenes in a suit and opposes a will, is entitled to costs if the will is pronounced against. *Rayson v. Parton*, 2 L. R., P. 38; 39 L. J., P. 20; 21 L. T. 647.

When issues are found distributively, the party condemned in costs is not liable for costs of issues found in his favour, if separately from the other costs. *Ib.*

— **Where Notice Given of Intention to Cross-Examine only.**—If the next of kin or others having a right to put executors upon proof of a will in solemn form of law, plead undue influence or fraud, they will be liable for costs, although they may have given a notice that they only intend to cross-examine the witnesses produced in support of the will. *Harrington v. Bowyer*, 2 L. R., P. 264; 41 L. J., P. 17; 25 L. T. 385; 19 W. R. 982.

A next of kin, who vexatiously calls in probate of a will granted in common form, may be condemned in costs, although he has given notice that he intends only to cross-examine the witnesses produced in support of the will. *Beale v. Beale*, 3 L. R., P. 179; 43 L. J., P. 70; 30 L. T. 770; 22 W. R. 712.

**Application for—Lapse of Time.**—In a suit between the Queen's proctor and a party claiming to be next of kin, as to the legitimacy of a deceased, a verdict was given in favour of, and administration granted to, such alleged next of kin. Under the impression that he could pay his costs of suit out of the property of the deceased, no application was made by him to the court at the time of trial in reference to that matter, but in consequence of proceedings in chancery he had been unable to recover such costs. A citation having been served upon him to shew cause why the administration should not be revoked, by reason that he was not one of the next of kin of the deceased, he applied to the court, after the lapse of nine years, to make a formal order that his costs of suit against the Queen's proctor should be paid out of the deceased's estate. The court refused to do so, after such lapse of time. *Dyke v. Williams*, 2 L. R., P. 239; 40 L. J., P. 33; 24 L. T. 805; 19 W. R. 784.

**Issue Devisavit vel non.**—When the heir-at-law filed a bill against the devisee and executor impeaching the validity of the will, and an issue was directed which resulted in the validity of the will being established:—Held, that the bill must be dismissed without costs as regarded the devisee, and that the heir-at-law must pay the costs of the executor. *Banks v. Goodfellow*, 11 L. R., Eq. 472; 40 L. J., Ch. 511.

**Codicil Proved by Legatee—Costs as of Executor Proving.**—A legatee who has propounded a codicil and succeeded is entitled to the same costs as an executor under similar circumstances. The defendant, the executor of the will of R. C., had proved the will only. The plaintiffs propounded a codicil. The court having pronounced for the codicil, condemned the defendant in costs, and gave the plaintiffs also out of the estate such sum, nomine expensarum, as would cover the additional expenses. *Wilkinson v. Corfield*, 6 P. D. 27; 50 L. J., P. 44; 29 W. R. 613; 45 J. P. 440.

**Varying Order.]**—The court, having made an order that the costs of all parties should be paid out of the estate, with a priority to the costs of the executor, who was universal legatee of the personal and devisee of the real estate, refused to vary such order, so as to make the costs a charge upon the real estate, in case the personalty was insufficient. *Davies v. Reynolds*, 3 L. R., P. 90; 28 L. T. 605.

The court, on decreeing probate, ordered that the costs of a defendant (who was interested in both the real and the personal estate, and had unsuccessfully opposed the will) should be paid out of the assets, although he had pleaded undue influence and fraud, being of opinion that acts of the testator, indicative of delusions, justified the opposition; but, being also of opinion that that was no ground for the pleas of undue influence and fraud, deducted from the defendant's costs what appeared a reasonable sum to cover the additional expense thereby occasioned, and that decree having been passed, the court refused an application on motion on behalf of the widow of the testator to vary it as to the costs. *O'Kelly v. Browne*, 9 Ir. R., Eq. 353.

**Liability of Married Women for.]**—In an action for probate which was tried by a jury, and in which the verdict was for the plaintiff:—Held, that the court had power to condemn in costs the defendant, a married woman having general separate estate. *Morris v. Freeman*, 3 P. D. 65; 47 L. J., P. 79; 39 L. T. 125; 27 W. R. 62.

Where a will was propounded by a married woman, and her husband had not been joined with her as a party to the suit, the court having pronounced against the will, condemned the wife in the costs. *Clarkson v. Waterhouse*, 2 S. & T. 378; 29 L. J., P. 136; 6 Jur., N. S. 326.

**Parties Cited, but not Appearing.]**—The court has power to condemn a party who has been cited, but has not appeared, in the costs of a testamentary suit. *King v. Gillard*, 1 L. R., P. 539; 37 L. J., P. 4; 17 L. T. 297.

**Of Queen's Proctor.]**—The court has no authority to condemn the Queen's proctor in the costs of unsuccessful litigation. *Atkinson v. Her Majesty's Proctor*, 2 L. R., P. 255; 40 L. J., P. 49; 25 L. T. 164; 19 W. R. 786.

**Liability of Administrator.]**—An order on an administrator to pay costs is equivalent to an order to pay out of the deceased's estate; and if the assets have been properly exhausted, no attachment will be granted for disobedience of such order. *Williams, In goods of*, 3 S. & T. 437; 33 L. J., P. 127; 10 L. T. 583.

**Of Administrator and Receiver pending Suit.]**—The duties of an administrator and receiver pending suit commence from the date of the order of appointment, and if the decree in the action is appealed from, do not cease until the appeal has been disposed of. Costs of the administrator and receiver pending suit and of his solicitor allowed from the date of the appointment until the dismissal of the appeal. *Taylor v. Taylor*, 6 P. D. 29; 50 L. J., P. 45; 45 J. P. 457.

**Of appointing Administrator pendente lite.]**—The costs of appointing an administrator pendente lite are part of the costs for which the unsuccessful party condemned in costs will be liable. *Fisher v. Fisher or Fry*, 4 P. D. 231; 48 L. J., P. 69; 44 J. P. 24.

**Priority in Payment of.]**—One of the creditors of a testator cited the executrix in the Probate Division to prove the will, and an order was made that she should prove it within a time limited, and that, in default of her doing so, administration should be granted to the creditor. The executrix proved the will, and another friendly creditor then commenced an action in the Chancery Division against her to administer the estate, and the ordinary administration decree was made. Afterwards the creditor who had issued the citation obtained in the Probate Division an order that his costs of the proceedings there should be paid out of the estate in priority to other claims:—Held, that the costs of the administration action must be paid in priority to the costs in the Probate Division. *Mayhew, In re, Howles v. Mayhew*, 5 Ch. D. 596; 46 L. J., Ch. 552; 37 L. T. 48; 25 W. R. 521—C. A.

**Set off of.]**—It is a common practice of the court to award each party a portion of the costs of a cause at the final hearing; and the court has jurisdiction to direct a set off of costs awarded by the court itself as between two parties. *Magrath v. Magrath*, 10 Ir. R., Eq. 155.

**Of Probate Action when included in Costs of Administration.]**—A testator by his will gave 2,000*l.* to be equally divided among certain legatees, and the residue of his estate to his executrix. The will was proved, but an action to set aside probate was shortly afterwards commenced in the Probate Division against the executrix by certain of the legatees, who were also next of kin of the testator, some of the plaintiffs being married women, suing without their husbands. Judgment, with costs of that action, was entered for the executrix on February 7th, 1879; and on March 1st, 1879, an action to administer the testator's estate was commenced in the Chancery Division by some of the plaintiffs in the probate action and some legatees, the husbands of the married women being now joined as plaintiffs against the executrix as defendant; the executrix thereupon paid the 2,000*l.* (less duty) into court, under an order which provided against its being paid out without notice. The Probate Division made an order on August 1st, 1879, directing the plaintiffs in the probate action to pay the specified taxed costs thereof to the solicitors of the executrix, and the executrix thereupon obtained a charging order in the administration action against the share in the fund in court of one party only, not being one of the married women. All the shares in question had been assigned or incumbered before the date of judgment in the probate action:—Held, that the costs of the probate action were expenses of administration caused by the acts and conduct of the legatees, and proper to be deducted from the legacies themselves, and to be considered a charge upon them as against assignees, incumbrancers, and husbands taking in right of their wives. *Knapman, In re, Knapman v. Wreford*, 18 Ch. D. 300; 50 L. J., Ch. 629; 45 L. T. 102—C. A.

— **Executrix entitled to Set off in Priority to other Claimants.**—Held, further, that the executrix had not by payment into court of the specific fund resigned any claim she might have against it for expenses of administration, and she was entitled, in priority to all parties claiming, to set off against such share therein, and to be paid the proportionate share of the taxed costs of the probate action. *Id.*

**Recovery of Costs—Elegit.**—A defendant in a suit having been condemned in costs, and having neglected to pay them, and having no personal property, but having real property:—Held, that the court had power to issue a writ of elegit. *Heath v. Heath*, 29 L. T. 931; 22 W. R. 266.

— **Sequestration.**—A writ of sequestration having been issued to enforce an order for the payment of costs, the sequestrator demanded possession of the property, which was in the hands of parties holding under the person whose estate had been sequestered, and was refused possession. The court declined to enforce the sequestration by an attachment against those parties, but granted a writ of assistance to the sheriff for that purpose. *Bayley v. Bayley*, 4 S. & T. 222.

— **Out of what Estate Payable.**—The court has not jurisdiction to order costs to be paid out of real estate. *Young v. Dendy*, 1 L. R., P. 344.

When the court made an order for the payment of the costs of a defendant who was interested in the residue, and had unsuccessfully contested the validity of a will out of the estate, and it afterwards appeared that the residue was insufficient to meet his costs, and that unless the order was varied a specific legatee, who had not appeared at the trial, would have to contribute towards those costs, the court allowed the legatee to enter an appearance in the cause to enable him to move the court to vary the order. *Id.*

— **Out of Realty.**—A testatrix directed by her will that all her "just debts, funeral and testamentary expenses be paid and discharged out of her real and personal estate." She died possessed of no personal estate, and the litigation in relation to her will was in some measure due to its concealment by her direction from the defendant in the suit, who opposed probate of it, but failed. In the circumstances of the case the court was of opinion that the defendant was entitled to his costs, and ordered such costs to be paid rateably out of the real estate. *Smith v. Hopkinson*, 4 P. D. 84; 47 L. J., P. 40; 39 L. T. 124; 26 W. R. 884.

The court has no jurisdiction to order costs to be paid out of real estate; and it is the practice of the court, without having regard to the amount or the ownership of the property, if the case has been a proper one for litigation, and has been properly conducted, to order the general costs to be paid out of the personal estate. *O'Kelly v. Browne*, 9 Ir. R., Eq. 353.

A will was proved by A., who acted as executor for some months. Then the Probate Court, and the House of Lords on appeal from the Probate Court, decreed probate to B. instead, and directed all the costs to be paid out

of the estate. There was very little personal estate, but considerable real estate. B. filed a bill for the administration of the real and personal estate of the testator in order to obtain payment of his costs:—Held, that the Probate Court not having jurisdiction over real estate, could not, neither could the House of Lords on appeal from the Probate Court, make an order for payment of the costs out of the real estate. B. therefore was not entitled to a decree for the administration of the real estate, but, as he had acted for some time as executor, he was entitled to a decree for the administration of the personal estate. *Charter v. Charter*, 3 Ch. D. 218; 45 L. J., Ch. 705; 34 L. T. 412; 24 W. R. 874.

Where the heir-at-law successfully resists probate of a will of real estate, the Court of Probate has no jurisdiction to charge the real estate with the costs of the litigation. *Newton v. Newton*, 13 Ir. Ch. Rep. 245.

— **Where no Estate out of which Costs can be Paid.**—A wife, having a power of appointment over certain funds, executed the same by will in favour of her husband. The funds were handed over to the husband in the lifetime of his wife, and by him transferred to the trustees of a settlement made in anticipation of the marriage of his adopted daughter. The husband survived his wife but did not prove her will, and died possessed of property of only nominal value. Subsequently his representative propounded the will of the wife, and was opposed by her next of kin. A copy of it was pronounced for, and the costs of the next of kin ordered to be paid out of her estate:—Held, that there was no property out of which such costs could be paid. *Adamson v. Hammond*, 3 L. R., P. 141; 43 L. J., P. 17; 29 L. T. 700.

**Staying Proceedings until Payment.**—A. died intestate, and letters of administration of his estate were granted to B. as his half-brother and one of the next of kin. C. commenced against B. an action in the Chancery Division for the administration of the estate of A., alleging that he was the maternal uncle and sole next of kin of the intestate, and that B. was illegitimate. The action was dismissed for want of prosecution, and C. afterwards commenced a fresh action against B. in the Probate Division for the revocation of the grant of letters of administration. The court refused to order a stay of proceedings until after the payment by C. of B.'s costs in the administration action. *Hankin v. Turner*, 48 L. J., P. 28; 40 L. T. 335; 27 W. R. 232.

## ii. Taxation of.

**Principle of.**—When the costs of an unsuccessful party are directed to be paid out of the estate, they are not taxed on so liberal a scale as between proctor and client. *Jeffrey v. Jeffrey*, 28 L. J., P. 43.

Inasmuch as, by 20 & 21 Vict. c. 77, s. 61, the heir-at-law is put in the same position as the next of kin, the same principles as to costs will be applied in both cases. *Fyson v. Westrope*, 1 S. & T. 279; 29 L. J., P. 139; 5 Jur., N. S. 250.

Where there are separate defendants liable to costs, the costs will be distributed in propor-

tion to the issues raised by the respective pleas. *Ib.*

— **Amount Allowable.**—On taxation of costs, as between solicitor and client, the schedule of fees, though a guide to the taxing officer, does not bind him in the exercise of his discretion, which ought to be exercised upon the principle of liability to the solicitor and justice to the opposite party. *Ryan v. Dolan*, 7 Ir. R., Eq. 92.

The remuneration for loss of time, which medical witnesses attending during the examination of the other witnesses fairly claim, may be paid to them and charged to the opposite party. *Ib.*

In a testamentary suit a compromise was effected by counsel, one of the terms of the arrangement being that the plaintiff should pay to the defendant's attorney a specified sum for his agreed costs:—Held, that the attorney was entitled to receive the sum specified, and there being nothing to shew that he had acted improperly in respect of the compromise, that his bill of costs was not liable to taxation. *Holditch v. Carter*, 3 L. R., P. 115; 29 L. T. 249; 21 W. R. 934.

**Counsel.**—In taxing a bill of costs the registrar is not bound, by the practice of the Prerogative Court, as to the number of counsel to be allowed, but should exercise his own discretion in the matter. *Braine v. Braine*, 1 S. & T. 271; 29 L. J., P. 151.

In making an allowance for briefs, he should consider whether they have been made unnecessarily long and expensive. *Ib.*

The question brought before the court on this application having been raised by the registrar, costs of the application were not allowed against the plaintiff. *Ib.*

The court will not interfere with the registrar's discretion as to the number of counsel to be allowed, and more than one consultation in the progress of a cause is never allowed. *Edwards v. Payne*, 1 S. & T. 276; 29 L. J., P. 145.

**Of Special Jury.**—An application for a certificate that a case was a proper one to be tried by a special jury ought to be made immediately after the verdict has been given; and if made on a subsequent day is too late. *Dillon v. Caffrey*, 6 Ir. R., Eq. 363.

An application for a certificate for the costs of a special jury was not made until three months after trial:—Held, that the court was bound to exercise the powers conferred on it by 20 & 21 Vict. c. 77, s. 36, with regard to trials by jury, subject to the same rules as the common law courts, and, therefore, under 6 Geo. 4, c. 50, s. 34, refused the application, as being too late. *Skipper v. Skipper*, 29 L. J., P. 133; 2 L. T. 636; 8 W. R. 589.

**Witnesses.**—In taxing the costs of a trial, the registrar has a discretion as to the number of witnesses whose expenses should be allowed. *Edwards v. Payne*, 1 S. & T. 276; 29 L. J., P. 145.

### iii. Security for.

A plaintiff applied for administration to B. on presumption of death. The defendant appeared

in answer to a citation advertised in newspapers, and alleged that he was B. The court refused to make any order on the defendant to give security for costs. *Robson v. Robson*, 3 S. & T. 568; 34 L. J., P. 6; 10 Jur., N. S. 1843; 11 L. T. 459.

A. claimed administration of the estate of R., as having died intestate in 1843. The defendant pleaded that R. did not die in 1843, or at any other time: in fact he alleged that he himself was R. The defendant was permanently resident at Bathurst in New South Wales. The court refused to order the defendant to give security for costs. *Ib.*

The court will not order a plaintiff to find security for costs, when, though a foreigner, he is staying in England at the time of the application, and there is nothing to lead to the supposition that he is on the point of leaving the country. His affidavit in opposition to such an application need not state an intention of permanent residence. *Crispin v. Dogliani*, 1 S. & T. 522; 6 Jur., N. S. 303.

### m. Orders and Decrees.

**Amendment.**—When the court pronounced for a will, but in its decree made no order as to costs, it subsequently amended its decree by ordering the costs of the legatee, who had propounded it, to be paid out of the estate. *Bewsher v. Williams*, 3 S. & T. 62; 11 W. R. 541.

**Effect and Operation—Generally.**—The 20 & 21 Vict. c. 77, s. 25, enacting that the court shall have the like powers for enforcing its orders as are vested in the Court of Chancery in relation to suits depending there, does not constitute an order of the Probate Court for payment of money a charge on land within 1 & 2 Vict. c. 110, s. 13. *Pratt v. Bull*, 1 De G., J. & S. 141; 32 L. J., Ch. 144; 9 Jur., N. S. 239; 7 L. T. 702.

The Court of Probate has, under 20 & 21 Vict. c. 77, s. 25, the like powers, jurisdiction, and authority for enforcing its orders, decrees and judgments as are by law vested in the Court of Chancery, but the limit of this authority must be found in the powers exercised by the Court of Chancery prior to the passing of 1 & 2 Vict. c. 110. The Court of Probate does not possess the additional powers and authority indirectly conferred upon courts of equity for the enforcing of their orders by that statute. *Crispin v. Cumano*, 1 L. R., P. 622; 38 L. J., P. 23; 20 L. T. 150.

— **Next of Kin bound by.**—A next of kin, who has been cognizant of and privy to a suit between the executors and another next of kin, is bound by the decision in that suit, although he has not been cited to see proceedings, and has not intervened therein. He cannot therefore re-open the question of the validity of the will after its validity has been established in such suit. *Ratcliffe v. Barnes*, 31 L. J., P. 61.

A next of kin, although not cited to see proceedings, and not having intervened, is bound by a decree in a suit in which a will is contested by other next of kin, if he was cognizant of the suit and had an opportunity of intervening. *Wytherley v. Andrews*, 2 L. R., P. 327; 40 L. J., P. 57; 25 L. T. 134; 19 W. R. 1015.

But this rule does not apply to a case when the parties to the suit compromise it, and the decree is founded on the compromise. *Ib.*

The court having pronounced for a will in consequence of a compromise between the parties contesting it, a next of kin, who was no party to the suit, although cognizant of it, was held not to be barred by the decree from instituting a fresh suit for the revocation of probate. *Ib.*

—**Heir-at-Law bound by.**—The heir-at-law is bound, as to the personalty, by a decree in a testamentary suit of which he was cognizant, although he had not been cited and had not intervened, unless the decree was founded on a compromise or something equivalent to a compromise. *Moran v. Moran, In goods of Moran, 8 Ir. R., Eq. 303.*

When, therefore, probate has been decreed on a verdict directed in consequence of the non-appearance of a party to the record, an heir-at-law so situated was held to be barred by the decree from disputing, save as to the realty, the validity of the will proved, and condemned in costs. *Ib.*

—**Acts as an Estoppel.**—After administration of the effects of E. had been granted to W. as one of the next of kin, a suit was instituted in chancery to which he was a party, and in it the question was raised who were the next of kin of E. The administratrix of S., who in his lifetime was one of the next of kin of E., obtained leave to attend and took part in the inquiry, which resulted in a decision that W. was not one of the next of kin of E. A suit for revocation of the grant of administration was afterwards instituted against W. by A. and B., who were the next of kin of S., the administratrix of S. having renounced her right to administer the estate of E.:—Held, that, although as against the administratrix of S., W. would have been estopped by the decision of the Court of Chancery from alleging that he was one of the next of kin of E., he was not estopped as against A. and B., as they did not claim through the administratrix of S., and were not parties to the chancery suit. *Spencer v. Williams, 2 L. R., P. 230; 40 L. J., P. 45; 24 L. T. 513; 19 W. R. 703.*

**Varying Decrees.**—The court has no jurisdiction to vary on motion a decree which had been passed. *O'Kelly v. Browne, 9 Ir. R., Eq. 353.*

**Compromise—Enforced as a Rule of Court.**—In a cause of proving a will and codicil in solemn form, promoted by the executor against the legal personal representative of the sole next of kin, a compromise having been agreed to, by which a verdict establishing the will and codicil was to be taken by consent for the plaintiff, and the defendant was to receive 2,000*l.* out of the estate:—Held, that the judge had jurisdiction to make the terms of the compromise a rule of court and to enforce it as such. Probate of the will and codicil was decreed to the plaintiff, as executor, the terms of the compromise being embodied in the decree. *Harvey v. Allen, 1 S. & T. 151.*

The court, having jurisdiction, under the Judicature Act, to enforce the performance of consents, will not refuse to make them rules of court, except in the case of complicated accounts. *Warmingham v. Norman, 1 Ir. L. R., Ch. D. 272.*

—**Refusal of Court to make Terms of a Rule of Court.**—But where on a trial, before a judge of assize and a jury, of issues relating to the validity of a will, certain executors of whom were the plaintiffs, and certain other executors of whom were the defendants in the suit, a verdict was taken by consent for the plaintiffs on an agreement made an order of nisi prius, one of the terms of which was that the executors (the defendants) should renounce probate, the judge refused to make the order of nisi prius a rule of the court, on the ground that the Court of Probate could not properly enforce an agreement that any executors of a will should renounce probate thereof, but granted probate to the plaintiffs. *Hargreaves v. Wood, 2 S. & T. 602; 32 L. J., P. 8; 11 W. R. 31.*

When a suit is compromised before trial, the court will not make the terms of compromise a rule of court, as it has no power to enforce compliance with the terms; but it will make an order that the contentious proceedings be discontinued, and that the terms of compromise be filed in the registry. *Roadnight v. Carter, 3 S. & T. 421.*

Where, at the trial of an issue by agreement between the parties, a verdict is taken by consent, such agreement cannot afterwards, even with the consent of the parties, be made a rule of court unless that was a term of the agreement. *Evans v. Saunders, 30 L. J., P. 184.*

During the progress of a suit, a compromise was entered into by the parties and committed to writing. A verdict was thereupon given for the validity of the will, but no order made as to the costs. The court, two years afterwards, refused to permit the terms of compromise to be embodied in an order to be enforced as a rule of court. *Garritt v. Christian, 2 L. R., P. 181; 24 L. T. 236.*

#### n. Attachment.

**For Non-Payment of Money or Costs.**—When an order has been made for payment of costs, the court will not grant an attachment for non-payment of them without an affidavit of personal service of the original order on the party to be attached. *Thomas v. Crouther, 2 S. & T. 501; 10 W. R. 861.*

The court will not consider the question of issuing an attachment for non-payment of a sum of money ordered to be paid, till personal service of the order has been made, or it is shewn that personal service is evaded. *William, In goods of, 3 S. & T. 437; 33 L. J., P. 127; 10 L. T. 583.*

An order that a defendant, "as administratrix of the effects of the deceased," do pay the costs of a suit, is tantamount to an order that such costs should be paid out of the estate, and does not render the party personally liable. *Ib.*

Where, therefore, such an order was made, and there were no assets, the court refused an attachment for non-payment of the costs. *Ib.*

The court will not allow an attachment to issue against a party for non-payment of costs pursuant to an order, unless there are affidavits by all the persons to whom those costs are payable that they have not been paid. *Bayly v. Bayly, 29 L. J., P. 146.*

The same strictness will not be required before issuing a sequestration. *Ib.*

**Against Married Women.**—Where the court

has condemned the defendants in costs, and has made an order upon them for the payment of the same, it will refuse to direct an attachment to issue against them for non-compliance with that order, on their stating, on affidavit, that they are married women and have no separate property. *Harris v. Bradbury*, 2 S. & T. 459; 31 L. J., P. 86; 10 W. R. 447.

An attachment will not be granted against a married woman for disobedience of an order for payment of costs if she has no separate property. But the onus of establishing that fact lies upon her; and if she does not appear, upon a motion for an attachment, of which she had notice, the court will grant the attachment. *Parker v. Hick*, 3 S. & T. 436; 33 L. J., P. 154.

**For Refusing to Bring in Will.**—A person served with a subpoena under 20 & 21 Vict. c. 77, s. 26, to bring in a testamentary paper, failed to comply with it. On a motion for an attachment against him:—Held, that, in accordance with Ord. XLIV. r. 2, the party proceeded against must have notice of the application in the first instance. *Baigent v. Baigent*, 1 P. D. 421; 33 L. T. 462; 24 W. R. 43.

The court granted an order for an attachment against A. for disobedience of a subpoena to bring in a will; but directed that the attachment should lie in the registry for eight days after notice to A. of its having issued, before proceedings should be taken to enforce it. *Simmons v. Dean*, 27 L. J., P. 103.

The application for such attachment is contentious business. *Id.*

Where a subpoena has been personally served upon an individual to bring in a testamentary paper, and such individual fails to comply therewith, the court will not at once order an attachment to issue against him, but will make a preliminary order that he shall attend in court to be examined in reference to his possession of such paper. *Parkinson v. Thornton*, 27 L. J., P. 3.

The executors appointed in a will intermeddled in the estate, but did not take probate of the will. Having been cited to do so, and not having obeyed the citation within the time limited by it, an attachment was applied for against them. The court refused to order an attachment in the first instance, but directed that a peremptory order should be served upon them to take probate within ten days. *Mordaunt v. Clarke*, 1 L. R., P. 592; 38 L. J., P. 45; 19 L. T. 610.

**For not Filing Inventory.**—See *Marshman v. Brooks*, *post*, col. 1053.

#### o. Writ of Sequestration.

**For Non-Payment of Costs.**—The court granted a writ of sequestration for non-payment of costs on an affidavit by the attorney that he had not received them, and that the parties to the suit had informed him that they also had not received them, notice of the motion having been given. *Bayly v. Bayly*, 29 L. J., P. 146.

The court refused to enforce a writ of sequestration for non-payment of costs in a testamentary cause by an attachment against the tenants, who held under the person whose estate had

been sequestered, and who refused to give up possession, but ordered a writ of assistance to the sheriff to be issued. *Bayley v. Bayley*, 29 L. J., P. 72.

In a testamentary suit an order was made on the defendant, both as executor of the original defendant and as being himself a party, to pay the taxed costs. The costs not having been paid within the time appointed, and the defendant being abroad, a writ of sequestration issued against his real and personal estate. A large amount of stock was standing in the books of the Bank of England to the credit of the defendant, as executor of the original defendant in the suit, and a dividend was due thereon:—Held, that the Court of Probate had no authority to make an order upon the Bank of England (without their assent) to pay over such dividends to the sequestrators. *Crispin v. Cuman*, 1 L. R., P. 622; 38 L. J., P. 28; 20 L. T. 150; 17 W. R. 535.

#### p. Other Matters of Practice.

**Photographing Signatures.**—The court will allow a photograph to be taken of signatures to a document purporting to be signed by an alleged testator, when it thinks a proper case has been made. *Neilson v. Underwood*, 4 Ir. R., Eq. 59.

**Appointment of Receiver.**—The Court of Chancery may appoint a receiver of personal estate pending the grant of probate, delayed on account of a caveat having been entered where a suit in the Probate Court has not been actually constituted. *Parkin v. Seddons*, 16 L. R., Eq. 34; 42 L. J., Ch. 470; 28 L. T. 353; 21 W. R. 538.

The court will also, under the same circumstances, appoint a receiver pendente lite of the rents of real estate, if neither the devisee nor the heir-at-law is in actual possession. *Id.* See also cases *ante*, col. 947.

**Receiver—Security of Guarantee Society.**—The security of a guarantee society may be taken in the case of a receiver in a probate action. *Carpenter v. Solicitor to the Treasury*. *Stokes*, in goods of, 7 P. D. 235; 51 L. J., P. 91; 46 L. T. 821; 31 W. R. 108; 46 J. P. 663.

**Presumption as to Death—Advertisements.**—The court refused to dispense with the usual advertisement in newspapers before presuming the death of a sailor who had been last heard of in 1859, as then about to sail from New Zealand to China in a barque now believed to have been lost. *Atkinson*, in goods of, 7 Ir. R., Eq. 219.

**Marking Papers.**—A will, with the necessary affidavits, was forwarded to the executor in India. The several papers were returned correct in every respect save that the will was not marked by the person before whom the executor was sworn, as required by r. 49 of Rules and Orders, 1862. The court, under the circumstances, dispensed with the rule, and decreed probate. *Williams*, in goods of, 17 L. T. 484; 16 W. R. 406.

**Caveats.**—Executors of a will affecting realty cannot be prevented from obtaining probate in

common form by a caveat entered by the heir-at-law, if he has not been cited. *Young v. Ferrie*, 29 L. J., P. 69; 5 Jur., N. S. 1318.

If an heir-at-law enters such a caveat, it is not necessary for the executors to deliver a declaration; and if they do so, and the heir-at-law does not plead to it, he will not be condemned in the costs incurred in delivering it. *Id.*

A married woman, under the powers given to her by her marriage settlement, executed a will. Subsequently the marriage was dissolved, and the will itself was destroyed by burning. Administration having been taken by her next of kin, was called in by the residuary legatee named in the will, who propounded the same, and the next of kin made no defence. A caveat had been entered by the person interested under the settlement, in case the deceased had not duly executed a will; but such caveat was not warned by the party propounding the will. The court directed that the caveat should be warned, in order that the party who had entered it might intervene, if he thought proper. *Ming v. Ming*, 36 L. J., P. 51; 16 L. T. 69; 15 W. R. 718.

**Inventories.**—An attachment will be granted against a married woman for non-compliance with a citation, calling upon her to file an inventory in the registry of an estate of which she is administratrix. *Baker v. Baker*, 2 S. & T. 380; 29 L. J., P. 138.

An administrator in custody under an attachment, obtained by the persons entitled in distribution, for not filing an inventory, is not entitled to be discharged from custody upon his filing such inventory, except upon payment of costs. *Marshman v. Brooks*, 32 L. J., P. 95.

The court has no jurisdiction to compel an administrator, who obtained his grant of administration from an ecclesiastical court before January, 1858, to file an inventory of the goods of deceased in the registry. By 20 & 21 Vict. c. 77, s. 87, such inventories are returnable only into the Court of Chancery. *Bouverie v. Maxwell*, 1 L. R., P. 272; 36 L. J., P. 3; 15 L. T. 137; 15 W. R. 89.

#### **Bringing into Registry Testamentary Papers.]**

—It is not sufficient, in order to make out the title to a term of years, with the view of obtaining administration, to refer to deeds, deducing such title in affidavits; the deeds themselves must be brought into the registry. *Keene, In goods of*, 1 S. & T. 265; 28 L. J., P. 34.

**Taking Wills out of Registry.]**—The court will not allow a will in its custody to be taken out of its jurisdiction on any alleged necessity for the furtherance of justice. It must presume that other courts, when satisfied that the original document is withheld by a competent authority, will admit secondary evidence. *Manfredi, In goods of*, 1 S. & T. 135; *S. P., Hall, In goods of*, 1 S. & T. 136, n.; 27 L. J., P. 38.

When an executor is in this country, the court will allow a will, which has been brought into the registry for the purpose of obtaining probate, to be delivered out to the executor, in order that he may be sworn thereto before a commissioner, on an exemplified copy of it being left in the registry. *Gibbs, In goods of*, 28 L. J., P. 90.

## **WINDING UP.**

*See* COMPANY.

## **WINDMILL.**

*See* EASEMENT.

## **WINDOWS.**

*See* EASEMENT.

## **WINE.**

*See* INTOXICATING LIQUORS.

## **WITNESS.**

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## **WOMEN.**

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## WORK AND LABOUR.

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### I. CONTRACTS FOR.

**By Tender and Acceptance—When a Binding Contract.**—A tender and acceptance may amount to a contract, although the acceptance refers to a formal contract to be drawn up afterwards. *Lewis v. Brass*, 3 Q. B. D. 667; 37 L. T. 738; 26 W. R. 152—C. A.

A defendant sent in a tender to do work for the plaintiff. The plaintiff's agent replied, accepting the tender, and adding, "The contract will be prepared by," &c. :—Held, that the tender and acceptance formed a complete contract. *Id.*

A, a railway contractor, met B. and several others, in order to receive tenders with reference to certain work. A. read a specification with reference to the work; after which B. and the others handed in their tenders. B.'s tender was signed with his name; but there was no evidence that it was in his handwriting :—Held, notwithstanding, that such tender, taken with the specification, sufficiently proved the contract. *Allen v. Foxall*, 1 C. & K. 315.

— **When a Mere Proposal.**—Guardians issued an advertisement stating that they would receive tenders for the supply of the workhouse with meat for three months, from thirty to fifty stone (setting out the description of meat), that sealed tenders were to be forwarded, and that all contractors would have to sign a written contract after acceptance of the tender. A. butcher wrote to the guardians as follows: "I propose to supply your house with meat according to advertisement for the next six months, at 6d. per pound." His proposal was accepted, and he was informed that he was appointed butcher, upon which he immediately declined

the appointment :—Held, that the transaction amounted merely to a proposal for a contract, and that there was no binding agreement till a written agreement had been signed. *Kingston-upon-Hull (Governors) v. Petch*, 10 Ex. 611; 24 L. J., Ex. 23.

The defendants issued a circular in which they stated that they had been instructed to offer to the wholesale trade for sale by tender the stock-in-trade of E. & Co., amounting as per stock book to 2,503l. 13s. 1d., and which would be sold at a discount in one lot. They also stated in the circular the day and the hour when the tenders would be received and opened at their offices. The plaintiffs made a tender which they alleged was the lowest. In an action against the defendants for not accepting such tender :—Held, that the circular was only an invitation for offers, and that there was no implied undertaking by the defendants to accept any tender at all. *Spencer v. Harding*, 5 L. R., C. P. 561; 39 L. J., C. P. 332; 23 L. T. 237; 19 W. R. 48.

**Agreement not to Tender—Validity.**—Tenders for the supply of stone were invited by a corporation. Four neighbouring quarry owners entered into an agreement to supply the stone in certain proportions inter se, and that the plaintiffs should make the lowest tender to the corporation. The plaintiffs entered into contracts with the other quarry owners to purchase the proportion of stone agreed upon from each. Notwithstanding the agreement, one of the quarry owners sent in a tender, which was accepted by the corporation. The plaintiffs then filed a bill for an injunction to restrain the defendants from supplying the stone during 1875. They demurred :—Held, overruling the demurrer, that the corporation were not necessary parties, and that the agreement was not void, either as against public policy or for want of equity. *Jones v. North*, 19 L. R., Eq. 426; 44 L. J., Ch. 388; 32 L. T. 149; 23 W. R. 468.

An agreement having been made between A. and B. not to tender in competition with each other for certain gas tar, A. in answer to an advertisement sent in a mere nominal tender, in consequence of which B. obtained the contract. On the expiration of the contract, fresh advertisements were issued, and a tender by B. was rejected, whereupon A., without communicating with B., sent in a tender on his own account :—Held, that the agreement between them was still pending, and A. was liable to B. for the breach of it. *Metcalf v. Bouck*, 25 L. T. 539.

**Special Conditions and Stipulations—Validity of.**—The language of a contract, where it admits of it, must receive such a construction as is consistent with reason and justice; but where it appears from the whole tenor of the agreement that the parties thereto intended, the one to insist upon and the other to submit to, conditions, however unreasonable and oppressive, the court will in such case give effect to them. *Stadhard v. Lee*, 3 B. & S. 364; 32 L. J., Q. B. 75; 9 Jur. N. S. 908; 7 L. T. 850; 11 W. R. 361.

The plaintiff contracted to execute certain works for the defendants, the agreement containing the following proviso: "That if the works did not proceed as satisfactorily as required by the defendants, they should have power to enter there-

upon, pay whatever number of men should be left unpaid by the plaintiff, and set to work whatever number of men they might consider necessary; the amount so paid, and the cost of the men so set to work, to be deducted from whatever moneys might be due to the plaintiff."—Held, that the intention of the parties was, that the defendants, if dissatisfied with the progress of the work, should be at liberty to avail themselves of the terms of the proviso, and deduct from the money due to the plaintiff such sums as had been expended in pursuance thereof. *Id.*

An engineer contracted with a corporation by deed to execute works. The deed contained a clause, by which it was covenanted that the corporation's own engineer should have power to direct the way in which portions of the work should be done; and if it should appear to him that they were not properly executed, and with due expedition, it should be lawful for him to give notice in writing to the plaintiff to alter any improper work, and to supply proper and sufficient materials and labour, and with due expedition to proceed therewith; and if the plaintiff should, for seven days after such notice, fail to comply therewith, then it should be lawful for the engineer to take the work out of the plaintiff's hands. It appearing to the engineer that the works were not being properly executed, and with due expedition, he gave the following written notice to the plaintiff:—"I give notice to you to supply all proper and sufficient materials and labour for the due prosecution of the works, and with due expedition to proceed therewith; and, further, that if you shall, for seven days after the giving of this notice, fail or neglect to comply therewith, I shall as engineer, and on behalf of the corporation, take the works wholly out of your hands."—Held, that the notice was sufficiently specific. *Pauling v. Dover (Mayor)*, 10 Ex. 753; 24 L. J., Ex. 128.

A building contract, entered into by a burial board, contained a clause that it should be lawful for the burial board, in case the contractor should fail in the due performance of any part of his undertaking, or should become bankrupt, or should not, in the opinion and according to the determination of the architect, exercise due diligence and make such progress as would enable the works to be effectually and efficiently completed at the time and in the manner therein mentioned, to determine the contract by a notice in writing under the hand of the clerk of the burial board, and to enter upon and take possession of the works, and of the plant, tools and materials of the contractors, and use or sell or use and sell the same as the absolute property of the burial board. The architect having given a certificate that the contractor was not exercising due diligence, the burial board gave the notice required to determine the contract, and took possession of the works; the certificate was given bonâ fide, but the delay was in fact occasioned by the act of the board in ordering extra works and otherwise:—Held, that the board was, notwithstanding, entitled to act as they did, their right to enter on the works being, by the terms of the contract, dependent on the opinion and judgment of the architect, and not upon the contractor's failure to exercise due diligence, in fact. *Roberts v. Bury Improvement Commissioners*, 4 L. R., C. P. 755; 38 L. J., C. P. 367.

VOL. VII.

## II. PERFORMANCE OF WORK.

## 1. IMPLIED CONDITIONS.

**General Principles—Requisite Skill.**—The public profession of an act is a representation and undertaking to all the world that the professor possesses the requisite skill and ability. *Harmer v. Cornelius*, 4 C. B., N. S. 236; 4 Jur., N. S. 1110.

When a skilled labourer, artisan, or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes. *Id.*

One who holds himself out as a valuer of ecclesiastical property, though he is not bound to possess a precise or an accurate knowledge of the law respecting the valuation of dilapidations as between an outgoing and an incoming incumbent, is bound to bring to the performance of the duty which he undertakes a knowledge of the general rules applicable to the subject, and of the distinction which exists between the cases of valuation as between an incoming and an outgoing tenant, and a valuation as between an incoming and an outgoing incumbent. *Jenkins v. Betham*, 15 C. B. 168; 24 L. J., C. P. 94; 1 Jur., N. S. 237.

A patent agent is expected to know the law relating to the practice of obtaining patents. *Lee v. Walker*, 7 L. R., C. P. 121; 41 L. J., C. P. 91; 26 L. T. 70.

When, therefore, such agent who was employed to procure a patent, being not aware of the decision (which makes it necessary, notwithstanding provisional specification has been filed, to take care that the patent is sealed before another patent for the same invention is obtained by a later applicant), delayed four months between filing the provisional specification and applying to have the patent sealed, whereby a subsequent applicant for a patent for the same invention was able to get his patent sealed first, and so prevent such agent from procuring a patent for his employer:—Held, evidence of negligence, for which such patent agent was liable in an action by his employer. *Id.*

**No Warranty that Plans can be Worked to.**—

When plans and a specification, for the execution of a certain work, are prepared for the use of those who are asked to tender for its execution, the person asking for the tenders does not enter into any implied warranty that the work can be successfully executed according to such plans and specification. *Thorn v. London (Mayor)*, 1 App. Cas. 120; 45 L. J., Ex. 487; 34 L. T. 545; 24 W. R. 932—H. L. Affirming 10 L. R., Ex. 112; 44 L. J., Ex. 62; 33 L. T. 308; 23 W. R. 416—Ex. Ch.

The contractor for the work cannot, therefore, sustain an action for damages as upon a warranty should it turn out that he could not execute it according to such plans and specification. *Id.*

T. contracted with a corporation to take down an old bridge and build a new one. Plans and a specification prepared by the engineer of the corporation were furnished to him, and he was required to obey the directions of the engineer. The descriptions given were stated to be believed to be correct, but were not guaranteed; and, in one particular matter at least, he was warned to make examination for himself. Part of the

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plan consisted in the use of caissons. These turned out to be of no value, and the work done in attempting to use them was wholly lost, and the bridge had to be built in a different manner. In this way much labour and time were wasted. The contract contained provisions as to the payment for extra work, and that work had (with the contract work) been duly paid for. The contractor sought for compensation for his loss of time and labour occasioned by the failure of the caissons, and in his declaration alleged that the corporation had warranted that the bridge could be inexpensively built according to the plans and specification. There was no express warranty to that effect in the contract:—Held, that none could be implied. *Ib.*

Semble, that if he had any remedy under these circumstances it was not in an action for damages as for breach of warranty, but for compensation as upon a quantum meruit. *Ib.*

The mere employment of an architect to prepare plans and a specification for a house, and to procure a builder to erect it, does not render the employer responsible for the accuracy of the bill of quantities furnished by such architect to the builder. *Scrivenor v. Pask*, 18 C. B., N. S. 785. Affirmed, 1 L. R., C. P. 715—Ex. Ch.

**Proper Performance—Condition Precedent to Remuneration.**—Where a person undertakes, and is employed to perform a work of skill and labour, and fails therein, so that his employer derives no benefit from the work, the former is not entitled to recover his demand, as the employer buys both his labour and his judgment, and he ought not to undertake the work, if he does not know whether he can succeed or not. *Duncan v. Blundell*, 3 Stark. 6.

If a surveyor makes an estimate which turns out to be incorrect to a considerable amount, through his omitting to examine the ground for the foundation of the work, he is not entitled to recover anything for his plans, specifications, or estimates made for that work. *Money Penny v. Hartland*, 1 C. & P. 352.

In an action on a special contract for work done under the contract, and for work, labour, and materials generally, the defendant may give in evidence that the work has been done improperly, and not agreeably to the contract; and the plaintiff in that case will only be entitled to recover the real value of the work done and the materials supplied. *Chapel v. Hickey*, 2 C. & M. 214; 4 Tyr. 43.

**Evidence of Wilful Negligence.**—A bill for improving a town and its surrounding hamlets was passed through the Commons, and carried into the House of Lords. In due course the standing orders committee reported upon it, that the notice to the inhabitants, which was the foundation of the bill, was not in conformity with the standing orders in two respects; first, that it did not sufficiently state the intention on the part of the commissioners to take compulsory powers for levying rates; and secondly, that there were compulsory clauses for the purchase of houses and lands, but no application had been made to the owners of the houses and lands for their consent; and thereupon the bill was rejected. Upon an action brought by the parliamentary agents against the

promoters of the bill for their costs, they pleaded wilful negligence on the part of the plaintiffs in the conduct of the bill:—Held, that it was a proper question for the jury, whether the standing orders in the first respect had not been virtually complied with, at least in so far as to relieve the defendants from the charge of wilful negligence; and as to the second objection, held, that the standing orders did not apply, because it was impossible to give notice to parties that their land in particular was intended to be purchased, when no land was set out; in which respect the bill had not the same reference to the standing orders as bills for making canals and railways or altering turnpike roads. *Bulmer v. Gilman*, 4 Scott, N. R. 781; 4 M. & G. 108; 1 D. & L. 367; 6 Jur. 761.

**By an Engineer.**—If an engineer is employed by a committee for erecting a bridge and forming a road to it, to make an estimate of the expense, he is bound to ascertain for himself, by experiments, the nature of the soil, although a person previously employed by such committee, having made the experiments, gives him, by their desire, information of the result. *Money Penny v. Hartland*, 2 C. & P. 378.

**By a Herald.**—In an action by heralds, for work and labour in making out a pedigree, they are bound to give general evidence of the pedigree being true, unless this has been dispensed with by the defendant. *Townsend v. Neale*, 2 Camp. 191.

**When Impossible to do Otherwise.**—A workman being bound to do his work in a workmanlike manner, it is no excuse for his doing it so as to be useless, that it was not possible to do it otherwise, unless he told his employer so. *Pearce v. Tucker*, 3 F. & F. 136.

**Incapacity by Act of God.**—Incapacity, by reason of the intervention of an act of God, to perform personal service, is an excuse for its non-performance, notwithstanding a covenant to serve absolute and unconditional in its terms; because the parties at the time of entering into the covenant must be supposed to have contemplated the continuance of the covenantor's ability to perform the service, as one of the conditions of the contract. *Boast v. Firth*, 4 L. R., C. P. 1; 38 L. J., C. P. 1; 19 L. T. 264; 17 W. R. 29.

In contracts to render services purely personal there is implied a condition that the parties will be exonerated from the contract if the performance is prevented by inability resulting from the act of God. *Robinson v. Davison*, 6 L. R., Ex. 269; 40 L. J., Ex. 172; 24 L. T. 755; 19 W. R. 1036.

A contract by a musician to play at a concert at a specified time, being a contract dependent on the personal skill of the artiste, is, though no condition is expressed in words, based on the assumption of sufficient health, and is subject to an implied condition that if the musician is, without his own default, disabled by illness to perform, he will be excused. *Ib.*

## 2. TIME FOR PERFORMANCE.

**When of the Essence of the Contract.**—B.

engaged to supply an engine and boilers for a steam vessel of A., in conformity with the drawings and specification furnished by C., the engine to be got under the superintendence of C., and when approved by him at the works, to be delivered by B. into the East India Docks, when B.'s liability would cease. One of the terms contained in the specification was, that the engine should be completed within two months :—Held, that time was of the essence of the contract, and B. was liable to an action at the suit of A. for not delivering the engine and boilers within the two months. *Wimshurst v. Dealey*, 2 C. B. 253.

By a building contract, it was agreed that the plaintiffs should, in the most workmanlike manner, and with the best materials, before the 1st of December, 1867, roof in, and before the 15th of May, 1868, completely finish, according to certain specifications, a farmhouse and buildings, but subject to extras, alterations, or additions, which might be made as in the agreement mentioned; and that the time mentioned in the agreement for the completion of the works should be of the essence of the contract, so that if the plaintiffs should not, on the 1st of December, 1867, roof in, and on the 15th of May, 1868, complete and make fit and ready for occupation the works, the plaintiffs should pay to the defendants as and for liquidated damages 3*l.* for every day from and after the 1st of December, 1867, and 15th of May, 1868, until such day as the works should be roofed in and completed, and the defendants might deduct such sum of 3*l.* per day from any moneys which might be due at any time from the defendants to the plaintiffs, or obtain payment of the same in any way they might think fit :—Held, that the plaintiffs undertook to execute not only the works specified, but also all alterations within the time prescribed in the contract, and that it was no implied condition of the contract that the alterations should be such as could reasonably be completed within this time. *Jones v. St. John's College, Oxford*, 6 L. R., Q. B. 115; 40 L. J., Q. B. 80; 23 L. T. 803; 19 W. R. 276.

— **Waiver of Condition.**—The plaintiff contracted to build cottages by the 10th October, they were not finished till the 15th; the defendant having accepted the cottages :—Held, that the plaintiff might recover the value of his work, on a declaration for work and labour. *Lucas v. Godwin*, 3 Bing., N. C. 737; 4 Scott, 502; 3 Hodges, 114; *S. P.*, *Thornhill v. Neats*, *infra*.

**Right to Damages for Default.**—A count stating that, in performing works, the plaintiff retained the defendant, a carpenter, to repair a house before a given day, that the defendant accepted the retainer, but did not perform the work within the time, per quod the walls of the plaintiff's house were damaged, cannot be supported. *Elsee v. Gatuward*, 5 T. R. 143.

### 3. PENALTIES FOR NON-PERFORMANCE.

**Right to Recover—In what Cases.**—To an action for work, the defendant pleaded that it was done under an agreement in writing whereby the plaintiff was to build for him six houses, and completely finish and give up the premises to him on or before a specified day, under a penalty of 1*l.* for each house, for each and every week

the works should remain incomplete, and possession withheld after that date, the amount of penalty to be paid out of the moneys which might become due to the plaintiff under the agreement; that the houses remained incomplete, and possession was withheld from the defendant for twelve weeks after and beyond the day stipulated, wherefore he claimed to deduct a certain sum of money. The plaintiff replied, that before any of the penalties had been incurred, it was mutually agreed that the plaintiff should perform other work in and upon the houses, in addition to the work in the first agreement, such additional work to be done within a reasonable time; that the work under the second agreement was so mixed up with the work under the first agreement, being part and parcel thereof, that it became impossible to complete the work in the first until the work under the second agreement was also completed, as the defendant at the time of making that agreement well knew, and that the plaintiff had performed all the work under both agreements within a reasonable time :—Held, a good legal answer to the claim for penalties, on the ground of waiver. *Thornhill v. Neats*, 8 C. B., N. S. 831.

A clause respecting penalties, in a contract for the building of a ship, imposed a penalty of 5*l.* a day on B. for every day after a certain day if the ship should not then be delivered to A. The ship was not delivered till long after the day appointed, but a large portion of the delay arose from the interference of A. or his agent :—Held, that no sum in the nature of a penalty was recoverable by A. *Russell v. Sa Da Bandeira (Viscount)*, 13 C. B., N. S. 149; 32 L. J., C. P. 68; 9 Jur., N. S. 718; 7 L. T. 804.

In an action for extras upon a contract for building steamers, the value of which had not been ascertained by the engineer or any third party, the employer pleaded a set-off for penalties for delay, and the contractor replied that the additions ordered made it impossible to complete the vessels in time :—Held, that the set-off for penalties could not be sustained assuming the fact to be as stated in the replication. *Westwood v. Secretary of State for India*, 7 L. T. 736; 11 W. R. 261.

### 4. DAMAGES FOR BREACH OF CONTRACT.

**Remoteness of Damage.**—A. contracted with B. to repair a steam-threshing machine, undertaking to get it ready for harvest time. A new fire-box being needed, C. engaged to make one for A. "in about a fortnight," but failed in the performance of his contract, and A. (who had paid C. for the article) was obliged to get one made elsewhere at an additional cost; but this he did not do in time to enable him to perform his contract with B., although there was ample time for him to have done so after C. had broken his contract, whereupon B. sued A., who paid him 20*l.* to settle the action :—Held, that A. was entitled to recover from C. the sum which he had paid him for the fire-box, and the extra cost incurred in getting another, but that the compensation paid by A. to B. was not such a damage as might fairly and reasonably be considered either as arising naturally from C.'s breach of contract, or such as might reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as the probable result of the breach of it. *Port,*

*man v. Middleton*, 2 C. B. N. S. 322; 27 L. J., C. P. 431; 4 Jur., N. S. 689.

— **Improper Repair of Ship.**—In an action against the defendants for breach of contract in improperly repairing a sea-going steam vessel, the plaintiff claimed damages for the loss sustained by the detention of the vessel by reason of such improper repairs:—Held, that he was entitled to do so, the detention of the vessel being the probable result of the breach of contract. *Wilson v. General Iron Screw Collier Company*, 47 L. J., Q. B. 239; 37 L. T. 789.

**Action by Contractor no Bar to Action against Contractor.**—A. having been employed by B. to do work according to a specification, brought an action to recover the price agreed to be paid upon the completion of the work. The action was settled by payment of the whole amount, after which B. brought an action against A. to recover damages for an alleged non-performance of the contract and for an alleged improper performance of the same:—Held, that he was not precluded from maintaining the action by reason of the settlement of the action brought against him by A. *Davis v. Hedges*, 6 L. R., Q. B. 687; 40 L. J., Q. B. 276; 25 L. T. 155; 20 W. R. 60.

5. DEDUCTIONS.—See sub tit. REMUNERATION.

#### 6. LIABILITY OF EMPLOYER FOR NEGLIGENCE OF WORKMEN.

Two dwelling-houses adjoined, built independently, but each on the extremity of its owner's soil and having lateral support from the soil on which the other rested. This having continued for much more than twenty years, one of the houses (the plaintiffs') was, in 1849, converted into a coach factory, the internal walls being removed and girders inserted into a stack of brickwork in such a way as to throw much more lateral pressure than before upon the soil under the adjoining house. The conversion was made openly, and without deception or concealment. More than twenty years after the conversion the owners of the adjoining house employed a contractor to pull down their house and excavate, the contractor being bound to shore up adjoining buildings and make good all damage. The contractor employed a sub-contractor upon similar terms. The house was pulled down, and the soil under it excavated to a depth of several feet, and the plaintiffs' stack being deprived of the lateral support of the adjacent soil sank and fell, bringing down with it most of the factory:—Held, that the plaintiffs had acquired a right of support for their factory by the twenty years' enjoyment, and could sue the owners of the adjoining house and the contractor for the injury. *Bower v. Peate* (1 Q. B. D. 821) approved; *Dalton v. Angus*, 6 App. Cas. 740; 50 L. J., Q. B. 689; 44 L. T. 844; 30 W. R. 196.

See also MASTER AND SERVANT—PRINCIPAL AND AGENT—NEGLIGENCE.

### III. PROPERTY IN MATERIALS.

#### 1. RIGHTS OF EMPLOYER.

##### Forfeiture by Contractor—Bankruptcy—Entry

by Employer.]—A builder contracted with the trustees of a company to build for them an hotel for a specified sum, and to provide all necessary materials (except ironwork and papering) to the satisfaction of their superintendent; with a proviso that, in the event of the contractor becoming bankrupt, it should be lawful for the trustees to take possession of the work then already done by him, and put an end to the agreement for the future, paying him a fair proportion for the work actually done. Before the work was completed the contractor (who had received several sums of money on account, to an amount greater than the value of the work done) became bankrupt, having in his workshop some wooden sash frames destined for the hotel, and approved of by the superintendent for that purpose, into which certain pulleys, the property of the trustees, had been inserted; which frames having been brought by the trustees to the hotel, a demand of the sash frames, without mentioning the pulleys, was made by the assignees, to which the trustees returned a general refusal to give them up:—Held, that the property in the sash frames was not vested in the trustees by force of the contract and subsequent approval by their superintendent; secondly, that the circumstances of these pulleys being inserted in the sash frames did not render the trustees tenants in common with the assignees of the entire chattel; thirdly, that the money advanced by the trustees did not give them such a lien on the sash frames as authorized the refusal to deliver them up; fourthly, that, by the true construction of the contract, a property passed to the trustees in such work only as was actually done and affixed to the realty by the bankrupt previously to his bankruptcy; fifthly, that the general demand and general refusal were sufficient evidence of a conversion of the sash frames by the trustees; and that it was not necessary for the assignees to have made a special demand of the sash frames as distinguished from the pulleys. *Tripp v. Armitage*, 4 M. & W. 687; 1 H. & H. 442; 3 Jur. 249. See also *Roberts v. Bury Improvement Commissioners*, 4 L. R., C. P. 755; ante, col. 1057.

A. agreed to build a ship for B. within a certain period, B. paying instalments of the price from time to time; and it was provided, that if A. should fail to complete the ship as stipulated, it should be lawful for B. to enter upon and take possession of the ship (which from the payment of the first instalment was to be the property of B.), and to cause the works to be completed by any persons whom he should employ, using such of the materials of A. as should be applicable to the purpose. A. failed to complete, and B. took possession of the ship. A. committed an act of bankruptcy, and after that B. proceeded to finish the ship, using applicable materials which were in the yard at the time of the act of bankruptcy, but were not then incorporated with the ship, nor had been specifically appropriated by A. for the ship. Some of the materials had been selected by B. before the bankruptcy, and some were piled within the ship, and the rest in a shed adjoining, but none had been actually used before the bankruptcy:—Held, that B. was not entitled to the materials under the agreement, as they had never been used, and therefore that the property in them passed to the assignees of

*A. Baker v. Gray*, 17 C. B. 462; 25 L. J., C. P. 161; 2 Jur., N. S. 400.

**Right to on Bankruptcy—Protected Transaction.]**—A builder contracted with a building club to erect houses for them on their own land. The contract contained a stipulation that, if the contractor should neglect or refuse to proceed with the work in a proper manner to the satisfaction of the architect of the club, or become bankrupt, or insolvent, or otherwise rendered incapable of completing the contract, the architect should have power, after giving two days' notice in writing to the contractor, to appoint other persons to complete the work, and to provide the requisite materials, and also to seize and retain all materials, plant, and implements; provided that the contractor should have drawn money on account of his contract. The contractor commenced the works and carried them on for some time, receiving a considerable sum from the club. On the 30th of May he filed a liquidation petition. On the 2nd of June the architect of the club gave notice to the contractor that, as he had neglected to proceed with the works, they should, on the expiration of two days, employ other means of completing the works, and that he must not remove any materials, implements, or plant from the works, and on the expiration of this notice the club took possession of the materials, implements, and plant:—Held, that the club was entitled, as against the trustee in the liquidation, to retain what they had seized, the seizure being a protected transaction within s. 94 of the Bankruptcy Act, 1869. *Waugh, In re, Dickin, Ex parte*, 4 Ch. D. 524; 46 L. J., Bk. 26; 35 L. T. 769; 25 W. R. 258.

**—Fraud on Bankruptcy Law.]**—An agreement, dated the 17th of September, 1878, between an owner of land and a builder provided that, in consideration of the rent thereby reserved and certain agreements on the part of the builder, the landowner would, as the builder should erect and completely cover in the messuages thereafter agreed to be erected by him, demise to him a piece of land for ninety-nine years, at a yearly rent of 300*l*. And the builder agreed to erect and completely finish forty houses each of a specified value, within fifteen months from the date of the agreement, and vigorously and effectually to proceed continuously with all buildings once commenced by him on the ground, and to accept leases of the land and houses as the same should be erected and covered in. Until the leases should be granted the builder was to hold the premises subject to the payment of the rent, and to the observance and performance of his part of the terms and stipulations of the agreement, and subject to the power of distress and entry in default of any of the stipulations on his part, or on his becoming bankrupt or insolvent, in either of which cases all improvements, materials, and effects on the land, or adjacent thereto, which should not have been actually demised to the builder, should become absolutely forfeited to the landlord, but without prejudice to any right of action which might have accrued to him under the agreement (which was not to be construed as an actual demise), and the landlord was to be at liberty to re-enter and take possession of the ground, premises, chattels and effects, and to relet or sell the same,

or otherwise to use and enjoy the same, as fully as if the agreement had never been made. In January, 1879, the builder filed a liquidation petition. At this time there was a large quantity of building materials on the land comprised in the agreement, which had been placed there by the builder. Up to the time of the filing of the petition the builder had made no default in performing his agreement:—Held, that the provision for forfeiture of the materials to the landlord on the bankruptcy of the builder was void, as contrary to the policy of the bankruptcy law, and that the materials on the land were the property of the trustee in the liquidation. Decision of Bacon, C. J., reversed. *Jay, Ex parte, Harrison, In re*, 14 Ch. D. 19; 42 L. T. 600; 28 W. R. 449; 44 J. P. 409—C. A. Reversing *S. C.*, nom. *Meads, Ex parte, Harrison, In re*, 49 L. J., Bk. 47; 41 L. T. 560; 28 W. R. 308.

**—Extent of Ownership.]**—A contractor supplied materials to a railway company for the purpose of carrying out his contract. By the terms of the contract it was provided that the materials brought upon the railway should immediately become the absolute property of the company, except that they were to remain under the dominion of the contractor; that, if he should duly complete his contract, the company would give to the contractor, as part of his payment, the unconsumed materials; and that if, instead of the contractor, the company should use the materials, the company should compensate him in respect of them:—Held, that the materials were not, by the terms of the contract, so absolutely the property of the company as to be seizable by the sheriff under an execution upon a judgment against the company. *Beeston v. Marriott*, 4 Giff. 436; 9 Jur., N. S. 960; 8 L. T. 690; 11 W. R. 896.

By a building contract between A., the landowner, and B., the builder, A. was to grant leases on the erection of the buildings, and to assist the building operations by making advances to B., according to the progress of the buildings. The 7th clause of the contract stated that all materials and other things brought on the premises by B. for the purpose of erecting the buildings were to be considered as immediately attached to and belonging to the premises, and were not to be removed therefrom without the consent of A. The 8th clause empowered A. to enter upon and take possession of the land, with all buildings and other materials standing thereon, in case B. should fail to proceed with the completion of the buildings:—Held, that the 8th clause did not qualify the 7th clause, and that the effect of the 7th clause was to give A. such an equitable interest in the materials for the buildings brought afterwards on the land by B. that they could not be taken in execution by a judgment creditor of B. *Brown v. Bateman*, 2 L. R., C. P. 272; 36 L. J., C. P. 134; 15 L. T. 658; 15 W. R. 359.

**—Property in or Right of User.]**—A contract for executing sewage works made between a contractor and improvement commissioners, provided that all plant brought by the contractor on to the works should be deemed to be the property of the commissioners, and should not be removed during the progress of the work without the written order of their engineer; and in case of suspension of the works by their engi-

neer for any default of the contractor, or of the work being taken out of the contractor's hands, the same should be subject to be used as should be ordered by the engineer in and about the completion of the works. The engineer suspended the works, and the commissioners took possession of the plant and completed the works. The contractor having become bankrupt, and a sum of 2,876*l. 7s. 5d.* having been certified to be due to the commissioners from him for default under the contract, the commissioners claimed to retain the plant, which was sold by consent for 685*l.*:—Held, first, that the contract gave the commissioners no property in the plant, but only a right of user. *Winter, In re, Bolland, Ex parte*, 8 Ch. D. 225; 47 L. J., Bk. 52; 38 L. T. 362; 26 W. R. 512.

Held, secondly, that this right of user was not such a dealing within s. 39 of the Bankruptcy Act, 1869, as to give them a right to set off the value of the plant against the sum due to them from the contractors. *Ib.*

**Right to Re-enter—Injunction to restrain Seizure.**—By a contract between a contractor and a railway company, under which the former was to execute the company's works, it was provided (amongst other things) that surplus chalk should be the contractor's property, and that if the contractor should fail in the due performance of the contract, the engineer might, by order of the board of directors, take the further performance of the contract out of the contractor's hands, and employ for the purposes of the contract such persons and on such terms and conditions as the engineer should think fit. In alleged exercise of the power conferred by the latter provision the company resumed possession, and took the further performance of the contract out of the contractor's hands, who thereupon filed a bill for an injunction, alleging impropriety of conduct and duress on the part of the engineer, and that the chalk taken would, upon the completion of the work, become the plaintiff's property as surplus, allegations the truth of which was *bonâ fide* disputed by the company:—Held, that the contract being one where, if the company was wrong, the contractor could be amply compensated in damages, whereas if the contractor were allowed to resume work the court could not enforce specific performance of the contract in order to compel the completion of the works, the contractor was not entitled to an interlocutory injunction. *Garrett v. Bantstead and Epsom Downs Railway Company*, 4 De G., J. & S. 462. See also *Jennings v. Brighton Intercepting and Outfalls Sewers Board*, 4 De G., J. & S. 735, n.

**Granting Periods of Indulgence.**—Under a clause in a building agreement, under which rent had not been paid (and not amounting to a demise), that in case of default in not completing the buildings, at successive periods, the owner should be at liberty to re-enter and seize the materials there, and successive defaults having been made and several periods of indulgence granted, but there was no waiver of the last default, and no alteration of the builder's position to his prejudice, and no default on the part of the owner:—Held, that the owner was

entitled to re-enter and seize the materials. *Stevens v. Taylor*, 2 F. & F. 419.

**Extending Time for Completion.**—Where a building contract contained a clause empowering the defendants, in the event of the works being delayed by the contractors, to take the contract out of their hands and employ others for the completion thereof; and also a clause enabling the engineer in certain events to extend the time limited for the completion of the contract, and the engineer, in pursuance of the clause, granted such extension:—Held, that it was not competent for the defendants to avail themselves of the power of taking the works out of the contractors' hands, simply on the grounds of delay, till or up to a time within the extended period, or simply on the grounds that the work was not finished before the expiration of that period. But, *aliter*, if other sufficient grounds were relied on for exercising the power. *Mohan v. Dundalk, Newry and Greenore Railway Company*, 6 L. R., Ir. 477.

Where the same contract contained a clause enabling the defendants, upon taking the works out of the contractors' hands as aforesaid, to use the plant and materials of any description belonging to the plaintiffs which should be on, or near to, or employed in the execution of the works, without making any payment for the same:—Held, that a defence alleging that the defendants had taken up the works under the terms of the contract for delay, and relying on this clause, was a sufficient answer to an action for the conversion and detention of such plant and materials by the defendants. *Ib.*

Contractors agreed to construct a dock and other works for a railway company. The contract contained the following clauses:—"Should the contractors fail to proceed in the execution of the works in the manner and at the rate of progress required by the engineer, or to maintain the works as hereinafter mentioned to the satisfaction of the engineer, their contract shall, at the option of the company, but not otherwise, be considered void as far as relates to the works or maintenance remaining to be done, and all sums of money that may be due to the contractors, together with all materials and implements in their possession, and all sums named as penalties for the non-fulfilment of the contract, shall be forfeited to the company, and the amount shall be considered as ascertained damages for breach of contract." "Time of completion. The whole of the works are to be entirely completed on or before 31st August, 1873, and the contractors will be subject to a penalty of 100*l.* per week for each week the works remain unfinished beyond the time stated." By other clauses, if the contractors failed to complete the works within the period limited, the company had power, without giving previous notice, to take the works out of their hands and employ other contractors; and if the engineer was dissatisfied with the mode of proceeding and progress of the works, he had power to procure and make use of all labour and materials from money due or to become due to the contractors: but this was not to relieve them from their obligation to proceed with the works. The works were not finished on the 31st August, 1873, and the contractors continued working till 22nd January, 1874. On 22nd January, 1874, the

company gave notice to the contractors under the above clause to avoid the contract, and afterwards took possession of the implements and materials:—Held, that the clause in question could only be acted on and enforced within the time fixed for the completion of the works, and therefore, the notice of 22nd January, 1874, was not valid and sufficient to avoid the contract, and the company was not justified in taking possession of the implements and materials. *Walker v. London and North-Western Railway Company*, 1 C. P. D. 518; 45 L. J., C. P. 787; 36 L. T. 53; 25 W. R. 10.

— **On Rescission of an Agreement.**—If one of the parties to a building agreement in which a right to rescind is stipulated for, himself rescinds it, he is not entitled to make entry on the premises for the purpose of removing the goods after the date of rescission. *Marsden v. Sambell*, 43 L. T. 120; 28 W. R. 952.

**Construction of Agreement—Substituted Contract.**—A contract for the construction of a railway provided that if the contractor should make default the company might enter and complete the works, and make use of the contractor's waggons, machinery and plant, and also have a lien on the same, with power of sale to reimburse themselves any loss or damage they might sustain by reason of such default. The contractor having become embarrassed, the company made a second contract with him, which provided they should take to and complete the works, and for that purpose should be allowed 10,000*l.*, and the use of all the contractor's plant, &c., which should, on the completion of the works, be restored to the contractor in whatever state it might then be. And this second contract provided that, if it should then be found that anything was due to or from the company from or to the contractor, the amount should be paid by the one to the other within three months after the engineer should have certified the amount that should be due. And it provided that, "in all other respects the original contract should stand, except so far as it was altered by or should be inconsistent with the second contract." The contractor had made no default down to the date of the second contract. The company completed the works, and the engineer certified that a large sum was due to them from the contractor. The company thereupon refused to deliver up the plant to the contractor, and claimed power to sell the plant, and to reimburse themselves out of the proceeds:—Held, that they were not so entitled, for the provisions of the second contract were in substitution of the corresponding provisions in the first contract; the two instruments were not to be read as one, nor were the clauses of the first, conferring the lien and power of sale, to be taken as incorporated into the second contract. *Hunt v. South-Eastern Railway Company*, 45 L. J., C. P. 87—H. L.

**Appropriation by Assent.**—A., a carpenter, contracted with B. to make him a greenhouse for 50*l.* A. completed the greenhouse, informed B. that it was ready, and requested payment. B. paid A. the 50*l.*, and requested A. to keep the greenhouse for him. A. sent the greenhouse to the premises of C., informing him that it belonged to B., and requesting him to take care of

it for B.; which C. agreed to do. B. never saw the greenhouse, and knew nothing of its being sent to C. While it remained on C.'s premises, A. became bankrupt:—Held, that the property in the greenhouse vested in B., by his assent to its appropriation to himself. *Wilkins v. Bromhead*, 6 M. & G. 963; 7 Scott, N. R. 921; 13 L. J., C. P. 74; 8 Jur. 83.

**Loss of Subject-Matter.**—A contract was made for new boilers and parts of machinery for a ship, to be paid for by instalments on certificates of the plaintiffs' surveyor. Two instalments of 2,000*l.* were paid, when the ship was lost at sea:—Held, that the contract was substantially one for work and labour to be done by the defendant, and that the two payments of 2,000*l.* each were intended only to be paid on account of a contract to be performed as a whole, and that therefore as a full performance of the contract had been rendered impossible by the loss of the vessel, no property in any portion of the work certified by the inspector to have been properly done, and in respect of which the two sums were so respectively paid, had passed to the plaintiffs, so as to entitle them to recover in detinue for its detention. *Anglo-Egyptian Navigation Company v. Rennie*, 10 L. R., C. P. 271; 44 L. J., C. P. 130; 32 L. T. 467; 23 W. R. 626.

Held, also, that the plaintiffs could not recover back the two sums of 2,000*l.* or either of them in an action for money had and received. *Id.*

(The plaintiffs brought error upon this judgment to the Exchequer Chamber, but after argument the case was referred to arbitration. 10 L. R., C. P. 571.)

## 2. RIGHTS OF PERSON EMPLOYED.

**Lien—Not affected by Contract to take Bills in Payment, by Negotiation of Acceptance, or by Nature of Possession.**—Engineers contracted with the debtor, the owner of a barge, to supply steam machinery to the vessel, at the docks of a dock company, for the price of 1,050*l.*, to be paid by approved bills; one at three months for 260*l.* when the boiler and engine should be placed in the vessel, one at three months for 260*l.*, and one at six months for 530*l.*, when the vessel should have made a trial trip. The vessel having been taken to the docks was there entered in the name of one of the engineers; and, whilst shipwrights and other agents of the debtor were occasionally or constantly on board, the vessel remained in the possession of the engineers till the boat was ready to make a trial trip. In the interim the engineers had been paid 360*l.*, partly in cash and partly by the debtor's acceptance, which they discounted. On the day appointed for the trial trip the debtor filed a liquidation petition, and a receiver took possession of the vessel. A few days afterwards the debtor's acceptance was dishonoured:—Held, that the lien of the engineers for the unpaid price for the machinery and their labour was not affected by their having agreed to take bills in payment, nor by the nature of the possession, nor by their having discounted the debtor's acceptance. *Willoughby, Ex parte, Westlake, In re*, 16 Ch. D. 604; 44 L. T. 111; 29 W. R. 935.

— **Right of Bill-holder.**—A contract for

the building of a ship provided that the purchase-money was to be paid by instalments, partly in cash, and partly by means of bills of exchange, to be paid and given at specified stages of the progress of the construction, the balance being paid on completion by a bill. The ship was from the time of paying or giving the first instalment to be the absolute property of the purchaser to the extent of his advances, subject nevertheless to the builder's lien for any unpaid instalments. Any bills given during construction were to be retired by the purchaser at completion and transfer. As the construction of the ship went on, the vendor drew bills upon the purchaser, which he accepted, for the instalments of the purchase-money. After these bills had been negotiated, but before any of them became due, the purchaser took proceedings for liquidation, including his liability on the bills among his debts, and his creditors passed a resolution to accept a composition. The bill-holders refused to accept the composition when tendered. The purchaser shortly after the resolution gave notice to the vendor to rescind the contract. Not long after this the vendor became bankrupt and the ship was completed by his trustee. The bill-holders having claimed a lien on the ship:—Held, that the principle of *Waring, Ex parte* (19 Ves. 345), was not applicable, and that the bill-holders had no lien on the ship. *Lambton, Ex parte, Lindsay, In re*, 10 L. R., Ch. 405; 44 L. J., Bk. 81; 32 L. T. 380; 23 W. R. 662. Affirming *S. C.*, sub nom. *Greener, Ex parte, Lindsay, In re*, 32 L. T. 205.

— In other Cases.]—See sub tit. LIEN.

#### IV. REMUNERATION.

##### 1. PERSONS ENTITLED TO SUE.

**Physician.**—A physician may recover upon an express contract to remunerate him for his attendance. *Veitch v. Russell*, 3 G. & D. 198; 3 Q. B. 928; Car. & M. 362.

**Barrister.**—So, a barrister, upon an express contract for remuneration, may recover for his services, as an assessor at an election of guardians. *Egan v. Kensington Union (Guardians)*, 3 Q. B. 945, n.; 3 G. & D. 204.

**Arbitrator.**—So, an arbitrator may recover fees on an express promise, for which he otherwise would have no legal claim. *Higgins v. Gordon*, 1 G. & D. 656; 3 Q. B. 466.

**On Assignment of Contract.**—A., a silk throwster, contracted with B. and C. for machinery to be made by him, and while the work was in progress had money on account. Before the machinery was finished, B. and C. assigned it to D. This circumstance was communicated by D. to A., who said he must go on with the work, and he, A., should see him paid. The machinery having been completed and delivered:—Held, that D. might sue A. for the price of such parts of it as had been made by him after the assignment. *Oldfield v. Lowe*, 9 B. & C. 73.

— **Privity.**—A. and B. having entered into a joint agreement with a railway company to execute a contract for the construction of a tunnel upon the line, A. assigned all his right and

interest in the contract to B., and the latter agreed to pay A. a given sum on the completion of the contract. After this agreement had been entered into between A. and B., it became necessary to alter the levels of the line, and B. by agreement with the company abandoned the contract, and another was entered into between the company and other persons, under which the tunnel at the altered level was completed:—Held, that A. was not in a position, upon the completion of the substituted contract, to maintain an action against B. for the payment of the sum stipulated to be paid by his agreement with A. *Humphreys v. Jones*, 5 Ex. 952; 20 L. J., Ex. 88.

A., employed by B. to transport goods to a foreign market, delegated the entire employment to C., who performed it without the privity of B.:—Held, that C. could not recover from B. compensation for such service. *Schmalzing v. Thomlinson*, 6 Taunt. 147; 1 Marsh. 500. And see *Cull v. Backhouse*, 6 Taunt. 148, n.; and *Guy v. Gower*, 2 Marsh. 273.

##### Employment by One Person for Another.]—

When one man employs another to do work for a third party, for whose benefit, it is known, the work is to be, and such third party gives instructions about it, there is not, even *prima facie*, an implied contract in the first employer to pay; but the question is whether, on the whole, he led the person employed to understand that he, and not the third party, was to pay for the work. *Chidley v. Norris*, 3 F. & F. 228.

A. having a patent for spinning machinery, received an order from B. to have some spinning frames made for him. A. employed C. to make the machines for B., informing B. that he had done so. After the machines had been completed, A. ordered them to be altered; they were afterwards completed according to the new order, and packed up in boxes for B., and C. informed B. that they were ready; but B. refused to accept them:—Held, that C. could not recover the price from B. in an action for work and labour, or materials. *Atkinson v. Bell*, 2 M. & B. 292; 3 B. & C. 277.

**Earnings of Personal Labour by Undischarged Bankrupt.**—The plaintiff, who was an architect, sued for remuneration in respect of employment under a contract made in 1877, and for damages for an alleged wrongful dismissal from such employment in 1880. The plaintiff was adjudicated bankrupt in 1878, and had never obtained his discharge:—Held, that the cause of action for remuneration and damages passed to the trustee, and that the proper course was to add him as co-plaintiff in the action, and give him the conduct of the action. *Emden v. Carter*, 17 Ch. D. 768; 51 L. J., Ch. 41; 44 L. T. 636—C. A. Affirming 17 Ch. D. 169; 50 L. J., Ch. 492; 44 L. T. 344; 29 W. R. 600.

##### 2. WHEN CONTRACT IMPLIED.

**General Rule.**—Services, however long continued, create no claim for remuneration without a bargain for them, express or implied, from circumstances shewing an understanding on both sides that there should be payment. *Reeve v. Reeve*, 1 F. & F. 280.

The plaintiff, in a letter, proposed to take a lease of the defendant's house for a term of years, if the defendant would carry out certain alterations. A correspondence and interviews followed, and it was ultimately agreed that the alterations should be made, the plaintiff to pay 75*l.* towards them. The plaintiff wished to have the drawing-room painted in a particular way, and the defendant consented that the plaintiff should send in his own workmen to paint it, which he accordingly did, and also laid down gas pipes, with the defendant's consent. Ultimately the plaintiff was prevented from taking possession of the house owing to the default of the defendant in carrying out the alterations to be performed by him, and brought an action for breach of the agreement, with the common counts for work done. The correspondence disclosed no agreement sufficient to satisfy the Statute of Frauds:—Held, that the plaintiff could, under the common counts, recover for the value of the work done by the defendant's consent. *Pulbrook v. Laues*, 1 Q. B. D. 284; 45 L. J., Q. B. 178; 34 L. T. 95.

The employing of a professional person implies an undertaking to remunerate him, but the inference may be rebutted by circumstances. *Manson v. Baillie*, 2 Macq. H. L. Cas. 80.

A defendant employed the plaintiffs to find a purchaser or mortgagee of an estate. Thereupon they went down to the estate, valued it, put it in their books, advertised it in their circulars and in newspapers, and took some journeys, and had communications about it, and ultimately, while negotiating with one N. upon the matter, the plaintiffs and the defendant agreed that a letter should be written by the plaintiffs to N., and that if such letter induced N. to become purchaser or mortgagee, the plaintiffs should be paid 100*l.* N. ultimately became mortgagee, but denied that he was influenced in any way by the letter:—Held, that the plaintiffs could not recover on a quantum meruit for work and labour, with particulars claiming commission as agreed. *Green v. Mules*, 30 L. J., C. P. 343.

The plaintiff repaired certain leasehold premises, held by the defendant under a covenant to repair, on a parol promise by the defendant to assign him his lease:—Held, that the defendant upon refusal to assign, was liable to an implied assumpsit to pay the plaintiff for such repairs. *Gray v. Hill*, R. & M. 420.

A lessor contracted to pay his tenant at a valuation, for certain erections pursuant to a plan to be agreed on, provided they were completed in two months: no plan was agreed on, and after the condition broken, the lessor encouraged the lessee to proceed with the work:—Held, that the lessee might recover as for work and labour, on an implied promise arising out of so many of the facts as were applicable to the new agreement. *Burn v. Miller*, 4 Taunt. 745. See also *Thorn v. London (Mayor)*, ante, col. 1058.

**Work Obtained by Fraud.**—When a person has, by fraud, induced another to perform a service for him, intending not to pay for the performance of it, still there is a liability implied by the law which may be enforced in the same way as an obligation arising out of an express contract. *Rumsey v. North-Eastern Railway Company*, 32 L. J., C. P. 244.

**When Written Agreement Unstamped.**—If an agreement cannot be read for want of a stamp, the plaintiff cannot recover the value of the work and labour, although the defendant may have had the benefit of it. *Hughes v. Budd*, 8 D. P. C. 478.

**Agent's Authority Rescinded.**—When an agent employed for an agreed commission to sell land at a given price succeeds in finding a purchaser at the stipulated price, but the principal, from whatever cause, declines to sell, and rescinds the agent's authority, the latter is entitled to sue for a reasonable remuneration for his work and labour, and is not bound to resort to a special action for the wrongful withdrawal of the authority. *Prickett v. Badger*, 1 C. B., N. S. 96; 26 L. J., C. P. 33; 3 Jur., N. S. 66.

In such a case, a contract to pay what is reasonable is implied by law; it is not a question for the jury. *Id.*

**Promise of a Present.**—A request to a tradesman to shew the defendant's house, and the defendant would make him a handsome present, is evidence of a contract to pay a reasonable compensation for the work and labour bestowed in that service. *Jewry v. Bush*, 5 Taunt. 302.

**Promise of what is Right and Proper.**—Where a person performed a work for a committee, under a resolution entered into by them, "that any service to be rendered by him should be taken into consideration, and such remuneration made as should be deemed right":—Held, that an action would not lie to recover a recompense for such work, as the resolution only imported that the committee was to judge whether any remuneration was due. *Taylor v. Brewer*, 1 M. & S. 290; *S. P.*, *Bryant v. Flight*, 5 M. & W. 111.

On a parol contract with a public board to perform work and labour for whatever "recompense the board might allow as right and proper," an action will lie to recover a reasonable recompense, although the board tenders what they consider right and proper. *Bird v. McGahey*, 2 C. & K. 707.

**Services with a View to a Legacy.**—If a man undertakes to perform services without any view to a reward, but with a view to a legacy, he cannot after the death of a person for whom they were performed set up a demand for such services against the testator's estate. *Le Sage v. Cousmaker*, 1 Esp. 187.

A surgeon for several years bestowed surgical attendance on a lady, but, expecting that she would amply compensate him by a legacy, sent in no bill. She died, and left him nothing, whereupon he sued her executors, claiming 500*l.* The jury awarded him 250*l.* The court refused to disturb the verdict. *Baxter v. Gray*, 4 Scott, N. R. 374; 3 M. & G. 771.

In such a case, to disentitle the party to sue, there must be something more than the mere expectation of a legacy. *Id.*

### 3. UNDER SPECIAL CONTRACTS.

#### a. Generally.

Where work is done under a special contract, the plaintiff is not precluded from recovering

under the general counts, unless there is something in the terms of the special agreement, which, either by stipulation or necessary intent, prevents him from so doing. *Robson v. Godfrey*, Holt, 236; 1 Stark. 275.

**Fraud by Employer.**—A. engaged to convey away rubbish for B. at a specified sum, under a fraudulent representation by B. as to the quantity of the rubbish which was to be so conveyed:—Held, that in an action for the value of the work actually done, A. could recover only according to the terms of the special contract; although when he discovered the fraud, he might have repudiated the contract, and sued B. for deceit. *Selway v. Fogg*, 5 M. & W. 83.

#### b. Deviations and Alterations.

**Payment for—In what Cases.**—Where work is done under a special contract and for estimated prices, and there is a deviation from the original plan by the consent of the parties, the estimate is not excluded, but is the rule of payment so far as the special contract can be traced; and for any excess beyond it the party is entitled to his quantum meruit. *Robson v. Godfrey*, Holt, 236; 1 Stark. 275.

Where a tradesman finishes work differing from the specification agreed on, he is not entitled to the actual value of the work, but only to the agreed price, minus such a sum as it would take to complete the work according to specification. *Thornton v. Placor*, 1 M. & Rob. 218.

A contractor agreed with an incorporated company to do certain works, the contract being under seal. In this contract there was a stipulation that if the company should think proper, at any time, to make any addition to the original works, the company should be at liberty to do so on giving him written instructions for that purpose, signed by the principal or assistant engineer. A verbal arrangement was afterwards made by the principal engineer for the execution of certain extension works, allowing for a variance in the prices, but stipulating, with the exception of that variance, all the provisions of the contract should be considered as applicable to the extension work. This work was executed by the contractor under this arrangement:—Held, that he could not afterwards reject the terms of the contract, and claim remuneration for the work as upon a quantum meruit, nor could he ask in equity for accounts to be taken independently of the contract. *Ranger v. Great Western Railway Company*, 5 H. L. Cas. 72.

Where work is undertaken on contract at a given price, the employer is not liable to any greater amount by consenting to alterations from the original plan, unless he is either expressly informed, or must necessarily, from the nature of the work, be aware that the alteration will increase the expense. *Lovelock v. King*, 1 M. & Rob. 60.

If a builder undertakes a work of specified dimensions and with specified materials, and deviates from the specification, he cannot recover upon a quantum valebat for the work, labour and materials. *Ellis v. Hamlen*, 3 Taunt. 52.

If A. agrees to make an article of certain materials for a stipulated price, but puts in materials of a better kind, he is not at liberty on that account to charge more than the stipulated price,

nor can he require the article to be returned because the buyer will not pay an increased price on account of the better materials. *Wilmot v. Smith*, 3 C. & P. 453.

Where, in the progress of building, work done under a contract, some process more expensive than contracted for was ordered by the architect, with the knowledge of the employer, and the builder's sub-contractor was told it was to be paid extra for:—Held, that there was evidence of a contract to pay him extra for it, and of authority in the architect to make such a contract with him. *Wallis v. Robinson*, 3 F. & F. 307.

**Alteration of Contract by Architect.**—The plaintiff entered into a written contract with the defendant to build a house on the defendant's land upon certain terms and conditions therein contained, the contract containing certain provisions for payment on the certificates of the defendant's architect, and also as to orders for extra work, the fulfilment of the provisions being, in fact, a condition precedent to the plaintiff's right of payment. The agreement, while in the custody of the architect and after execution by the plaintiff, was altered in a material particular, the alteration having reference to the provision with regard to extras. The plaintiff built the house and received payment from time to time for the work so done by him; the payments were made according to the provisions of the contract, and, in fact, the contract was fully acted on by both parties to it. Payment for extra work under the contract being refused by the defendant on the ground that the plaintiff had not complied with the terms relating thereto, which were a condition precedent to his right to recover for the same, the plaintiff brought an action upon a quantum meruit on the ground that the agreement having been altered by defendant was void, or at least that the defendant could not in any way avail himself of it as against the plaintiff, and that, therefore, the plaintiff could recover on a quantum meruit for extras actually done by him. The written agreement was put in evidence at the trial by the plaintiff himself:—Held, that this being an action on an executed contract for work done on real property, the plaintiff was bound to shew what the terms of the contract were, and that, therefore, the document, though altered in a material part by the defendant's architect, was either still an instrument binding upon the plaintiff, or at least might be looked at to see what the terms were; and that the plaintiff could not recover on a quantum meruit. *Pattison v. Luckley*, 10 L. R., Ex. 330; 44 L. J., Ex. 180; 33 L. T. 360; 24 W. R. 224.

**— Authority to Vary or Alter.**—An obligor, who binds himself to perform certain works according to a specification and other detailed and working drawings, to be furnished during the progress of the works, with power for the obligee, by his surveyor, to direct additions or omissions, must, in a plea of performance quoad such parts in which no orders were given by the surveyor to vary and deviate from the original plan, shew an authority in the surveyor to give such directions, or aver that the deviation or variation was an omission or an addition. *Rea v. Peto*, 1 Y. & J. 37.

Action on an agreement to build a house according to certain drawings, plans and specifica-

tions, and to the satisfaction of the plaintiff, and with the best materials, alleging as breaches that the defendant did not build the house to the satisfaction of the plaintiff, and that he did not perform the work with the best materials; the defendant pleaded, that he deviated from the drawings by the direction of the plaintiff's architect:—Held, that this plea was bad on general demurrer, the architect not being shewn to be the plaintiff's agent to bind him by any deviation from the drawings. *Cooper v. Langdon*, 9 M. & W. 60; 1 D., N. S. 392.

#### **o. Extras.**

**Contract with Company—Not under Seal.]—**An incorporated company entered into a contract, under seal, with A. for the execution of works according to the terms of a specification annexed, which contained provisions for extra work. A. entered upon the work under the superintendence of the company's engineer, and also under such superintendence, and with his approbation, executed extra works, which, however, could not be considered as coming within the provisions of the contract under seal. A. afterwards made a claim upon the company to a much larger amount than that specified by the contract, and the directors paid him a sum generally on account. By 8 & 9 Vict. c. 16, s. 97, the directors of such a company may make parol contracts without the same being reduced into writing, where such contract would, if entered into between private persons, be valid; and by s. 98, the directors are bound to enter minutes of such contracts in a book; and, by one of the clauses of the special act of the company under which it was incorporated, three directors constituted a quorum:—Held, that as there was not any evidence that the company had contracted for this extra work under seal, or that the company had entered into a contract for the same under the terms of their special act, or of any general act authorizing the same, the company was not liable to A. for the extra work so performed by him. *Homersham v. Wolverhampton Waterworks Company*, 6 Railw. Cas. 790; 6 Ex. 137.

**Work comprised in Specification, though not Mentioned.]—**A. agreed to build a house for B., who prepared a specification, which contained particulars of the different portions of the work. Under the head of "Carpenter and joiner," there were specified the scantling of the joists for the different floors, the rafters, ridge and wall, but no mention was made of the flooring. The specification stated, that "the whole of the materials mentioned or otherwise in the foregoing particulars, necessary for the completion of the work, must be provided by the contractor." At the foot of the specification A. signed a memorandum, whereby he agreed with B. "to do all the works of every kind mentioned and contained in the foregoing particulars, according, in every respect, to the drawings furnished, or to be furnished, for 1,100*l*. The house to be completed, and fit for occupation, by the 1st of August, 1858." A. prepared the flooring boards, brought them to the premises, and planed and fitted them to the several rooms, but refused to lay them down without extra payment, because the flooring was not mentioned in the specification, whereupon B. put an end to the contract,

and took possession of the works, and proceeding to complete the building, used the flooring boards so prepared and fitted by A.:—Held, first, that A. was not entitled to recover for the flooring as an extra, because it was included in the contract, though not mentioned in the specification. *Williams v. Fitzmaurice*, 3 H. & N. 844.

Held, secondly, that A. could not maintain trover for the flooring boards left on the premises by him, and subsequently used by B. *Ib*.

**When Written Orders Stipulated for.]—**Where a clause in a contract stipulated that for all extra work written directions should be given, under the hand of the architect:—Held, that a sketch made by the architect, and not signed by him, was not such a direction as complied with the contract. *Myers v. Sarl*, 30 L. J., Q. B. 9; 9 W. R. 96.

When in a builder's written contract it is stipulated therein that any order given for extras shall be also in writing, there must be something beyond an order to entitle a person to obtain payment for such extras. *Franklin v. Darke*, 3 F. & F. 65; 6 L. T. 291.

A. contracted with B., that B. shall, within a certain time, build A. a ship, complete and ready for sea; and that the price in the contract mentioned should be inclusive of all charges for the ship, finished and fitted perfectly in every respect; and that no charges should be demanded for extras, but any additions which might be made, by order in writing of A.'s agent, should be paid for at a price previously agreed upon in writing. During the progress of the building of the ship, several additions and alterations were made by the direction of A.'s agent, but no written order was given for them. When the ship was nearly completed, A.'s agent gave B. notice that he should require from him a supply of a quantity of articles for the use of the ship. It was stipulated in the contract that the ship should be fitted, formed, and equipped in manner similar in all respects to that which is practised with ships of the same class in her Majesty's navy under contracts with the Admiralty. A.'s agent, upon B. at first declining this last-mentioned quantity of goods, afterwards arranged with B. that they might be supplied by B., without prejudice to the question, whether B. was bound to supply them under his contract, and B. supplied them accordingly:—Held, that B. could not recover for extras, alterations or additions made during the course of the performance of the contract, unless where he had received previous written orders, agreeably to the contract. *Russell v. Sa Da Bandeira (Viscount)*, 13 C. B., N. S. 149; 32 L. J., C. P. 68; 9 Jur., N. S. 718; 7 L. T. 804.

As the last-mentioned parcel of goods must be considered to have been delivered on board after the ship was delivered and completed:—Held, that A. was liable for this quantity of goods independently of the contract. *Ib*.

An act empowered a corporation to scour an inland harbour, and they did so by taking up the mud in barges, and letting it out at the mouth of the harbour, so as to be carried down the river. The corporation employed the plaintiff to excavate and remove certain estimated quantities of earth down the river at certain

prices, the contract (not noticing the scouring process) providing only for extra work ordered by the engineer of the plaintiff in writing. In consequence of the cleansing process, which was continued while the plaintiff was engaged in the work, the quantity of soil he had to remove was vastly increased by great deposits of mud. The plaintiff applied for and was refused any additional remuneration, and after the work was completed sued the corporation for compensation, but the case of the plaintiff, as stated at the trial, did not shew that the mode of cleansing adopted by the corporation was unusual or unreasonable, and, on the contrary, it appeared rather to be a proper mode of carrying out the powers of the act:—Held, that, as it did not appear that the process was unlawful or wrongful, it was no cause of action. *Rigby v. Bristol (Mayor)*, 29 L. J., Ex. 359.

**—Insufficiency of Stamp-Evidence.]—**When work has been done under a written contract not admissible for want of a stamp, evidence of extra work cannot be given without proof of the written contract, and if that is inadmissible the judge cannot look at it for the purpose of seeing whether or not the proposed evidence refers to it. *Bernan v. Cornish*, 1 D. & L. 585; 12 M. & W. 421; 13 L. J. & N. 91; 8 Jur. 46; *S. P.*, *Jones v. Howell*, D. P. C. 176, and *Vincent v. Cole*, 3 C. & P. 481.

**When Right to Payment Accrues.]—**In a contract for building steamers (to the satisfaction of the engineer), to be completed within six months, with penalties for delay, it was provided that the engineer might allow an extension of time, and might also order additions or alterations by orders in writing, and that the value of such additions or alterations should be ascertained, and added to or deducted from the contract price, as the case might be; and further, that any dispute or difference as to such additions or alterations should be referred to the engineer, whose decision or valuation should be final. Additions and alterations were duly ordered, and the steamers were not completed in time. In an action for extras, the value of which had not been ascertained by the engineer or any third party, the employer pleaded a set-off for penalties for delay, and the contractor replied that the additions ordered made it impossible to complete the vessels in time:—Held, first, that the action was not maintainable until the value of the additions had been ascertained. *Westwood v. Secretary of State for India*, 7 L. T. 736; 11 W. R. 261.

**Liability for—Construction of Contract.]—**A. agreed to do for B. & Co. all the woodwork on an iron ship which they were building for M. & Co., according to a tender, the whole to be completed for \$8,000l. The contract or tender contained the following clause: "Any important work not mentioned in this tender that may be required to be done by the owners to be paid for by them, in addition to the amount herein specified." The work was undertaken by A. for B. & Co., upon the faith of a guarantee by C., as follows: "In consideration of your contracting with Messrs. B. & Co. for the woodwork of an iron ship now building by them for Messrs. M. & Co. we hereby guarantee the payment to you

according to the contract." The word "important" in the contract was inserted by A. with the consent of B. & Co. after the guarantee was signed by C.:—Held, that the contract bound B. & Co. for extra work done, they being the persons referred to therein as the owners, and that the insertion of the word "important" had no material effect upon the liability of C. under the guarantee. *Andrews v. Lawrence*, 19 C. B., N. S. 768.

**Action by Sub-Contractor.]—**A sub-contractor suing an employer for work extra the original contract must put in that contract, if in writing, and also prove a separate and distinct contract with the employer to do the work sued for. *Eccles v. Southern*, 3 F. & F. 142.

**Under a Certificate.]—**See post, col. 1085.

#### 4. COMPLETION OF CONTRACT.

**Necessity of—No Claim for Unfinished Work.]—**Upon an entire contract—as to repair a damaged chandelier and make it complete for 10l.—an action will not lie for the value of a partial repair, though such repair was beneficial to the defendant, and consisted partly in a supply of fresh materials, such materials not having been demanded back. *Sinclair v. Bowles*, 4 M. & R. 1; 9 B. & C. 92.

Where A. contracts to do work and supply materials upon the premises of B. for a specific sum, to be paid on completion of the whole, A. is not entitled to recover anything until the whole work is completed, unless it is shewn that the performance of his contract was prevented by the default of B. *Appleby v. Meyers*, 2 L. R., C. P. 651; 36 L. J., C. P. 331; 16 L. T. 669—Ex. Ch. See also ante, col. 1059.

**Time for Payment.]—**Where A. contracts to do work on materials supplied to him by B. (as where he contracts to survey a parish and to set down the results of such survey in a map, upon paper furnished to him by B.), his right to sue for work and labour is complete as soon as he has finished the work, and has given B. a reasonable opportunity of ascertaining its correctness; and if (there being no contract for a specific price) he demands more for the work than a reasonable price, and refuses to deliver it except on payment of such larger price, that does not preclude him from suing for and recovering a reasonable price. *Hughes v. Lenny*, 5 M. & W. 183; 2 H. & H. 13.

**Loss of Subject-Matter.]—**The plaintiffs contracted with the defendant to erect machinery upon his buildings and premises, and in his occupation, for a specified sum, and to keep the whole in order under fair wear and tear for two years. When the machinery was only partly erected, a fire accidentally broke out in the buildings, and, without any fault by either party, destroyed both the buildings and machinery then erected thereon:—Held, that the plaintiffs were not entitled to recover anything in respect of any portion of the machinery which had been erected and destroyed, as the whole work contracted to be done by them had not been completed. *Id.*

An action lies by a shipwright for work and

labour done, and materials delivered in repairing a ship, though burnt in dock before the repairs are completed. *Menetone v. Athawes*, 3 Burr. 1592.

A contract was made for new boilers and parts of machinery for a ship, to be paid for by instalments on certificates of the plaintiffs' surveyor. Two instalments of 2,000*l.* were paid, when the ship was lost at sea:—Held, that the contract was substantially one for work and labour to be done by the defendant, and that the two payments of 2,000*l.* each were intended only to be paid on account of a contract to be performed as a whole, and that therefore as a full performance of the contract had been rendered impossible by the loss of the vessel, no property in any portion of the work certified by the inspector to have been properly done, and in respect of which the two sums were so respectively paid, had passed to the plaintiffs, so as to entitle them to recover in detinue for its detention. *Anglo-Egyptian Navigation Company v. Rennie*, 10 L. R., C. P. 271; 44 L. J., C. P. 130; 32 L. T. 467; 23 W. R. 626.

Held, also, that the plaintiffs could not recover back the two sums of 2,000*l.* or either of them in an action for money had and received. *Id.*

(The plaintiffs brought error upon this judgment to the Exchequer Chamber, but after argument the case was referred to arbitration. 10 L. R., C. P. 571.)

**Incapacity by Act of God.]**—Incapacity by reason of the intervention of an act of God to perform personal service is an excuse for its non-performance, notwithstanding a covenant to serve absolute and unconditional in its terms, because the parties must be supposed to have contemplated the continuance of the covenantor's ability to perform the service as one of the conditions of the contract. *Boast v. Forth*, 4 L. R., C. P. 1; 38 L. J., C. P. 1; 19 L. T. 264; 17 W. R. 29.

A. ordered of B. a set of artificial teeth, which were by the terms of the contract to be fitted to her mouth; before they were so fitted A. died:—Held, a contract for the sale of goods within the Statute of Frauds (29 Car. 2, c. 3), s. 17; and that B. could not sue A.'s executor for work and labour done and materials provided for the testatrix. *Lee v. Griffin*, 1 B. & S. 272; 30 L. J., Q. B. 252; 7 Jur., N. S. 1302; 4 L. T. 546; 9 W. R. 702.

In contracts to render services purely personal there—as, for example, a contract by a musician to play at a concert—is coupled a condition that the parties will be exonerated from the contract if the performance is prevented by inability resulting from the act of God. *Robinson v. Davison*, 1 L. R., Ex. 269; 40 L. J., Ex. 172; 24 L. T. 755; 19 W. R. 431.

**Bankruptcy of Contractor before Completion—Price fixed by Official Assignee.]**—A member of the Stock Exchange contracted with another member to purchase certain shares. Before completion the purchaser failed to meet his engagements, and was declared a defaulter on the Stock Exchange. By the rules of the Stock Exchange the price of shares, contracted to be bought or sold by such a defaulter, are to be fixed by the official assignee of the Stock Exchange, and the differences paid to or claimed from the assignee:—Held, that the price fixed by the assignee is substituted for the original

contract, and is a liquidated sum due under the contract, and, therefore, that a bankruptcy petition may be founded upon a claim for such price. *Ward, Ex parte, Ward, In re*, 22 Ch. D. 132; 52 L. J., Ch. 73; 48 L. T. 332; 31 W. R. 112—C. A.

**Exercise of Right of Election to Rescind.]**—The exercise of a right of election to rescind a building agreement must be signified in an unqualified manner and within a reasonable time, or, at all events, not after the other party to the agreement has gone to expense in the belief of the right of election not being exercised. *Marsden v. Sambell*, 43 L. T. 120; 28 W. R. 952.

**Mistaken Claim to Rescind, Effect of.]**—A mistaken claim by one of the parties to such an agreement to rescind it does not *ipso facto* operate to rescind the agreement, unless the other party claims a rescission on the ground of the mistaken claim. *Id.*

**Performance Prevented or rendered Impracticable by Employer.]**—The defendants employed an architect to draw a specification of a building, and he employed the plaintiff to make out the quantities; the plaintiff's work was to be paid for by the successful competitor for the building contract; but a dispute having arisen between the architect and the defendants, they refused to go on with the building, upon which the architect sent in his bill to them, together with the plaintiff's bill for making out the quantities; the defendants paid the architect's account only:—Held, that as the defendants had by their own acts rendered it impossible that the successful competitor should defray the plaintiff's charges, according to the understanding, they were liable to him for the amount of his charges. *Moon v. Witney Union (Guardians)*, 3 Bing. N. C. 814; 5 Scott, 1; 3 Hodges, 206.

Where, by the terms of a contract, a service to be performed by A. for B. is to be paid for in goods, A. cannot declare for the value of the service, but must sue on the special contract. But if B. by his own act renders the delivery of the goods impossible, A. may sue for the value of the service. So, if B. allows the goods to be sold under an execution against him. *Keys v. Harwood*, 2 C. B. 905; 15 L. J., C. P. 207.

A printer having agreed to print for the defendant a work which was to contain a dedication, to be thereafter sent to him, printed the work, and also the dedication, but on the latter being returned to him revised, discovered for the first time that it contained libellous matter, whereupon he refused to continue the printing of it; and on the defendant refusing to accept or pay for the work, without the dedication, brought an action against him for the price of the work, without the dedication:—Held, first, that the contract was not within the 17th section of the Statute of Frauds, being one of work and labour, and not of goods sold. *Clay v. Yates*, 1 H. & N. 73; 25 L. J., Ex. 237; 2 Jur., N. S. 908.

Held, secondly, that the dedication being libellous, the printer was justified in refusing to publish it, and was entitled to recover the expense of printing the body of the work. *Id.*

**— Bankruptcy of Employer.]**—A company employed a broker to dispose of their shares, on the terms that he should be paid 100*l.* down and

400*l.* in addition, upon the allotment of the whole of the shares of the company. The broker disposed of a considerable number of shares when the company was wound up:—Held, that the broker was prevented earning the 400*l.* by the act of the company, and was therefore entitled to recover a proportion of the 400*l.* *Inchbald v. Western, Neilgherry Coffee, Tea and Cinchona Company*, 17 C. B., N. S. 733; 34 L. J., C. P. 15; 10 Jur., N. S. 1129.

The defendant, a builder, contracted with the plaintiff, a building surveyor, that if the plaintiff would supply the quantities for a certain projected building, the defendant would, if he was accepted as the building contractor, pay the plaintiff out of the first instalment; the plaintiff furnished the quantities, but the defendant subsequently abandoned the building contract:—Held, first, that it was implied that the defendant should duly proceed with the building contract. *M'Connell v. Kilgallen*, 2 Ir., Q. B. D. 119.

Held, secondly, that performance of his contract with the plaintiff having been rendered impossible by his own act, he was bound to pay the plaintiff for the quantities furnished. *Id.*

— **When Payment Conditional in Certain Events.**—An agreement was made between the plaintiff, who was an architect, and A., who was possessed of land, by which the plaintiff agreed to lay out the land for building purposes, and to make all the requisite plans, on the condition that he should make A. no charge for such services, but that, in the event of the land being disposed of for building purposes, the plaintiff should be appointed the architect on A.'s behalf, and parties building on the land should pay the plaintiff a percentage on the outlay, provided they did not employ him as their architect; but that, in the event of A. or his executors wishing to dispense with the plaintiff's services at any time, he or they should be at liberty to do so, on remunerating him for his time and trouble in making the preparations. The declaration alleged that the plaintiff had prepared all the plans, according to the agreement, and that the land had not been disposed of for building purposes; and that after the death of A. his executors dispensed with the further services of the plaintiff in respect of the contract, and put it out of their power to dispose of any part of the land for building purposes, whereby the plaintiff claimed to be paid for making the preparations:—Held, that the plaintiff was not entitled to recover, as there was no understanding on the part of A. to dispose of the land for building purposes only; and the land not having in fact been so disposed of, the plaintiff was not, according to the contract, to be remunerated. *Moffatt v. Laurie*, 15 C. B. 533; 24 L. J., C. P. 56; 1 Jur., N. S. 283.

— **Pleadings.**—A count stated that, by a deed between the plaintiff and the defendants acting under the Public Health Act, 1848, as the Local Board of Health for a borough, the plaintiff contracted with them that he would execute and complete all the works mentioned in a specification annexed, in and about the constructing a sewer in the town, according to the specification and a plan prepared by a surveyor; the several portions of the works to be completed on or

before the time mentioned in the specification, and to the satisfaction of the surveyor. And it was provided that if the plaintiff, from bankruptcy, insolvency, or any other cause whatever, should be prevented or delayed in proceeding with the works, or should not proceed to the satisfaction of the surveyor, it should be lawful for the local board, after three days' notice, signed by their clerk, to be given to the plaintiff of their intention so to do, to employ any other person to complete the work, and, at the expiration of the notice, the deed should, at the option of the local board, become void as to the plaintiff, and the amount already paid to him should be considered the full value of the works executed by him up to that time, and no further claim should be made for contract or additional works, and the materials at that time on the premises should become the property of the board without further payment for the same. And it was provided that one-fourth of the whole amount should be paid when one-third of the works should have been certified by the surveyor to have been completed to his satisfaction, another fourth part when two-thirds of the works should have been so completed, another fourth part on completion of the works so certified, and the remaining part within two months from that time. Averment, that the plaintiff in part executed the works, and was ready to complete the works. Plea, that after the commencement of the works the plaintiff did not proceed with the same according to the specification and to the satisfaction of the surveyor, whereupon the defendants, by a notice signed by their clerk, and delivered to the plaintiff, gave notice of their intention to proceed with the works, and to employ another person; that three days after the delivery of the notice, the deed, at the option of the defendants, became void, and the defendants proceeded with the works, and employed other persons; and that by reason of the premises they refused to permit the plaintiff to complete the works:—Held, first, that the declaration was good, since there was an implied contract on the part of the defendants to allow the plaintiff to complete the work subject to the provisions for determining the employment in the events mentioned. *Davies v. Swansea (Mayor)*, 8 Ex. 808; 22 L. J., Ex. 297.

Held, also, that the power of determining the employment might be exercised before any payment was made, and therefore the plea was good. *Id.*

— **Mutual Abandonment.**—The plaintiff agreed with the defendant to prepare and issue advertisements and notices for the purpose of selling tickets to see a procession, and to use his best endeavours in selling them, being paid 10*l.* per cent. upon the proceeds of the tickets sold. The plaintiff issued the advertisements and notices, but before the sale of the tickets the defendant countermanded his authority to sell, and the plaintiff therefore sold none, but sent the applicants to the defendant. The plaintiff then brought an action for the work done:—Held, that he was not entitled to recover in this form of action, it not being shewn that the contract was mutually abandoned. *De Bernardy v. Harding*, 8 Ex. 821; 1 C. L. R. 884; 22 L. J., Ex. 340.

**Readiness to Complete—Questions for the**

**Jury.**—In an action by architects whose plans, after having been accepted, are rejected on the ground that the work cannot be done for the amount of their estimates, it is for the jury whether it is an express or implied condition of the contract, that the estimates shall be reasonably near the actual cost. *Nelson v. Spooner*, 2 F. & F. 613.

The plaintiffs declared upon a contract, by which they were to manufacture and fix complete for the defendant a copper necessary for the fitting up of a brewhouse, according to a specification; and the defendant was to permit the plaintiffs to put up the work, and pay for the same on the delivery and fixing up thereof; assigning as a breach that the defendant would not permit the plaintiffs further to proceed with and to complete the work, but discharged them therefrom. Upon the trial of an issue on the readiness of the plaintiffs to manufacture and complete the copper, it was left to the jury to say, upon the evidence, which party was in fault in occasioning the contract not to be carried into effect:—Held, no misdirection. *Pontifex v. Wilkinson*, 1 C. B. 75.

The plaintiff contracted to fit up for the defendant a brewery at the house of a third person, the whole to be fixed complete for a certain sum, nothing being said about the time or mode of payment. When a portion of the work was done, the plaintiff refused to complete it without security, which the defendant refused to give. In an action against the defendant for not permitting the plaintiff to proceed with or complete the work, or paying for what was done, it was left to the jury to say by whose default the work was stopped. The jury having found a verdict for the defendant the court declined to interfere. *Pontifex v. Wilkinson*, 2 C. B. 349.

##### 5. SUBJECT TO CERTIFICATES.

**When Certificate a Condition precedent.**—In a building contract it was provided that the contract should not be vacated by any additions or alterations, but that the price to be paid for such alterations should be settled by a surveyor, who was to be sole arbitrator in settling such price, and all disputes arising in or about the premises; and the employer agreed to pay certain proportions of the contract price upon receiving a certificate in writing, signed by the surveyor, testifying that certain portions of the building had been done, and his approval thereof, and the balance that should be found due after deducting the previous payments, within two months after receiving the surveyor's certificate that the whole of the works had been completed to his satisfaction:—Held, that the surveyor's certificate was a condition precedent to the builder's right to sue upon the contract in respect of alterations. *Morgan v. Birnie*, 3 M. & Scott, 76; 9 Bing. 672.

Where a building agreement contained a proviso that no instalment should be paid, unless the plaintiff delivered to the defendant a certificate, signed by the surveyor of the defendant, that the works were performed according to a specification:—Held, that the want of a certificate was a good defence under the general issue to an action for the instalments, and that the plaintiff was not at liberty to prove that it was withheld by collusion with the defendant. *Milner v. Field*, 5 Ex. 329; 20 L. J., Ex. 68.

By a building agreement between A. and B., it was stipulated that A. should complete for a specified price certain works on certain houses of B., the whole to be completed on a specified day, and to be done to the satisfaction of a surveyor named, upon whose approval payment was to be made. A. failed to complete the work. He sued B. on the agreement for the agreed price, and for a reasonable price according to measure and value. There was evidence, on the trial, that B. had resumed possession of the houses, and was so far enjoying the fruits of A.'s labour:—Held, that there was no evidence in support of the claim, for that he could not recover on the special count, not having fulfilled it; and that the mere fact of B.'s taking possession of his own land, on which buildings had been erected, or where repairs had been done, or alterations made to a building thereon, did not afford an inference that he had dispensed with the conditions of the special agreement under which the works were done, or of a contract to pay for the work actually done according to measure and value. *Munroe v. Butt*, 8 El. & Bl. 738; 4 Jur., N. S. 1231.

Upon an application for production by the defendant of an agreement between the plaintiff and the defendant, in order that it might be made a rule of court under the Common Law Procedure Act, 1854, s. 17, it appeared that the agreement was for the erection of four houses by the plaintiff, which were to be inspected by S. and C., or some other architect or valuer, to be appointed by the defendant, who were to give a certificate of the progress and value of the works. The agreement contained a power for the defendant to employ other persons to execute the contract, if "the plaintiff should become bankrupt . . . or if there should be any unreasonable delay or unsatisfactory conduct on his part with regard to the erection of such buildings, or with regard to any work, matter or thing connected therewith: the fact of such delay or unsatisfactory conduct to be ascertained and decided by S. and C., or other the architect or valuer for the time being, against whose decisions there should be no appeal:—Held, rejecting the application, that the agreement was not a "submission to arbitration by consent," within the 17th section, as the decision of the architect was not in the nature of a judicial proceeding, but was intended to be the sole foundation of any liability on the part of the defendant. *Wadsworth v. Smith*, 6 L. R., Q. B. 332; 40 L. J., Q. B. 118; 19 W. R. 797.

In an action on a builder's contract, which provided that all the works should be left complete and clear, to the satisfaction of the architect, and did not contain any provision for payment by instalments:—Held, 1st. That the completion of the works to the satisfaction of the architect was a condition precedent to the builder's right to recover on foot of the contract. 2ndly. That he was not entitled to recover for the value of work done, as to which, while incomplete, the architect had expressed approval so far as then partially executed, but which was not subsequently completed to the architect's satisfaction. *Richardson v. Mahon*, 4 L. R., 1r. 486.

**Nature and Sufficiency of Certificate.**—Where the architect checked the builder's charges, and sent them to the employer:—Held, that this did

not amount to such a certificate of satisfaction as to enable the builder to sue the employer, although he had not objected to pay, on the ground that no sufficient certificate had been rendered. *Morgan v. Birnie*, 3 M. & Scott, 76; 9 Bing. 672.

— **In Writing.**—A building contract contained a clause for payment of the price of the building by instalments, with a proviso that, before each payment, the architect should certify that the works were carried out to his satisfaction:—Held, that the certificate need not be in writing. *Roberts v. Watkins*, 14 C. B., N. S. 592; 32 L. J., C. P. 291; 9 Jur., N. S. 128; 8 L. T. 460; 11 W. R. 783.

— **By whom Made.**—Where payments to a contractor are to be certified for by the engineer of a railway company, he is not disqualified from so doing on account of his having become lessee of the railway, at a rent depending on the amount so certified for. *Hill v. South Staffordshire Railway Company*, 11 Jur., N. S. 192; 12 L. T. 63—L. J.

— **Contents.**—By a contract for building a borough gaol it was provided, that "no alterations should be made without the written authority of the architect, by whom the value of such alterations should be ascertained; and that no allowance for alterations should be made, unless the value of the same was ascertained at the time the work was done, and entered in a book, such entry to be submitted to and approved of by the architect." "That no payments should be made to the contractors, except on the production of a certificate from the architect, that a certain amount of work had been done, and that the architect should deliver his certificate thereof at the end of every fourteen days;" and "that the contractors should be entitled to receive at the end of every fourteen days the amount for which the architect should have given such certificate, the amount of such certificate to be less, by certain varying proportions, than the value of the work done, until ninety per cent. of the whole should be completed; that no further payments should be made to the contractors until three calendar months after the architect should have certified the completion of the whole work to his satisfaction, when one-half of the remainder should be paid, and the balance at the end of twelve months from the date of the architect's certificate of completion."—Held, that the architect's certificate of final completion was sufficient, without mentioning the amount remaining due. *Pashby v. Birmingham (Mayor)*, 18 C. B. 2.

By the contract it was further provided, that if any dispute or difference should arise with the contractors in any way relating to the contract, or if any question should arise between any of the several contractors relating to the proposed building, such dispute, difference or question should be settled by the architect, whose decision should be absolute and final:—Held, that this condition applied only to disputes as to the mode of carrying on the several works, and not to differences between the contractors and their employers as to their claim for extras. *Id.*

— **As to Collateral Question.**—The plaintiff contracted with the defendants to erect certain

buildings. By a clause of the specification it was agreed that, if the plaintiff should not, according to the determination of the architect, exercise due diligence, the defendants might determine the contract and enter on the works. The architect certified that the plaintiff was not exercising due diligence, and the defendants determined the contract. To an action by the plaintiff for not allowing him to complete the works the defendants pleaded a justification under the clause of the specification; to which the plaintiff replied that his failure to exercise due diligence was caused by their delay and default, and their architect in not providing plans and setting out the land. The defendants rejoined that the non-exercise of due diligence was not, according to the determination of the architect, caused by their default or of their architect:—Held, that under the contract, the architect could not bind the plaintiff by his determination that the defendants had not by their default prevented him from proceeding with the work, and that consequently the replication was good, and the rejoinder bad. *Roberts v. Bury Improvement Commissioners*, 5 L. R., C. P. 310; 39 L. J., C. P. 129; 22 L. T. 132; 18 W. R. 702—Ex. Ch.

— **Not Written Orders.**—A contract for the construction of large iron buildings for a lump sum, contained a clause, that no alterations or additions should be made without a written order from the employers' engineer, and no allegation by the contractors of knowledge of, or acquiescence in, such alterations or additions on the part of the employers, their engineers or inspectors, should be accepted or available as equivalent to the certificate of the engineer, or as in any way superseding the necessity of such certificate as the sole warrant for such alterations and additions. During the execution of the contract the contractors alleged it was impossible to cast certain iron trough-girders of a specified weight, and subsequently, they were allowed to erect girders of a much heavier weight; and the actual weights were entered in the engineer's certificates issued from time to time authorizing interim payments. On the completion of the contract the contractors claimed a considerable amount in excess of the contract price for the extra weight of metal supplied:—Held, that the engineer's certificates were not written orders, and the claim was therefore excluded by the terms of the contract. *Tharvis Sulphur and Copper Company v. McElroy*, 3 App. Cas. 1040.

By an agreement under seal between the plaintiff and the guardians of the poor, after reciting that he had proposed to contract to erect a work-house and perform all the works particularized in a specification prepared by the architects for 5,500*l.*, the plaintiff agreed with the guardians that he would in a workmanlike manner do all the works mentioned in the specification, at the times mentioned, and would completely finish the whole by the 24th June, 1840. That if the architects should think proper to make any alterations or additions in the progress of the works, they should give to the plaintiff written instructions for the same, signed by them; and the plaintiff should not be considered as having authority to do such additional works without such written instructions. And the guardians agreed with the plaintiff that they should pay him 5,500*l.* at the rate of 7*½* per cent. on the amount of the

work done, and the remaining 25l. per cent. within thirty days from the full completion of the contract, provided that the plaintiff should not be entitled to receive any payment until the works on which such payments were made to depend should have been completed to the satisfaction of the architects, who should examine and make a valuation of the amount so completed from time to time, and certify the same to the defendants, after which the plaintiff should be entitled to receive the amount of payment at the rate aforesaid, which should be then due in respect of the work so certified to be completed. During the progress of the works, the architects from time to time delivered to the plaintiff certificates in the form of letters, signed by them and addressed to the clerk of the board of guardians, stating that the board might safely advance £ — to the plaintiff on account of works executed. Certificates in this form to the amount of 5,000l. were given, but in fact payments were made by the guardians to the amount of 6,300l. These payments were made generally in respect of the works actually done, without distinguishing the one description from the other. No written directions were given by the architects for the additional works, except that letters were in evidence signed, some by one of the architects, and others by both, in which allusion was incidentally made to some of the additional works in progress, and containing suggestions as to the mode of executing them, and save also that long after the works were complete, the architects, on the application of the plaintiff, made a valuation of the additional works, which they estimated at 3,133l., and signed a paper, stating that to be the amount of their valuation:—Held, first, that the deed, in requiring written directions, meant written directions before the additional work should be done, and that the certificates, letters and final valuation of the architects did not amount to such directions. *Lamprell v. Billericay Union*, 3 Ex. 283; 18 L. J., Ex. 282.

Held, secondly, that the payments made on the certificates of the architects were to be treated as sums paid on account of whatever the plaintiff might eventually be entitled to recover, and the want of written directions being an answer to any claim in respect of the additional works, he could not apply any part of the 6,300l. in satisfaction of them. *Ib.*

— **Effect upon Stipulation for Written Orders.**—A. engaged B. to build a market house, and the contract and conditions stipulated that no deviations in the way of extras or omissions should be made without the written authority of an architect, and that they should be priced at the contract prices; that no claim should be made for extra or additional works without the production of the written order of the architect, signed when the instructions for them were given; that certain proportionate payments should be made from time to time, on the certificate of the architect, that the sum claimed was a proper one, the architect's opinion to be final as to the value; that if any dispute should arise as to the meaning of the specifications or contract, the architect was to define the meaning, and that his decision as to the nature, quantity and quality of the works executed, or to be executed, should be final, and also his decision as regarded the value

of the extras and additions, which was to be regulated by the contract of price. The architect gave a certificate, that a certain sum, which included extras and additions, was to be regulated by the contract price. The architect gave a certificate that a certain sum, which included extras and additions, was proper to be paid:—Held, that neither party could raise the question of whether or not there was a sufficient order in writing; that a pump, drains, &c., though separately ordered, came within the meaning of works connected with the contract, and that the architect's decision as to their value was final. *Good-year v. Weymouth and Melcombe Regis (Mayor)*, 1 H. & R. 67; 35 L. J., C. P. 12.

The plaintiffs contracted to execute for the defendants specified works, and also all such additional works as should be deemed necessary by the defendants' principal or resident engineer. The contract deed provided that no extra works should be made without an order in writing, signed by the principal engineers or engineer, or by the resident engineer; that such extra works should be valued by such engineers or engineer, having regard to the schedule of prices in the specification, and that the decision of such engineers or engineer should be final as to the value of such extra works; that if any extra works should be ordered, the contractors should send in accounts thereof within one month; and that in default of their doing so, the defendants should not be bound to pay for them. That the defendants should not be bound to pay for any works, except upon the production of a certificate signed by some principal or resident engineer; and that the principal engineers or engineer for the time being should be the exclusive judges of the execution of the works and of everything connected with the contract; and that the certificates under their or his hands or hand should be binding and conclusive on both parties:—Held, that the engineers having given a certificate for the extra works, the defendants were precluded from setting up as defences to the action for the price of the extra works, that the extra works had not been ordered in writing, and that no accounts had been sent in for them, as required by the deed. *Connor v. Belfast Water Commissioners*, 5 Ir. R., C. L. 55.

**When Certificate Conclusive.**—Where a contract for the erection of certain works provided that all extras or additions, payment for which the contractor should become entitled to under the said contract, should be paid for at the price fixed by the surveyor appointed by the contractor's employer:—Held, that this provision impliedly gave power to the surveyor to determine what were extras under the contract, and consequently that his certificate awarding a certain amount to be due for extras was conclusive. *Richards v. May*, 10 Q. B. D. 400; 52 L. J., Q. B. 272; 31 W. R. 708.

In an action for a balance due under a building contract, with a plea of set-off for penalties incurred by reason of delay, and a replication of hindrance and exoneration on the part of the defendant, evidence of such hindrance and exoneration admitted; but a certificate of the defendant's architect that the balance was due, is conclusive. *Arnold v. Walker*, 1 F. & F. 671.

— **Effect of Arbitration Clause.**—D. employed an architect to prepare designs for a man-

sion-house, the architect guaranteeing that the total cost should not exceed 15,000*l*. A builder, forming his estimate partly on certain rough plans prepared by the architect and partly on his verbal explanations, signed a tender to complete the house for 13,690*l*. He afterwards signed a formal contract and specifications, being at the time when he signed it in weak health, and being unaware of the existence of the architect's guarantee as to the cost of the buildings. The contract contained a clause making the architect the arbitrator in case of any dispute, and giving him power to determine whether any work was extra work or not, and what sum should be paid for any extra work. The builder proceeded with the works, the cost of which vastly exceeded the estimate, owing, as he alleged, to the fact that the quantities in the working drawings prepared by the architect exceeded the quantities which he had given to the builder as the basis of his estimate. The architect having refused to certify for anything beyond the contract price, the builder filed a bill praying for a rectification of the contract, and for a declaration that he was entitled to be paid by measure and value for all quantities of work executed by him in excess of the quantities included in his estimate:—Held, that he must be bound by the general terms of the contract, as it was owing to his own negligence that he entered upon it without due deliberation, but that the arbitration clause in the contract could not be enforced, inasmuch as the architect's guarantee as to the total cost of the buildings, which was not disclosed to the builder, made it the architect's interest to disallow all claims for extra work; and that he was, therefore, entitled to be paid for all works not included in the specifications by measure and value. *Kimberley v. Dick*, 13 L. R., Eq. 1; 41 L. J., Ch. 38; 25 L. T. 476; 20 W. R. 49.

The plaintiff entered into a contract with the defendants to remove 10,000 cubic yards of the bed of the Mersey contiguous to Seacombe Ferry for 5,000*l*., and to completely finish the work under the direction and to the satisfaction of the defendants' engineer by the 1st of October, 1878, subject to such an extension of time as the engineer might think reasonable, in case a temporary staging then erected on the site of the work should not be removed within such a time as would enable the plaintiff to complete the work by the 1st of October, 1878. The defendants were to make monthly payments on the certificate of the engineer to the amount of 80 per cent. of the value of the work done during each month, and the balance of the sum of 5,000*l*. on the completion of the work. There was also a clause in the contract providing that if any difference should arise between the local board and the contractor concerning the work contracted for, or concerning anything in connection with the contract, such difference should be referred to the engineer, and his decision should be final and binding on the local board and the contractor. The work was completed on the 11th November, 1879, and then a correspondence took place between the plaintiff and the engineer with reference to the plaintiff's claims against the defendant board. The engineer admitted that the plaintiff was entitled to compensation for the expense caused by delay in consequence of the non-removal of the staging, and agreed to allow 15*l*. 10*s*. per day for thirty-eight days, but they could not agree upon the amount

due to the plaintiff for extra work and other expenses. In June, 1880, the engineer sent a certificate to the Works Committee of the defendant board, stating that the work was finished to his satisfaction, and that 1,065*l*. 19*s*. was due to the plaintiff, and the defendants sent the plaintiff a cheque for 962*l*. 6*s*. 2*d*., being the balance of the sum certified after making certain deductions. The plaintiff, after giving credit for this sum, brought an action against the defendants for 2,489*l*. 13*s*. 11*d*.:—Held, that it was not a difference concerning a matter in connection with the contract, and as to which the decision of the engineer was conclusive. In order to bind a contractor to the certificate or decision of an architect or engineer appointed by the party for whom the work is done, there must be very conclusive language in the contract:—Held, also, that the documents set out in the case did not amount to a contract by the engineer, or a reference to, or award by, him as to the plaintiff's claims. *Lawson v. Wallasey Local Board*, 11 Q. B. D. 229; 52 L. J., Q. B. 302; 47 L. T. 625. Affirmed, 52 L. J., Q. B. 309, n.; 48 L. T. 507; 47 J. P. 437—C. A.

— **Rights of Action.**—An action is maintainable by a railway against a contractor for not doing brickwork of the specified thickness, although certified to have been so done by the company's engineers, in collusion with a sub-contractor; but the fraud or neglect of the engineers is material to be considered in regard to the question of damage, though not affecting the right of action against the contractor. *South-Eastern Railway Company v. Waiton*, 2 F. & F. 457.

A builder agreed to repair a house according to certain plans and specification, and to the satisfaction of the architect, the work to be done under the architect's directions. By the specification the builder was to allow for the value of the old lead, and he alleged that he made this allowance in his estimate. The architect certified his satisfaction of the completion of the contract:—Held, that, in an action by the builder against the owner of the house for the money agreed to be paid by the latter, no evidence could be received that the work was not done according to the plans and specification, and that unless he could prove that he had informed the owner or the architect of his having allowed for the old lead in his estimate, he must deduct the value from the amount of his charge. *Harvey v. Lawrence*, 15 L. T. 571.

An English company, who owned a railway in Russia, entered into a contract for the manufacture and delivery to them of rails for their railway. The contract provided that a sample should be sent to the company's engineer for approval, before the commencement of the work. It was, however, "to be expressly understood that such approval is not in any way to relieve the contractor from any of the conditions or stipulations contained in this specification." During the progress of the work tests were to be applied by the engineer at his discretion, and the entire contract was to be executed in every respect to the satisfaction of the engineer, "who shall have the power of rejecting any rails or fishing plates he may disapprove on any ground whatever, and whose decision on any points of doubt or dispute that may arise in reference to this contract shall be final and binding on all

parties. . . . The engineer will inspect, either personally or by deputy, every stage of the process of the manufacture of the works. . . . This examination at the works is not in any way to commit the company to the approval and acceptance of any rails or fishing plates, which, when delivered, shall not be strictly in accordance with the drawings and specification." After the rails had been delivered to the company and paid for by them, and more than half of them laid down in Russia, it was discovered that they were defective. An action being brought by the company for breach of contract:—Held, that it could not be maintained, as the contract shewed that the parties intended the final expression of the engineer's satisfaction with the entire contract to be conclusive. *Duna-berg and Witepsk Railway Company v. Hopkins, Gilkes & Company*, 36 L. T. 733.

— **As to further Claims.**—On a building contract, whereby additions and alterations were not to avoid it, but to be allowed for at amounts to be named by the employer's surveyor, the contract being made up of a tender framed on quantities calculated by the surveyor, and specifications referred to them, and signed by the builder alone:—Held, that the builder having completed the work, and claimed payment under the contract, could not claim for work as excess of the quantities on which it was based, nor for any additions or alterations beyond the amount allowed by the surveyor. *Coker v. Young*, 2 F. & F. 98.

The engineer of a railway company prepared a specification of the works on a proposed railway, and certain contractors fixed prices to the several items in the specification, and offered to construct the railway for the sum total of the prices affixed to the items. A contract under seal was thereupon made between the contractors and the company, by which the contractors agreed to construct and deliver the railway completed by a certain day at a sum equal to the sum total above mentioned. If the contractors failed to proceed with the works the company might take possession and proceed with them; in which case a valuation should be made by the engineer, or if either party required it, by arbitration. The contract contained provisions making the certificate of the engineer conclusive between the parties; and it was provided that all accounts relating to the contract should be submitted to and settled by the engineer, and that his certificate for the ultimate balance should be final and conclusive; it was further provided that all questions, except such as were to be determined by the engineer, were to be referred to arbitration. The railway was completed and the engineer gave his final certificate as to the balance due to the contractors. The contractors had assigned their interest in the contract to trustees on trust for their creditors and for themselves, in certain proportions. The contractors filed a bill against the company, making claims on several grounds, and praying an account and payment:—Held, that the contractors could not, on mere verbal promises by the engineer, maintain against the company a claim to be paid sums beyond the sums specified in the contract under seal. *Sharpe v. San Paulo Railway Company*, 8 L. R., Ch. 597; 29 L. T. 9.

Held, also, that, although the amount of the works to be executed might have been under-

stated in the engineer's specification, the contractors could under the circumstances maintain any claim against the company on that ground. *Id.*

In the absence of fraud on the part of the engineer, and where his certificate has been made a condition precedent to payment, his certificate must be conclusive between the parties. *Id.*

The defendant contracted to do certain work for the plaintiff, which was to be subject to the approval of an architect, and no payment was to be made without his certificate. The defendant demanded a larger sum than was certified by the architect, and brought an action for the amount. The plaintiff filed a bill for an injunction to restrain the action:—Held, that he could as well plead at law as in chancery that the architect's certificate was conclusive under the contract; and there was no equity to justify the bill. *De Worms (Baron) v. McIlher*, 16 L. R., Eq. 554.

**Action against Architect—Refusal to certify, fraudulent and collusive.**—When, under a building contract, it was a condition precedent to payment that the builder should execute the works to the satisfaction of a named architect:—Held, that an action could be maintained against the architect for collusively, fraudulently, and to the injury of the builder, refusing to certify that he was satisfied with the works. *Ludbrook v. Barrett*, 46 L. J., C. P. 798; 36 L. T. 616; 25 W. R. 649.

Where a sum of money is agreed to be paid for work and materials, upon the certificate of a third person, if such third person, in collusion with and by the procurement of the person who has agreed to pay, improperly neglects to certify, an action may be maintained against the latter for the agreed sum, notwithstanding the certificate was made a condition precedent to the payment of the money. *Batterbury v. Vyse*, 2 H. & C. 42; 32 L. J., Ex. 177; 9 Jur., N. S. 754; 8 L. T. 283; 11 W. R. 283.

But where, by the terms of a contract, works were to be done for the defendants by the plaintiffs, according to plans and specifications, and to be paid for by instalments, "on production by the contractors to the defendants, or one of them, of the certificate of L., or other the surveyor for the time of the defendants, that they (the contractors) had duly and efficiently performed and completed such works to his satisfaction," and in an action upon this contract, the declaration averred that all things necessary had been done by the plaintiffs, to entitle them to have the certificate of the surveyor, that the work had been duly and efficiently performed and completed to his satisfaction; but that the surveyor had not given such certificate, but had wrongfully and improperly neglected and refused so to do:—Held, that, in the absence of collusion, the plaintiffs were not entitled to recover without producing the surveyor's certificate; nor were the defendants responsible for the refusal of the surveyor to give one. *Clark v. Watson*, 18 C. B., N. S. 278; 34 L. J., C. P. 148; 11 L. T. 679; 13 W. R. 346.

— **Want of Care in Certifying.**—Statement of claim set out an agreement under which plaintiff contracted with a company to build for them a hall whereof defendant was employed as architect; defendant was to be allowed to order additions and deductions, the amounts of which were

to be ascertained by him in a certain manner, all matters of dispute were to be left to defendant, and his decision was to be final; plaintiff was to be paid on the certificate of defendant. The statement of claim then alleged—that the work was done and the certificate given, but that defendant did not use due care and skill in ascertaining the amounts to be paid by the company to the plaintiff, and neglected and refused to ascertain the amount of the said additions and deductions in the manner aforesaid, and knowingly or negligently certified for a much less sum than was, in fact, the net balance payable; and further—that defendant refused to reconsider the said certificate and allow plaintiff to point out to him the said errors in the bill of quantities:—Held, that no cause of action against defendant was disclosed by the above statement of claim; defendant's duties involving the exercise of judgment and skill. Per Lord Coleridge, C. J.:—Had the defendant's duties been merely ministerial, the action would have been maintainable. *Stecenson v. Watson*, 4 C. P. D. 148; 48 L. J., C. P. 318; 40 L. T. 485; 27 W. R. 682.

A contract for the performance of works contained a provision that if the contractor shall not, according to the determination of the employers' engineer, enable the works to be completed according to the contract, the employers might put an end to the contract, and that the contractor should be paid such sum as the engineer should determine to have been reasonably earned for work actually done. The contract having been put an end to under this provision, the contractor filed a bill in equity against the employers and their engineer, complaining of undue delay on the part of the latter in awarding the amount earned by the contractor, and seeking payment of what was due upon the contract, but did not establish any case of fraud or collusion against the engineer:—Held, that the bill was properly dismissed, with costs. *Scott v. Liverpool Corporation*, 3 De G. & J. 334; 28 L. J., Ch. 236; 5 Jur., N. S. 104.

#### 6. DEDUCTIONS.

**On Account of Bad Work.**—If A. employs B. to make bricks for him at a stipulated price per thousand, and B. does so, and some of the bricks are so badly made as to be good for nothing, A. will be entitled to make a deduction for those badly-made bricks out of the stipulated price, and may make such deduction in an action brought by B. for the stipulated price; but if the bricks are badly made in a trifling degree, only so as merely to be less valuable than they otherwise would have been, A., in an action for the stipulated price, will not be entitled to make any deduction on this account. *Pardow v. Webb*, Car. & M. 531.

Where a plaintiff declares on a quantum meruit for work and labour, and materials, the defendant may reduce the damages by shewing that the work was improperly done, and may entitle himself to a verdict by shewing that it was wholly inadequate to answer the purpose intended. *Furnsworth v. Gerrard*, 1 Camp. 38; *S. P.*, *Grounscell v. Lamb*, 1 M. & W. 352.

Where a party contracted to supply and erect a warm-air apparatus for a certain sum:—Held, in an action for the price (the defence to which

was, that the apparatus did not answer), that if the jury thought it was substantial in the main, though not quite so complete as it might be under the contract, and could be made good at a reasonable rate, the proper course would be to find a verdict for the plaintiff, deducting such sum as would enable the defendant to do what was requisite. *Cutler v. Close*, 5 C. & P. 337.

— **Not a Set-off.**—In actions for work and labour, as well as in actions for goods to be supplied according to contract, a defence that the subject-matter of the action is not worth the contract price, by reason of a breach of the contract, is not a set-off in the nature of a cross action. *Mondell v. Steel*, 8 M. & W. 858; 1 D., N. S. 1.

Nor can it be pleaded in bar to an action for the recovery of special damage resulting from the breach of contract. *Id.*

**Price of Materials.**—The plaintiff contracted in writing to do work for the defendant, and find the materials for it, for a fixed sum. The defendant afterwards supplied a portion of the materials, which the plaintiff accepted and used up in the work. In an action for the work done by the plaintiff:—Held, that the defendant was entitled to deduct from the damages the value of the materials supplied by him, without pleading a set-off. *Newton v. Forster*, 12 M. & W. 772.

**Cost of Work.**—The plaintiff contracted to execute certain work for the defendants, the agreement containing the following proviso: "That if the works did not proceed as rapidly and satisfactorily as required by the defendants or their agents, they should have power to enter thereupon, pay whatever number of men were unpaid, and set to work whatever number of men they should think necessary, the amount so paid, and the cost of the men so set to work, to be deducted from whatever moneys might be due to the plaintiff:—Held, that the intention of the parties was that the defendants if bona fide dissatisfied, whether with or without sufficient reason, with the progress of the work, should be at liberty to deduct from the money due to the plaintiff such sums as had been expended in pursuance of the said proviso. *Stadhard v. Lee*, 3 B. & S. 364; 32 L. J., Q. B. 75; 9 Jur., N. S. 908; 7 L. T. 815; 11 W. R. 361.

#### V. PLEADINGS AND EVIDENCE.

##### 1. COMMON COUNTS.

When a person contracts to build a house, he is not entitled to recover for the materials on a count for goods sold and delivered. *Cottrell v. Apsey*, 1 Marsh. 581; 6 Taunt. 322.

Materials cannot be recovered under a count for work and labour only. *Heath v. Freeland*, 1 M. & W. 543; 2 Gale, 140; 5 D. P. C. 166.

A count for work, labour and materials will enable a plaintiff to recover for attendances as a farrier, and for medicines administered. *Clark v. Mumford*, 3 Camp. 37.

A. contracted with B. to build an engine of one hundred horse power for 2,500*l.*, to be completed and fixed by a certain time. The engine was intended for the purpose of pumping a mine, and was composed of various parts, which

were made at A.'s factory, and conveyed thence and set up at different times at B.'s colliery, until the engine was completed. A. sued B. for the price, and claimed 3,000*l.* for the price and value of a main engine and other goods sold and delivered by him to B.:—Held, that the price agreed on could not be recovered under this count, but that the proper form of the count would have been either for work, labour and materials, or for erecting and constructing an engine. *Clarke v. Bulmer*, 11 M. & W. 243; 12 L. J., Ex. 463. See *Chanter v. Dickinson*, 6 Scott, N. R. 182; 2 D., N. S. 838; 5 M. & G. 253; 12 L. J., C. P. 147; 7 Jur. 89.

In an action for the price of and the setting up of a fourteen-horse-power steam engine, the last instalment to be paid two months after its completion, it appeared that the degree of power in the engine delivered was not equal to the power mentioned in the contract, and improvements and alterations were made from time to time till the action was brought:—Held, that the common counts would lie. *Parsons v. Sexton*, 2 C. & K. 266.

A. was employed by B. to devise a method of curving metal tubing for the purpose of manufacturing life-buoys, of which B. was patentee:—Held, that A. might recover compensation for the labour and skill, and also the value of the materials employed by him in the course of the work, under a count for work and labour and materials. *Grafton v. Armitage*, 2 C. B. 336; 15 L. J., C. P. 20; 9 Jur. 1039.

In an action for work and labour, where there had been a breach of contract on the part of the plaintiff:—Held, that he could not recover a quantum meruit, nor prove that his breach of contract arose from the defendant's default. *Keuley v. Stokes*, 2 C. & K. 435.

A claim for a month's wages by a menial servant, on dismissal, without warning and without cause, cannot be recovered under a count for work and labour. *Fewings v. Tindal*, 5 D. & L. 196; 1 Ex. 295; 17 L. J., Ex. 18; 11 Jur. 977.

If the entire work and labour to be done under a contract have been performed, and the benefit of it accepted by the defendant, the plaintiff can recover the value of the work and labour under the common count on a quantum meruit, although the evidence or proceedings in the case may establish that, up to the trial, he insisted on the special contract: it is not necessary that he, before bringing the action, should elect to abandon the special contract. *Savage v. Caning*, 1 Ir. R., C. L. 434.

Under a count for work and labour on a quantum meruit, evidence of skill is admissible. *Bird v. M'Gahey*, 2 C. & K. 707.

## 2. PLEAS.

In an action by executors for work and labour of their testator, money paid by him and on an account stated with him, and for work and labour and money paid by the executors, and on an account stated with them as executors, a plea, that the testator, in consideration of the defendant consenting to act on a provisional committee for a projected railway, agreed to indemnify him from any charges on account of the railway, and the work was done and money paid by the testator, and the account stated with him, in respect of the same, in surveying the line, and that the work was done and money

paid by the executors in and about surveying the line, and the account was stated with them in respect of the same work; that all the causes of action accrued after the promise to indemnify, and that the defendant made the promises only in his character of member of the committee; that the railway was abandoned, and the work and payments became of no value, and all sums recovered from the defendant in respect thereof would be lost to the defendant, and he would be damned to that extent:—Held, a good plea for avoiding circuity of action, since the defendant, on the facts alleged, was entitled to recover from the testator, in his life or from his representatives, as much as they would recover from him. *Connop v. Levy*, 11 Q. B. 769; 5 Railw. Cas. 124; 17 L. J., Q. B. 125; 12 Jur. 306.

Another plea alleged that the testator in his lifetime caused the defendant to enter into the contracts by fraud:—Held, a good plea, not only to the first count, but also to the second count, since, if the defendant was induced by the testator's fraud to make the original contract with him, the same fraud procured the implied promise to the executors for the work they had done, and money they had paid in pursuance of that contract. *Id.*

The plaintiff declared on an agreement that the defendant should furnish the plaintiff with a steam-engine by a specified time, to be paid for by instalments, payable at certain times with reference to the progress of the work. Breach, that the steam-engine was not furnished by the specified time. A plea, alleging the non-payment of the second instalment, though due with reference to the work done, according to the terms of the agreement, is an issuable plea. *Zulueta v. Miller*, 4 D. & L. 186; 2 C. B. 895; 15 L. J., C. P. 267; 10 Jur. 859.

To an action against the defendant for unskilfully erecting a kitchen range in the plaintiff's house, he pleaded that the plaintiff ought not to be admitted to allege that he did not use due skill in constructing the range, because, after the supposed grievance, the now defendant commenced an action against the now plaintiff for work and labour in constructing the range, and for the price thereof, and that the now plaintiff pleaded payment of money into court, which the now defendant took out of court in full satisfaction:—Held, that the plea did not amount to an estoppel, and afforded no answer to the action. *Rigge v. Burbridge*, 16 M. & W. 598; 15 L. J., Ex. 309.

Where there is a special contract for work, to be done at a fixed price, and the declaration consists of the common counts for work and labour, to which the defendant pleads that he never was indebted, he may prove that the work was done in an improper manner. *Cousins v. Paddon*, 5 Tyr. 535; 2 C., M. & R. 547; 4 D. P. C. 488; 1 Gale, 305.

In an action for a machine, sold and delivered:—Held, that the defendant might shew under the general issue that the machine was manufactured by the plaintiff for the defendant, under a condition that if it did not work, nothing should be paid for it; that it could not be made to work, and that it was useless to the defendant. *Grounsell v. Lamb*, 1 M. & W. 352; 2 Gale, 28.

Held, also, that although the machine was not proved to have been returned to the plaintiff, he was not entitled to any damages on the quantum

valebat, without shewing some new implied contract arising from the defendant's dealing with the goods. *Ib.*

In an action for work and labour on an implied contract, the defendant, under the plea that he never was indebted, may go into evidence to prove that the work was done under such circumstances as shew that there was no implied contract to pay anything; but upon this plea the defendant cannot go into evidence of misconduct, except such as goes to shew that there was no implied contract to pay. *Cooper v. Whitehouse*, 6 C. & P. 545.

### 3. EVIDENCE.

In an action for a tradesman's bill, where the work has been done by several persons under him, any of the workmen called may be asked as to the particular sums which they received. *Fricker v. French*, 5 Esp. 79.

In an action for work and labour, it is presumptive evidence for the defendant that he was in the habit of paying other workmen employed by him in the same line of business regularly and at stated times, and that the plaintiff had been at such times with the other workmen. *Lucas v. Novosiliaski*, 1 Esp. 296.

Where evidence was received that the work was done in respect of a house, of which the defendant agreed to give the plaintiff a lease:—Held, that the agreement as to the lease was improperly received; and the jury having found for the plaintiff on the common count, and having also found that the defendant had broken the agreement, the defendant was entitled to a new trial. *Hopkins v. Richardson*, 14 L. J., Q. B. 80.

In an action for work done and materials supplied to the defendant in respect of certain dwelling-houses, the question being whether he was really the owner and person interested in the houses, it is competent to the plaintiff to call other tradesmen as witnesses to prove that the defendant had personally given orders to them to do work and supply materials in respect of the same houses. *Woodward v. Buchanan*, 5 L. R., Q. B. 285; 39 L. J., Q. B. 71; 22 L. T. 123.

Under a count of quantum meruit evidence of skill is admissible. *Bird v. McGehey*, 2 C. & K. 707.

In an action by an executor for work done, it appeared that his claim was for extras incurred in making a machine for the defendant by the testator beyond what was contained in a written agreement and specification. The plaintiff did not produce the agreement, which was unstamped, and in the hands of a third party, but proved that the defendant had ordered, and the testator executed additions and alterations, and also that the testator had told a witness that he had received money from the defendant on account of the extras. On this evidence the defendant claimed a nonsuit, but the judge allowed the case to go to the jury, who found for the plaintiff:—Held, that the defendant was not entitled to a nonsuit, but the court deeming the evidence insufficient to justify the verdict, made the rule absolute for a new trial. *Edie v. Kingsford*, 14 C. B. 759; 2 C. L. R. 832; 23 L. J., C. P. 123.

When a man is employed to do work under a written contract, and a separate order for other

work is afterwards given by parol during the continuance of the first employment, the written contract need not be produced in an action for the second work. *Reid v. Batte*, M. & M. 413.

The defendant entered into a contract with H. for the execution, by H., of works at a shed belonging to the defendant. In order to induce M. to supply H. with the castings necessary for the carrying out of this contract, the defendant promised M. to pay her 218*l.* then due to her from H. within six months, provided he had work done by H. as security for the same:—Held, in an action by the executors of M., to recover the 218*l.* under this agreement, that they were bound to shew that work to that amount had been done for the defendant by H., and that for this purpose it was necessary to produce the contract between H. and the defendant, under which the work was executed. *Hill v. Nuttall*, 17 C. B., N. S. 262; 33 L. J., C. P. 303.

In addition to the agreement, the defendant also undertook to pay M. for such further castings as should be required for his shed, and should be supplied by her on account of H. Further castings were supplied by M. to H., but as to some of them there was no evidence that they were delivered by H. at the shed:—Held, that there was evidence for the jury to find the defendant liable for these castings under the second agreement. *Ib.*

If an agreement cannot be read for want of a stamp, the plaintiff cannot recover the value of the work and labour to which the agreement refers, although the defendant may have had the benefit of it. *Hughes v. Budd*, 8 D. P. C. 478.

When work has been done under a written contract, evidence of extra work cannot be given without proof of the written contract, and, if it is inadmissible for want of a stamp, the judge cannot look at it for the purpose of determining whether or not the proposed evidence relates to it. *Buxton v. Cornish*, 1 D. & L. 585; 12 M. & W. 426; 13 L. J., Ex. 91; 8 Jur. 46; *S. P.* *Jones v. Howell*, 4 D. P. C. 176.

A. had built a house for B. under a written contract, not admissible in evidence for want of a stamp; A. sued B. for the value of certain works about the house, alleging them to be extras, and not included in the contract:—Held, that the court could not look at the unstamped contract to ascertain whether those works were included in it or not, and that the plaintiff must be nonsuited. *Vincent v. Cole*, 3 C. & P. 481; M. & M. 257.

## WORKHOUSE.

See POOR LAW.

## WORKMAN.

I. LIEN.—See LIEN.

II. TRADE UNIONS.—See TRADE.

III. OTHER POINTS.—See MASTER AND SERVANT.

**WOUNDING.***See CRIMINAL LAW.***WRECK.***See SHIPPING.***WRIT.**

I. OF NE EXEAT REGNO.

II. OF REBELLION.

III. OF ATTACHMENT.—*See ATTACHMENT.*IV. OF CAPIAS.—*See ARREST.*V. OF CA. SA.—*See EXECUTION—SHERIFF.*VI. OF ELEGIT.—*See EXECUTION—SHERIFF.*VII. OF FI. FA.—*See EXECUTION—SHERIFF.*VIII. OF HABEAS CORPUS.—*See HABEAS CORPUS.*IX. OF INJUNCTION.—*See INJUNCTION.*X. OF INQUIRY.—*See INQUIRY.*XI. OF LEVARI FACIAS.—*See EXECUTION—SHERIFF.*XII. OF POSSESSION.—*See EXECUTION—SHERIFF.*XIII. OF REVIVOR.—*See SCIRE FACIAS.*XIV. OF SCIRE FACIAS.—*See SCIRE FACIAS.*XV. OF SEQUESTREARI FACIAS.—*See ECCLIASTICAL LAW.*XVI. OF SUBPENA.—*See EVIDENCE.*XVII. OF SUMMONS.—*See PRACTICE.***I. OF NE EXEAT REGNO.**

**In what Cases.]**—The plaintiff, a mortgagee of a German ship which had been lost, commenced an action in the Chancery Division against the owner on the covenant contained in the mortgage deed, and applied for a writ of ne exeat regno, alleging by affidavit that the defendant was about to leave England, and that the debt would be in danger of being lost if he was not prevented from so doing, but not shewing that the defendant's advance would prejudice the plaintiff in the prosecution of the action:—Held, that the writ must be refused, for that the claim

was a mere legal demand, for which the plaintiff could not before the passing of the Judicature Act have sued in the Court of Chancery, and that the defendant could only be prevented from leaving England in the case provided for by the Debtors Act, 1869, s. 6. *Drover v. Beyer*, 13 Ch. D. 242; 49 L. J., Ch. 37; 41 L. T. 393; 28 W. R. 110—C. A.

Held, further, by the Master of the Rolls, that the result would have been the same as to an equitable debt before the passing of the Judicature Act. *Ib.*

The writ of ne exeat regno is a high prerogative right, originally applicable to purposes of state; afterwards extended to private transactions; it is confined to cases of equitable debts, and is equivalent to equitable bail. *Dick v. Swinton*, 1 Ves. & B. 373; *Jackson v. Petrie*, 10 Ves. 164; *Boehm v. Wood*, 1 Turn. & Russ. 343; *Whitehouse v. Partridge*, 3 Swans. 377.

A court of equity will not grant a ne exeat regno for a mere legal demand. *Pearne v. Lisle*, Amb. 75.

The Court of Exchequer will grant an order in the nature of a ne exeat regno against an accountant of the crown, sworn to be about to leave the kingdom without having rendered his accounts. *Att.-Gen. v. Mucklow*, 1 Price, 289.

**Proceedings—Jurisdiction.]**—The master of the rolls has jurisdiction to direct a ne exeat regno to issue. *Boehm v. Wood*, 1 Turn. & Russ. 343.

For the court to grant a ne exeat regno, there must be the most distinct evidence of a debt due. Mere belief on the part of the plaintiff, that if the accounts were taken, a balance would be found due to him, is not sufficient. *Thompson v. Smith*, 34 L. J., Ch. 412; 11 Jur., N. S. 276.

A trustee was in contempt for not answering, and out of the jurisdiction. He had gone out of the jurisdiction to avoid answering; he had sold out the trust fund to an amount exceeding 20,000l., he had come from Boulogne with a return ticket, and intended to depart shortly, and had in fact been arrested at the station, on the day before the motion for a ne exeat was made, while attempting to depart. The order for a writ of ne exeat was made. *Hawkins v. Hawkins*, 1 Drew. & Sm. 75; 6 Jur., N. S. 490.

**— Affidavit.]**—A ne exeat regno will not be granted on a general affidavit of belief of the defendant's intention to quit the country, the circumstances on which that belief was founded not being stated. *Perry v. Dorset*, 19 W. R. 1048.

**Time for Issuing.]**—When a sum of money admitted to be due is ordered to be paid on or before a certain day, a writ ne exeat regno may be issued against the debtor before the day has arrived; the order amounting to an immediate judgment, though payment is deferred. *Sobey v. Sobey*, 15 L. R., Eq. 200; 42 L. J., Ch. 271; 27 L. T. 808; 21 W. R. 309.

In a suit for an account a ne exeat regno can be obtained against a co-defendant. *Ib.*

**Improperly Issuing—Effect of not Moving to Discharge Writ.]**—A writ of ne exeat was obtained by the plaintiff immediately after the commencement of an action. The defendant was arrested, but was discharged upon payment

to the sheriff of the sum for which the writ was marked. By his statement of defence the defendant alleged that the writ had been improperly obtained, and claimed damages for his arrest, and at the trial he insisted upon this claim:—Held, that, as he had not moved to discharge the writ, it must be taken to have been properly issued, and, consequently, that he was not entitled to any damages. *Lees v. Patterson*, 7 Ch. D. 866; 47 L. J., Ch. 616; 38 L. T. 451; 26 W. R. 399.

**Pleadings.**—The defendant made the allegation that the writ had been improperly issued, and the claim for damages, in one paragraph of the statement of defence, which was numbered consecutively with the others, but was not headed separately as a counter-claim:—Held, that the pleading was good as a counter-claim. *Id.*

**When Unexecuted — Writ of Assistance.**—Where a writ of ne exeat regno remained un-

executed, and the party appeared to be still keeping out of the way, a writ of assistance was ordered to issue. *Cazet de la Borde v. Othon*, 23 W. R. 110.

## II. OF REBELLION.

The persons named in a writ of rebellion, and charged with the execution of it, have a right, at their discretion, to require the assistance of any of the liege subjects of the crown, to assist in the execution of the writ. *Miller v. Knox*, 4 Bing. N. C. 574; 6 Scott, 1.

## YEAR.

*See* TIME.

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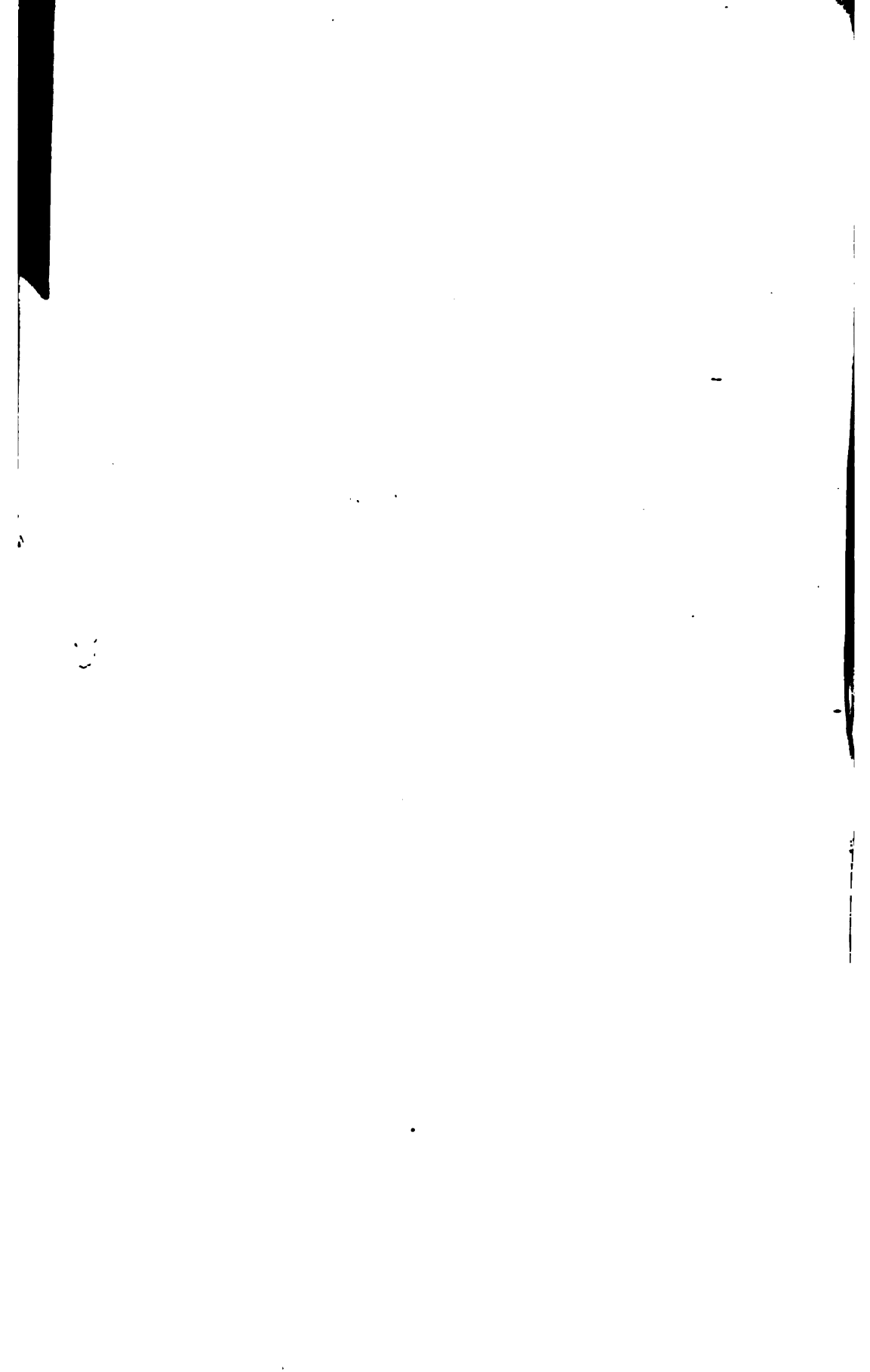
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